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Date: 13 March 2023

Honourable Dr K. Jacobs, MP
Chairperson: Portfolio Committee on Health
Parliament
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Dear Dr Jacobs

RESPONSES BY STATE LAW ADVISERS TO LEGAL ISSUES RAISED IN PORTFOLIO COMMITTEE ON HEALTH DURING DELIBERATIONS OF NATIONAL HEALTH INSURANCE BILL, 2019 [B11 – 2019]

1. The Chairperson of the Portfolio Committee on Health ("the Portfolio Committee") requested the Office of the Chief State Law Adviser ("office") to provide responses to the legal issues raised by members of the Portfolio Committee during deliberations on the National Health Insurance Bill, 2019 [B11-2019] ("the Bill").

2. The general mandate of the office is to provide legal advice, translation and legislative drafting services to all organs of state that may refer work to it. In relation to the introduction of draft Bills in Parliament, the role of the office is provided for in Rule 279(2) of the Rules of the National Assembly ("the NA")[1], which provides as follows:

[1] 9th Edition, 26 May 2016.

"Introduction of Bills in Assembly

> ***279.*** *(2) A Bill introduced by a Cabinet member or Deputy Minister must be certified by the Chief State Law Adviser or a state law adviser designated by him or her as being—*
> *(a) consistent with the Constitution; and*
> *(b) properly drafted in the form and style which conforms to legislative practice.".*

3. Our office is therefore required to certify a draft Bill introduced by a Cabinet member or Deputy Minister as consistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and properly drafted in the form and style which conforms to legislative practice. The certification process entails checking the draft Bill in respect of its compliance with the Constitution, other laws and whether Government policy is properly reflected in the draft Bill. We further express an opinion with regard to the tagging or classification of the draft Bill (whether it is a section 74, 75, 76 or 77 Bill).[2] The office also, upon request, assists Parliament in clarifying any legal issues that may arise regarding the provisions of a Bill during the deliberation by the Parliamentary committees. The role of the Department in the process is to deal with any issue regarding Government policy and its implementation reflected in and implicated by the Bill.

4. Section 85 of the Constitution provides the following regarding the executive authority of the Republic:

> ***"Executive authority of the Republic***
>
> ***85.*** *(1) The executive authority of the Republic is vested in the President.*
> *(2) The President exercises the executive authority, together with the other members of the Cabinet, by—*
> *(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;*
> *(b) developing and implementing national policy;*
> *(c) co-ordinating the functions of state departments and administrations;*
> *(d) preparing and initiating legislation; and*
> *(e) performing any other executive function provided for in the Constitution or in national legislation.".*

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2 Our office certified the Bill on 29 July 2019.

5. The executive authority of the Republic vests in the President and the President exercises this executive authority together with the other members of Cabinet, which executive authority includes the development and implementation of national policy. Section 85(2)*(d)* of the Constitution provides that the President in exercising his executive authority, together with the other members of the Cabinet, is vested with the power to prepare and initiate legislation.

6. The main purpose of the Bill as outlined in Chapter 1 of the Bill, is to establish and maintain a National Health Insurance Fund ("the Fund") in the Republic of South Africa ("the Republic"). According to the Bill, the aim of the Fund is to achieve sustainable and affordable universal access to quality health care services by serving as the single purchaser and single payer of health care services in order to ensure the equitable and fair distribution and use of health care services.

7. Furthermore, quality health care services will be achieved by ensuring the sustainability of funding for health care services within the Republic and by providing for equity and efficiency in funding by the pooling of funds and strategic purchasing of health care services, medicines, health goods and health related products from accredited and contracted health care service providers.

8. Instructive in any analysis relating to policy decisions, the Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*[3] held as follows:

> *"[99] The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'*[4]*. The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'*[5]*. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy, the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say*

3 2002 (5) SA 721 (CC).
4 Section 165(2) of the Constitution.
5 Section 7(2) of the Constitution.

so.". (Our emphasis).

9. In the case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders*[6] (NICRO), the Constitutional Court held:

> *"Where justification depends on factual material, the party must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate government concerns. If that be the case the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of the policy to limit a constitutional right."*[7] *(Our emphasis).*

10. In the case *of Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[8], the Constitutional Court considered the factors in determining whether a decision is reasonable[9]. The court held the following in respect of policy decisions taken:

> *"...a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations would depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that required an equilibrium to be struck between a range of competing interests or considerations and which was to be taken by a person or institution with specific expertise in that area had to be shown respect by the courts. Often a power would identify a goal to be achieved, but would not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker..." . (Our emphasis).*

Legislative Framework

11. Section 27(1) of the Constitution provides for health care, food, water and social security, as follows:

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6 2005 (3) SA 280 (CC). Hereinafter referred to as the "NICRO case".

7 NICRO case at para 36.

8 2004 (7) BCLR 687 (CC). Hereinafter referred to as "Batho Star case".

9 Para 45 of Bato Star case provides as follows:

> " What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected...".

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"Health care, food, water and social security

27. *(1) 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 dependants, appropriate social assistance.
(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.". (Our underlining)

12. In terms of section 27 of the Constitution, everyone has the right to have access to health care services and the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right. The primary focus of the Bill is to give effect to the constitutional right of access to health care services. Section 27(1) of the Constitution, in our view, is clear and unambiguous.

International law

13. The Republic is a State Party to and as such a signatory to certain binding international instruments. The preamble to the Bill outlines two such instruments which the Republic ratified i.e. the International Covenant on Economic, Social and Cultural Rights[10] and the African Charter on Human and People's Rights[11]. Article 12 of the International Covenant on Economic, Social and Cultural Rights provides as follows:

"Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial

10 *International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, ratified on 12 January 2015.*
4 *African Charter on Human and People's Rights, 1981, ratified on 9 July 1996.*

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hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.".

14. Article 12(1) of the International Covenant on Economic, Social and Cultural Rights is clear; it obligates State Parties to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health by amongst other things, creating conditions which would assure to all, medical services and attention in the event of sickness.

15. The African Charter on Human and People's Rights provides for "Human and Peoples' Rights", and Article 16 thereof provides as follows:

"Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.".

16. Article 16 of the African Charter on Human and People's Rights, therefore also provides for the right of every individual to enjoy the best attainable state of physical and mental health and requires State Parties to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

17. In the judgement of *Glenister v President of the Republic of South Africa*,[12] the Constitutional Court dealt with the Republic's international obligation to establish an anti-corruption entity. The Constitutional Court confirmed the obligation of the Republic to comply with international agreements that it had acceded to. In this regard, Moseneke DCJ and Cameron J, held the following:

"[192] *And it is here where the courts' obligation to consider international law when interpreting the Bill of Rights is of pivotal importance. Section 39(1)(b) states that when interpreting the Bill of Rights a court "must consider international law". The impact of this provision in the present*

12 [2011] ZACC 6.

case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.

[193] *That is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them, more especially the UN Convention.*

[194] *That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance. It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.*

[195] *This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.*

...

[198] *More specifically, the amicus contended, and we agree, that failure on the part of the state to create a sufficiently independent anti-corruption entity infringes a number of rights. These include the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.". (our underlining)*

18. Section 231 of the Constitution provides for international agreements, as follows:

"International agreements

231. *(1) The negotiating and signing of all international agreements is the responsibility of the national executive.*

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical,

administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.". (our underlining)

19. We hold the view that the Republic, as a State Party to the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights, is bound by these international instruments. The binding nature of these international agreements, in accordance with section 231(2) of the Constitution, means that the Republic has a duty to comply with their provisions and domesticate these obligations into our law. In other words, the Republic, as a State Party to these international instruments, is implementing a legislative measure by introducing the Bill in Parliament, in order to give effect to its international obligation of providing health care services and in further compliance with section 27 of the Constitution.

National legislative authority

20. Section 44(1) of the Constitution provides for the national legislative authority, as follows:

"***National legislative authority***

44. *(1) The national legislative authority as vested in Parliament—*

(a) confers on the National Assembly the power—

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power—
(i) to participate in amending the Constitution in accordance with section 74;
(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.".

21. Section 44(1) of the Constitution vests in Parliament the national legislative authority to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4 (which are functional areas of concurrent national and provincial legislative competence), but excluding a matter within a functional area listed in Schedule 5 to the Constitution.

Rationality

22. According to the Constitutional Court in the *Affordable Medicines Trust and Others v Minister of Health and Another*[13] matter, the exercise of all legislative power is subject to two constitutional constraints. Firstly, there must be a rational connection between the legislation and the achievement of a legitimate government purpose.[14] The Constitutional Court made reference to the decision in *New National Party of South Africa v Government of the Republic of South Africa and Others*,[15] where the Court held as follows:

> *"The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.".*[16]

23. Secondly, according to the Court in the Affordable Medicines Trust matter, the legislation must not infringe upon any of the fundamental rights entrenched in the Bill of Rights. However, the Court confirmed that these rights may be limited by a law of general application in accordance with

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13 2006 (3) SA 247 (CC).
14 At paragraph 74 of Affordable Medicines Trust and Others v Minister of Health and Another, 2006 (3) SA 247 (CC).
15 1999 (3) SA 191 (CC); 1999 (5) BCLR 489.
16 At paragraph 19 of *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).

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section 36 of the Constitution.[17] Such a limitation must be justifiable in terms of section 36(1) of the Constitution, which provides as follows:

> ***"Limitation of rights***
>
> ***36.*** *(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*
> *(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose.*
> *(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.".*

24. Therefore, if any provision of the Bill limits any right in the Bill of Rights, such a limitation must be justifiable in terms of section 36 of the Constitution. Any argument thus, that a provision of the Bill violates or limits a right in the Bill of Rights must elaborate and motivate how such a violation or limitation is not justifiable under section 36(1) of the Constitution.

25. The principle of rationality was also enunciated on in the Constitutional Court judgment of *Glenister v President of the Republic of South Africa*[18] where the court went further and said –

> *"... The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector.".[footnotes omitted]*

26. The rational connection constraint requires that all legislation must comply with the principle of legality. The principle of legality requires that the Executive and the Legislature (and all organs of state) may not exercise any power or perform any function beyond that conferred on them in terms of the law.[19]

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17 At paragraph 76 of Affordable Medicines Trust and Others v Minister of Health and Another, 2006 (3) SA 247 (CC).

18 At paragraph 55 of 2011 (3) SA 347 (CC).

19 At paragraph 58 of Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

27. Jafta J, in *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*[20], made the following statement in respect of rationality:

> *"... Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained.".(our underlining)*

28. The issue that needs to be determined in respect of the provisions of the Bill is whether there is a rational connection between the provisions of the Bill and the achievement of a legitimate government purpose. Since the stated purpose of the Bill is to achieve sustainable and affordable universal access to quality health care services, the Bill, as the measure chosen by the Executive to achieve this particular purpose, must reasonably be capable of accomplishing this purpose. However, in accordance with the dictum by the learned Jafta J in the Constitutional Court, the Bill need not be the best means or the only means through which the purpose may be attained.

29. In *Albutt v Centre for the Study of Violence and Reconciliation and Others,*[21] the Constitutional Court formulated the rationality test as follows:

> *"The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the ground of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution.". (our underlining)*

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20 At paragraph 55 of [2018] ZACC 20.

21 At paragraph 51 [2010] ZACC 4.

30. From the information shared with us by the Department, we hold the view that the provisions of the Bill are rationally connected to the objective of providing sustainable and affordable universal access to quality health care services for all in the Republic. The combined constitutional obligations of section 27 of the Constitution and the binding international obligations, which must be given effect to, are key to motivating the rationality of the Bill.

Concurrent national and provincial legislative competence

31. As indicated above, section 44(1) of the Constitution vests in Parliament the national legislative authority to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4 to the Constitution, which is a functional area of concurrent national and provincial legislative competence. Concurrent national and provincial legislative competence means that both Parliament and provincial legislatures are equally competent, and may legislate, on the matters listed in Schedule 4.

32. In the context of concurrent national and provincial legislative competence, the drafters of the Constitution contemplated a situation where there could be a conflict between national and provincial legislation regarding a matter listed in Schedule 4 to the Constitution that they may have separately legislated on. Section 146 of the Constitution provides for a mechanism to resolve any conflict between national and provincial legislation. We hold the view that the Bill falls within the ambit of "health services", which is a functional area listed in Part A of Schedule 4 since it deals with the types and manner of services by medical practitioners, generally, that may be accessed and supplied.

33. The Constitution differentiates between types of conflicts and the manner in which they must be resolved. Amongst these are conflicts between national and provincial legislation that fall within a functional area listed in Schedule 4. The resolution of foreseeable conflicts pertinent to the Bill are catered for in sections 146 and 148[22] of the Constitution.

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22 "***Conflicts that cannot be resolved***

34. Freedman *et al* writes that an enquiry regarding a conflict between laws, a court first has to settle the issue of whether both spheres acted within the scope of their legislative competence before dealing with the actual question of the conflict. Legislative competence refers to a legislature's authority to pass a particular law. Legislative conflict, however, refers to a situation where there is a conflict between the provisions of two or more laws passed by different spheres of government either falling within a Schedule 4 (concurrent national and provincial legislative competence) or Schedule 5 (exclusive provincial legislative competence) functional area.[23]

35. "In *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal,*[24] the Constitutional Court explained that a law passed by a legislature in one sphere will be inconsistent with a law passed by a legislature in another sphere when those laws "cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time". They are not inconsistent, the Court went on to explain, "when it is possible to obey each without disobeying the other"."[25]

36. Where a court finds it difficult to determine whether there is a conflict between national and provincial legislation or between national legislation and a provincial Constitution, in terms of section 150 of the Constitution, a court must prefer an interpretation of the legislation or the constitution that avoids conflict over the one that results in conflict.[26]

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148. *If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.*".

23 The Law of South Africa- Constitutional Law: Structures of Government (Volume 5(3) - Second Edition Replacement) –Conflicting Laws: DW FREEDMAN assisted by RM Robinson original text by GE DEVENISH Last Updated: Reflects the law as at 31 January 2012 Available at https://www.mylexisnexis.co.za/Index.aspx [Accessed 28 August 2019].

24 *1996 11 BCLR 1419 (CC) at Paragraph 24*

25 The Law of South Africa- Constitutional Law: Structures of Government (Volume 5(3) - Second Edition Replacement) –Conflicting Laws: DW FREEDMAN assisted by RM Robinson original text by GE DEVENISH Last Updated: Reflects the law as at 31 January 2012 Available at https://www.mylexisnexis.co.za/Index.aspx [Accessed 28 August 2019].

26 "***Interpretation of conflicts***

150. When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.".

37. Section 146 of the Constitution, in our view, is the more apposite section from which the national government sources its authority to pass legislation which falls within the purview of Schedule 4 to the Constitution. The section in its entirety provides as follows:

> ***"Conflicts between national and provincial legislation***
>
> ***146.*** *(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.*
>
> *(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:*
>
> *(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.*
>
> *(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—*
>
> *(i) norms and standards;*
>
> *(ii) frameworks; or*
>
> *(iii) national policies.*
>
> *(c) The national legislation is necessary for—*
>
> *(i) the maintenance of national security;*
>
> *(ii) the maintenance of economic unity;*
>
> *(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;*
>
> *(iv) the promotion of economic activities across provincial boundaries;*
>
> *(v) the promotion of equal opportunity or equal access to government services; or*
>
> *(vi) the protection of the environment.*
>
> *(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—*
>
> *(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or*
>
> *(b) impedes the implementation of national economic policy.*
>
> *(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.*
>
> *(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.*
>
> *(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.*
>
> *(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.*

> *(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.".* (our underlining)

38. In terms of section 146 of the Constitution, national legislation that applies uniformly in respect of the country as a whole may be enacted and will prevail over provincial legislation if certain conditions are met. These conditions are stipulated in section 146(2) of the Constitution.

39. In this regard, and referring to the amended text of the Constitution and the interim Constitution, the Constitutional Court in the Second Certification judgment[27] stated as follows:

> *"...The achievement of uniformity in the context of AT 146(2)(b) therefore requires the establishment of standards, rules or patterns of conduct which can be applied nationally. As we have stated above, this is an objectively justiciable criterion. Under the IC, an override for the purpose of uniformity is permitted where legislation contained "norms or standards". Neither of these words is capable of precise definition. The Concise Oxford Dictionary defines "standard" as "an object or quality or measure serving as a basis or example or principle to which others conform or should conform or by which the accuracy or quality of others is judged". "Norm" is defined as a "standard or pattern or type". Given the ill-defined import of the words "norms and standards", and the governing criterion of uniformity, it is likely that even under the IC, framework legislation and national policies which sought to establish uniformity by establishing standards, rules or patterns of conduct would have been held to fall within the scope of "norms and standards."."* (Footnotes omitted.)

40. Furthermore, in terms of section 146(3) of the Constitution, national legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—

> *"(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or*
> *(b) impedes the implementation of national economic policy.".*

41. In line with section 146(2) *(a), (b)* and *(c)* of the Constitution, in our view the Bill is proposed national legislation dealing with matters that cannot be regulated effectively by legislation enacted by the respective provinces

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27 Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), at paragraph 159.

individually. In order for these matters to be dealt with effectively, they require uniformity across the Republic and the Bill provides that uniformity by establishing the national policy and framework for all spheres of government to implement and to function within.

42. Where a conflict between the National Health Insurance Act, if enacted, and any provincial legislation, should arise sections 146, 148, 149 and 150 become relevant and applicable, as the circumstances require.

Functions of provinces

43. We have, earlier in this opinion, described the context within which the Bill must be evaluated. In paragraphs 31 to 42, we discussed the powers, functions and role of provinces in relation to Schedule 4 to the Constitution. To summarise, both national and provincial governments are expressly authorised by the Constitution to enact legislation that deals with health services. Where a conflict in law arises the constitutional provisions of sections 146 and 148 become relevant to resolve the conflict.

44. We point out the judgement of *Minister of Education v Harris,*[28] in which the Constitutional Court had to decide whether policy determined by the Minister of Education in terms of the National Education Policy Act, 1996 (Act No. 27 of 1996), was binding on everyone. This court endorsed the judgement of *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd,*[29] in which Harms JA held that—

> *"... laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear. ...".(our underlining).*

45. Based on the Harris judgment and section 146(2)(b) of the Constitution, it appears that legislation that empowers a Minister to formulate

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28 [2001] ZACC 25 at paragraph 10.
29 2001(4) SA501 (SCA) at paragraph 7.

policy, establish frameworks and determine norms and standards should, in our view, determine the binding nature of that policy, frameworks and norms and standards for provinces.

46. Section 125 of the Constitution provides the following:

> ***"Executive authority of provinces***
>
> ***125.*** *(1) The executive authority of a province is vested in the Premier of that province.*
>
> *(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by—*
>
> *(a) implementing provincial legislation in the province;*
> *(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;*
> *(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;*
> *(d) developing and implementing provincial policy;*
> *(e) coordinating the functions of the provincial administration and its departments;*
> *(f) preparing and initiating provincial legislation; and*
> *(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.*
>
> *(3) A province has executive authority in terms of subsection (2) (b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).*
>
> *(4) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.*
>
> *(5) Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power.*
>
> *(6) The provincial executive must act in accordance with—*
>
> *(a) the Constitution; and*
> *(b) the provincial constitution, if a constitution has been passed for the province.".*

47. But for the sections referred to above, no other express provision could be found vis-a-vis the role of provinces in respect of laws which may relate to health services. We argue, therefore, that the legislative instrument that codifies the authority to determine national policy and a framework within which governments must perform their functions is the National Health Act,

2003 (Act No. 61 of 2003) ("National Health Act"). We argue further that the specific roles and functions of the national and provincial governments in respect of health care services are determined in the National Health Act.

48. Section 2 of the National Health Act determines the following as the objects of the Act:

> ***"Objects of Act***
>
> ***2.*** *The objects of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by—*
> *(a) establishing a national health system which—*
> *(i) encompasses public and private providers of health services; and*
> *(ii) provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford;*
> *(b) setting out the rights and duties of health care providers, health workers, health establishments and users; and*
> *(c) protecting, respecting, promoting and fulfilling the rights of—*
> *(i) the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care;*
> *(ii) the people of South Africa to an environment that is not harmful to their health or wellbeing;*
> *(iii) children to basic nutrition and basic health care services contemplated in section 28 (1) (c) of the Constitution; and*
> *(iv) vulnerable groups such as women, children, older persons and persons with disabilities." (our emphasis)*

49. Section 3 of the National Health Act provides as follows:

> ***"Responsibility for health***
>
> ***3.*** *(1) The Minister must, within the limits of available resources—*
> *(a) endeavour to protect, promote, improve and maintain the health of the population;*
> *(b) promote the inclusion of health services in the socio-economic development plan of the Republic;*
> *(c) determine the policies and measures necessary to protect, promote, improve and maintain the health and well-being of the population;*
> *(d) ensure the provision of such essential health services, which must at least include primary health care services, to the population of the Republic as may be prescribed after consultation with the National Health Council; and*
> *(e) equitably prioritise the health services that the State can provide.*
> *(2) The national department, every provincial department and every municipality must establish such health services as are required in terms of this Act, and all health establishments and health care providers in*

the public sector must equitably provide health services within the limits of available resources.

50. Sections 21 and 25 of the National Health Act set out a detailed list of functions that must be carried out by organs of state. The envisaged amendments, provided for in clause 58 of the Bill read with the Schedule, would result in the addition and deletion of functions carried out by national and provincial governments.

51. Clause 58 of the Bill provides as follows—

"Repeal or amendment of laws

58. *(1) Subject to this section and section 57 dealing with transitional arrangements, the laws mentioned in the second column of the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.*

(2) The repeal or amendment of any law by this Act does not affect—

(a) the previous operation of such law or anything done or permitted under such law;

(b) any right, privilege, obligation or liability acquired, accrued or incurred under such law;

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed in terms of such law."

52. The following amendments are contained in the Bill in respect of Sections 21 and 25 of the National Health Act:

"General functions of national department

21. *(1) The Director-General must—*

(a) ensure the implementation of national health policy in so far as it relates to the national department; and

(b) issue guidelines for the implementation of national health policy.

(2) The Director-General must, in accordance with national health policy—

(a) liaise with national health departments in other countries and with international agencies;

(b) issue, and promote adherence to, norms and standards on health matters, including—

(i) nutritional intervention;

(ii) environmental conditions that constitute a health hazard;

(iii) the use, donation and procurement of human tissue, blood, blood products and gametes;

(iv) sterilisation and termination of pregnancy;

(v) the provision of health services, including social, physical and mental health care;

(vi) *health services for convicted persons and persons awaiting trial;*

(viA) develop and manage the national health information system;

(vii) *genetic services; and*

(viii) *any other matter that affects the health status of people in more than one province;*

(c) *promote adherence to norms and standards for the training of human resources for the health sector for purposes of rendering health services;";*

(d) *identify national health goals and priorities and monitor the progress of their implementation;*

(e) *coordinate health and medical services during national disasters;*

(f) *facilitate and promote the provision of port health service and participate in intersectoral and interdepartmental collaboration;*

(g) *promote health and healthy lifestyles;*

(h) *promote community participation in the planning, provision and evaluation of health services;*

(i) *conduct and facilitate health systems research in the planning, evaluation and management of health services;*

(j) *facilitate the provision of indoor and outdoor environmental pollution control services;*

(k) *facilitate and promote the provision of health services for the management, prevention and control of communicable and non-communicable diseases; **[and]***

"(l) *co-ordinate the health services rendered by the national department with **[the health services]** those rendered **[by]** through provinces and District Health Management Office, and **[provide]** such additional health services as may be necessary to establish a comprehensive national health system;*

(m) plan the development of public and private hospitals, other health establishments and health agencies;

(n) control and manage the cost and financing of public health establishments and public health agencies;

(o) develop a national policy framework for the procure- ment and use of health technology;

(p) develop guidelines for the management of health districts;

(q) assist the District Health Management Office in con- trolling the quality of all health services and facilities; and(r) together with the District Health Management Office promote community participation in the planning, provision and evaluation of health services in a health district."

(3) (a) The Director-General must prepare strategic, medium term health and human resources plans annually for the exercise of the powers and the performance of the duties of the national department.

(b) The national health plans referred to in paragraph (a) must form the basis of—

(i) *the annual budget as required by the national department responsible for finance and state expenditure; and*

(ii) *any other governmental planning exercise as may be required by any other law.*

(4) The national health plans must comply with national health policy.

*(5) The Director-General must integrate the health plans of the national department **[and]**, provincial departments and districts annually and submit the integrated health plans to the National Health Council.*

Provincial health services, and general functions of provincial departments

25. *(1) The relevant member of the Executive Council must ensure the implementation of national health policy, norms and standards in his or her province.*

(2) The head of a provincial department must, in accordance with national health policy and **[the]** relevant provincial health policy **[in respect of or]** perform such health functions within the relevant province as may be prescribed—

(a) provide specialised hospital services;

[(b) plan and manage the provincial health information system;]

(c) participate in interprovincial and intersectoral co-ordination and collaboration;

(d) co-ordinate the funding and financial management of district health councils;

(e) provide technical and logistical support to district health councils;

[(f) plan, co-ordinate and monitor health services and must evaluate the rendering of health services;]

(g) co-ordinate health and medical services during provincial disasters;

[(h) conduct or facilitate research on health and health services;

(i) plan, manage and develop human resources for the rendering of health services;

(j) plan the development of public and private hospitals, other health establishments and health agencies;

(k) control and manage the cost and financing of public health establishments and public health agencies;

(l) facilitate and promote the provision of comprehensive primary health services and community hospital services;]

(m) provide and co-ordinate emergency medical services and forensic pathology, forensic clinical medicines and related services, including the provision of medico-legal mortuaries and medico-legal services;

(n) **[control]** assist the District Health Management Office in controlling the quality of all health services and facilities;

(o) provide health services contemplated by specific provincial health service programmes;

(p) provide and maintain equipment, vehicles and health care facilities in the public sector;

(q) consult with communities regarding health matters;

(r) provide occupational health services;

[(s) promote health and healthy lifestyles;]

(t) promote community participation in the planning, provision and evaluation of health services;

(u) provide environmental pollution control services;

(v) ensure health systems research; and

(w) provide services for the management, prevention and control of communicable and non-communicable diseases.

[(3) The head of a provincial department must—

(a) prepare strategic, medium term health and human resources plans annually for the exercise of the powers of, the performance of the duties of and the provision of health services in the province by the provincial department; and

(b) submit such plans to the Director-General within the time frames

and in accordance with the guidelines determined by the National Health Council.]

(4) Provincial health plans must conform with national health policy.".

53. We hold the view that, notwithstanding Schedule 4 to the Constitution, the National Health Act is the law that determines the roles, responsibilities and functions of the spheres of government in accordance with the national health policy determined by the Minister. The roles, responsibilities and functions referred to above are not determined by the Constitution itself. Rather, the Constitution authorises that both the national and provincial governments are authorised to enact legislation relating to health services. We interpret this to mean that in the context of the National Health Act, provinces may enact provincial laws to deal with health services authorised by the national framework and to give effect to the national health policy. This is evidenced by sections 3 and 25 of the National Health Act. Any amendment to the above provisions, including the introduced amendment to sections 21 and 25 of the National Health Act contained in the Schedule to the Bill, does not in and of itself, offend the Constitution.

Co-operative government

54. The constitutional principle of co-operative government becomes instructive in the matter of concurrent national and provincial legislative competence. Chapter 3 of the Constitution provides for the principle of co-operative government between all spheres of government and organs of State, and in this respect, section 41 of the Constitution provides as follows:

"Principles of co-operative government and intergovernmental relations

41. *(1) All spheres of government and all organs of state within each sphere must—*

(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by—

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—

(a) establish or provide for structures and institutions to promote and facilitate inter-governmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.

(3) An organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.".

55. The Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005) ("Intergovernmental Relations Framework Act"), gives effect to section 41(2) of the Constitution. In terms of section 40(1) of the Intergovernmental Relations Framework Act, organs of state have a duty to avoid intergovernmental disputes and must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions and they must, as far as possible, settle intergovernmental disputes without resorting to judicial proceedings.

56. In relation to the Bill, if a province exercises its provincial legislative competence and enacts legislation which deals with a health service, such province is obliged to comply with the constitutional obligation of co-operative government, as indicated in section 41(1)(e), (f), (g) and (h)(iv) of the Constitution. Such a province must respect the constitutional status, institutions, powers and functions of the national government and co-ordinate its actions, and its provincial legislation with the Bill.

57. In *Doctors for Life International v Speaker of the National Assembly and Others*,[30] Ngcobo J (as he then was), stated that—

30 [2006]ZACC11.

"The principle of co-operative government requires each of the three spheres to perform their functions in a spirit of consultation and co-ordination with the other spheres". [31]

58. Chaskalson P in *Premier, Western Cape v President of the Republic of South Africa and Others,*[32] held that section 41(1)(g) of the Constitution is concerned with the way power is exercised and not with whether or not a power exists[33] and also held that—

"Although the circumstances in which section 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.". (our underlining).[34]

59. At paragraph 50 the Constitutional Court held that—

"The principle of cooperative government is established in section 40 where all spheres of government are described as being distinctive, inter-dependent and inter-related. This is consistent with the way powers have been allocated between different spheres of government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is "one sovereign, democratic state," and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government. These provisions vest concurrent legislative competences in respect of important matters in the national and provincial spheres of government, and contemplate that provincial executives will have responsibility for implementing certain national laws as well as provincial laws.". (our underlining).

60. Chaskalson P, at paragraph 55, goes further and holds the following regarding the importance of co-operation between different spheres of government:

"Cooperation is of particular importance in the field of concurrent law-making and implementation of laws. It is desirable where possible to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made therefor in the budgets of the different governments.". (our underlining).

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31 At paragraph 82.
32 [1999]ZACC2.
33 At paragraph 57.
34 At paragraph 58.

61. Therefore, in the exercise of their provincial legislative competence, in respect of health services, provinces must comply with the principle of cooperative government, which is of particular importance in the field of concurrent law-making and implementation of laws. The provinces must avoid conflicting legislative provisions, and the Bill must be clear as to which administration will implement the specific provisions of the law. As section 1(a)[35] of the Constitution provides, South Africa is one sovereign, democratic state, and has a constitutional structure that makes provision for framework provisions to be determined by the national sphere of government. These provisions vest concurrent legislative competences in respect of important matters in the national and provincial spheres of government, and also contemplate that provincial executives will have responsibility for implementing certain national as well as provincial laws.

62. The Supreme Court of Appeal in *Maccsand (Pty) Ltd & another v City of Cape Town & others*,[36] commented on the legal principles relating to the separation of powers, cooperative government and the deadlock-breaking measures regarding the conflict of legislation originating from different spheres of government. The Supreme Court of Appeal referred to sections 40, 41 and 146 of the Constitution and held that—

> ***"[10]*** *The Constitution devolves governmental powers in various ways. Not only does it separate powers between the legislative, executive and judicial arms of government but it also divides legislative and executive powers among three spheres of government. It does this in section 40(1) which provides:*
> *'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.'*
>
> ***[11]*** *This division of power represents a significant change from the*

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35 **"Republic of South Africa**

1. *The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.".

36 [2011] ZASCA 141.

hierarchical structure of government that existed under the pre1994 Constitutions in which the national legislature was sovereign and all powerful, and provincial and local government exercised only those powers that had been allocated to them by the sovereign legislature. Now the position is different. As Ngcobo J held in Doctors for Life International v Speaker of the National Assembly & others the 'basic structure of our government consists of a partnership' between the three spheres of government, oiled by the principles of cooperative government. These principles require, inter alia, that the various spheres of government "exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

[12] *Once governmental power is divided in this way, it becomes necessary to allocate powers to each sphere of government. The Constitution achieves this by section 44 (national legislative competence); section 85(2) (national executive competence); section 104(1) (provincial legislative competence); s 125(2) (provincial executive competence); and sections 156(1) and (2) (local executive and legislative competence). Schedule 4 of the Constitution lists functional areas of concurrent national and provincial legislative competence and schedule 5 lists functional areas of exclusive provincial legislative competence. In this way powers are distributed among, and in some cases reserved, to each sphere of government. A necessary corollary of this is that one sphere may not usurp the functions of another, although intervention by one sphere in the affairs of another is permitted in limited circumstances. In addition deadlock-breaking measures are in place for instances when legislation originating from different spheres conflicts; and the idea of cooperative government includes dispute resolution provisions so that intergovernmental disputes may be resolved without litigation.". (footnotes omitted)*

63. The constitutional principle of co-operative government must be complied with in the exercise of concurrent national and provincial legislative competence and law-making regarding health services. It is our view that by introducing the Bill in Parliament, the national government is not encroaching on the geographical, functional or institutional integrity of the provinces and is not usurping their functions.

PROVISIONS OF BILL

64. The contents of the Bill are an important consideration when applying the constitutional principles outlined above and when testing the provisions of the Bill for purposes of legality and desirability within the context described above.

Chapter 1

65. Chapter 1 of the Bill provides for the purpose of the Bill, which is to establish and maintain the Fund in the Republic. In terms of clause 2 of the Bill, its aim is to achieve sustainable and affordable universal access to quality health care services by serving as the single purchaser and single payer of health care services in order to ensure the equitable and fair distribution and use of health care services.

66. Furthermore, quality health care services will purportedly be achieved by ensuring the sustainability of funding for health care services within the Republic and by providing for equity and efficiency in funding by pooling of funds and by the strategic purchasing of health care services, medicines, health goods and health related products from accredited and contracted health care service providers.

67. The policy instrument entitled "National Health Insurance for South Africa" published in the *Gazette* on 30 June 2017 reads as follows[37]:

> *"NHI represents a substantial policy shift that will necessitate massive reorganisation of the current health care system, to address structural changes [sic] that exist in both the public and private sectors. It reflects the kind of society we wish to live in: one based on the values of justice, fairness and social solidarity. Implementation of NHI is consistent with the global vision that health care should be a social investment.*
> ...
> *The implementation is underpinned by Vision 2030 of the National Development Plan (NDP), which envisions that by 2030, everyone must have access to an equal standard of care, regardless of their income, and that a common Fund should enable equitable access to health care, regardless of what people can afford or how frequently they need to use a service.*
> ...
> *Universal population coverage under NHI will ensure that all South Africans have access to comprehensive quality healthcare services. This means that people will be able to access healthcare services closest to where they live. The healthcare services will be accessed at appropriate levels of care and will be delivered through certified and accredited public and private providers."*

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37 At page of *Gazette* No. 40955 dated 30 June 2017.

68. We hold that view that the National Executive, in accordance with section 85(2) of the Constitution is authorised to develop and implement national policy. This constitutional authorisation includes an amendment or change of policy motivated by imperatives that may necessitate such amendment or change. This, in and of itself, is not constitutionally unsound provided that the amendments or change of policy is demonstrated to meet the relevant constitutional requirements of rationality, reasonableness and non-arbitrariness. The introduction therefore, of a single mechanism to secure equitable, quality healthcare for the entire population of the Republic is not, in our view, automatically an infringement of section 27 of the Constitution.

69. We wish to point out the significance of clause 3(4) of the Bill, which provides that the envisaged National Health Insurance Act does not in any way amend, change or affect the funding and functions of any organs of state in respect of health care services until legislation contemplated in sections 77 and 214, read with section 227[38] of the Constitution and any other relevant legislation, have been enacted or amended. Section 77 of the Constitution provides for national legislative process in respect of money Bills, as follows:

> "***Money Bills***
>
> ***77.*** *(1) A Bill is a money Bill if it—*
> *(a) appropriates money;*
> *(b) imposes national taxes, levies, duties or surcharges;*
> *(c) abolishes or reduces, or grants exemptions from, any national taxes,*

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38 "***National sources of provincial and local government funding***

227. *(1) Local government and each province—*
(a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and
(b) may receive other allocations from national government revenue, either conditionally or unconditionally.

(2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.".

levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except—

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.".

70. Section 214 of the Constitution provides for the equitable shares and allocations of revenue, as follows:

"Equitable shares and allocations of revenue

214. *(1) An Act of Parliament must provide for—*

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

(b) the determination of each province's equitable share of the provincial share of that revenue; and

(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made ...".

71. Clause 3(4) of the Bill is an important provision relating to the ultimate implementation of the Bill when enacted. The effect of the clause contained in the text as an express substantive provision, will be that the laws required to be amended and new laws required to be enacted must be completed before the National Health Insurance framework law is put into operation in its entirety.

72. But for preparatory work authorised under the National Health Insurance, until such time as the process outlined in Clause 3(4) is complete, the status quo as reflected in the National Health Act and other applicable and relevant laws remain intact.

Chapter 2

73. Chapter 2 of the Bill provides for access to health care services. The chapter deals with the eligibility to become a beneficiary of the Fund and that the Fund must, in consultation with the Minister, purchase comprehensive health service benefits as determined by the Benefits Advisory Committee of the Fund on behalf of—

- South African citizens;
- refugees;
- persons who are permanently resident in the Republic;
- all children, including children of asylum seekers or illegal foreigners; and
- all inmates as provided for in section 12 of the Correctional Services Act, 1998 (Act No. 111 of 1998).

Asylum seekers, refugees and illegal foreigners

74. We have been requested to consider the provisions of the laws dealing with asylum seekers and advise on the legality of the provisions of Chapter 2 in so far as it relates to foreign individuals.

75. It must be noted that Chapter 2 limits the right of access to health care in respect of an asylum seeker or illegal foreigner. These categories of persons, in terms of Clause 4(2) of the Bill are only entitled to emergency medical services and service for notifiable conditions of public health concern. Other foreign persons visiting the Republic not in possession of a travel insurance contract or policy may access only emergency medical services and services for notifiable conditions of public health concern.

76. The Refugees Act[39] was passed in order to, *inter alia*, give effect, within the Republic, to the relevant international legal instruments, principles and standards relating to refugees[40]. Section 1A of the Act that provides for the

39 Refugees Act, 1998 (Act No. 130 of 1998)
40 Refer to long title of the Refugees Act.

interpretation and application of the Act, reads as follows:

> ***"Interpretation and application of Act***
>
> ***1A.*** *This Act must be interpreted and applied in a manner that is consistent with—*
> *(a) the 1951 United Nations Convention Relating to the Status of Refugees;*
> *(b) the 1967 United Nations Protocol Relating to the Status of Refugees;*
> *(c) the 1969 Organization of African Unity Convention Convention Governing the Specific Aspects of Refugee Problems in Africa;*
> *(d) the 1948 United Nations Universal Declaration of Human Rights; and*
> *(f) any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party.".*

77. The Refugees Act gives effect to the various international instruments, to which the Republic is a State Party, that deal with the management of refugees. Section 3 of the Refugees Act provides for refugee status and reads as follows:

> ***"Refugee status***
>
> ***3.*** *Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—*
> *(a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or*
> *(b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or*
> *(c) is a spouse or dependant of a person contemplated in paragraph (a) or (b)."*

78. Section 5 of the Refugees Act provides for the cessation of refugee status under specified circumstances.

79. Section 5(3) of the Refugees Act provides that the refugee status of a person who ceases to qualify for it may be withdrawn in terms of section 36 of that Act.

80. Section 36(2) provides that after consideration of all material facts, the Standing Committee may withdraw the recognition of a person as a refugee contemplated in section 36(1) and such person must be dealt with as an illegal foreigner under the Immigration Act.

81. Section 22(5) empowers the Director-General to withdraw an asylum seeker visa in the prescribed manner if—

(a) the applicant contravenes any condition endorsed on that visa;

(b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent;

(c) the application for asylum has been rejected; or

(d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5.

82. Of particular importance to the Bill, section 27 of the Refugees Act provides for the protection and general rights of refugees, and reads as follows:

> ***"Protection and general rights of refugees***
>
> ***27.*** *A refugee is entitled to—*
>
> *(a) a formal written recognition of refugee status in the prescribed form;*
>
> *(b) full legal protection, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, 1996, except those rights that only apply to citizens;*
>
> *(c) apply for permanent residence in terms of section 27 (d) or 31 (2) (b) of the Immigration Act after ten years of continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee, after considering all the relevant factors and within a reasonable period of time, including efforts made to secure peace and stability in the refugee's country of origin, certifies that he or she would remain a refugee indefinitely;*
>
> *(d) an identity document referred to in section 30;*
>
> *(e) a travel document if he or she applies in the prescribed manner; and*
>
> *(f) seek employment.".*

83. Section 27 of the Refugees Act affords full legal protection to refugees, in the form of the rights set out in Chapter 2 of the Constitution. This protection includes the right to health services, in addition to emergency medical services, in line with section 27(1)(a) of the Constitution.

84. We are of the opinion that clause 4(1)*(c)* is in line with the Refugees Act in so far as it relates to accessing health services i.e. it places a refugee in the same position as a citizen of the Republic.

85. Whilst the Constitution provides for comparison with other open and democratic societies, there are further constraints placed by our Constitution in relation to the exercise of all legislative power. The Constitution requires that exercise of legislative power must be rationally connected to a legitimate government purpose and must not infringe the rights in the Bill or Rights. This has therefore ushered in an ethos of justification in relation to law-making.

86. Section 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

87. Section 36(2) of the Constitution provides that except as provided in section 36(1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

88. In terms of section 39(1) of the Constitution, when interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

89. We are of the view that the limitation of the rights of foreign individuals to the extent provided for in the Bill, based on references made to available resources in section 27(2) of the Constitution and by the Department, meets the requirements of the limitations test and is constitutionally sound.

Jurisprudence relating to rights of foreign individuals

90. Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely. The section further provides that the practice of a trade, occupation or profession may be regulated by law. In **Union of Refugee Women and Others and The Director of the Private Security Industry Regulatory Authority and Others**,[41] the Constitutional Court had to consider whether section 23(1)(a) of the Private Security Industry Regulation Act, 2001 (Act No. 56 of 2001) ("the PSIRA Act") discriminated against the applicants, in that case, on the basis of their refugee status and consequently infringed on their right to equality. That case concerned the right of refugees to work in the security industry in South Africa, which is regulated by the PSIRA Act. That legislation provided, inter alia, that no person may render a security service for reward unless he or she is registered as a security service provider in terms of the Security Act. One can only so register if one is a South African citizen or has permanent resident status. The constitutionality of the provisions in relation to foreign nationals who had not obtained permanent resident status was challenged. The Constitutional Court held, in relation to the security industry, that differentiation between citizens and permanent residents on the one hand, and all other foreigners on the other, has a rational foundation and serves a legitimate governmental purpose.

91. The Constitutional Court stated[42] that the test to be used when assessing whether a particular law or act complies with section 9 of the Constitution was

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41 (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC) (12 December 2006) ("Union of Refugee Women case"). See para 48 of Kondile J's judgment and para 128 of Sachs J's judgment. See also ***Larbi-Ordam and Others v MEC for Education and Another*** (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (26 November 1997).

42 See para 34 of the Union of Refugee Women case.

laid down in **Harksen v Lane**[43] as follows:

> *"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
>
> *(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*
>
> *(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
>
> *(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) or section 9(4).*
>
> *(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."*

92. The Constitutional Court in the **Union of Refugee Women** case[44] recapped that the first leg of the equality analysis thus involves determining whether the provision in question differentiates between categories of people. It found that section 23(1)*(a)* of the PSIRA Act differentiates between citizens and permanent residents on the one hand, and all other foreigners, including refugees, on the other. This differentiation is clear; citizens and permanent residents may apply for registration as security service providers, all other foreigners are barred from doing so unless they fall within the terms of section 23(6) of the PSIRA Act.

93. The Constitutional Court then considered whether there was a rational connection between section 23(1)*(a)* and its purpose.[45] It stated that with

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43 ***Harksen v Lane NO and Others*** 1998 (1) SA 300 (CC) at para 54; 1997 (11) BCLR 1489 (CC) at para 53.

44 See para 35.

45 See paras 36 to 42.

regard to the level of scrutiny required when determining whether a rational connection between a legislative provision and its intended purpose exists, the Constitutional Court, in Prinsloo v Van der Linde,[46] explained:

> *"In regard to mere differentiation the Constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the Constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. It has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification'."* (footnotes omitted)

94. The Constitutional Court held that section 23(1)*(a)* of the PSIRA Act does not single out refugees. The differentiation is between citizens and permanent residents on the one hand, and all other foreigners, including holders of, for example, temporary residence permits, visitor's permits, study permits, relative's permits, work permits, retired person permits and exchange permits, on the other.[47] In considering whether there was unfair discrimination, the Constitutional Court stated that the following factors have to be taken into account:

> *"(a) Under the Constitution a foreigner who is inside this country is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.*[48]
>
> *(b) The Constitution distinguishes between citizens and others as it confines the protection of the right to choose a vocation to citizens.*[49]
>
> *(c) In the final Certification case*[50] *this Court rejected the argument that the confinement of the right of occupational choice to citizens failed to comply with the requirements that the Constitution accord this "universally accepted fundamental right" to everyone. It held that the right of occupational choice could not be considered a universally accepted fundamental right.*[33] *It also held that the European Convention for the Protection of Human Rights and Fundamental Freedoms embodies no such right to occupational choice nor does the International Covenant on Civil and Political Rights. The distinction between citizens and foreigners is recognised in the United States of America and also in Canada. There are other*

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46 ***Prinsloo v Van der Linde and Another*** 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC), at para 25.

47 See para 45 of the ***Union of Refugee Women*** case.

48 ***Lawyers for Human Rights and Another v Minister of Home Affairs and Another*** 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 27.

49 Section 22 of the Constitution.

50 ***Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*** 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

acknowledged and exemplary constitutional democracies such as India, Ireland, Italy and Germany where the right to occupational choice is extended to citizens or is not guaranteed at all.

(d) In Watchenuka,[51] Nugent JA held that it is acceptable in international law that every sovereign nation has the power to admit foreigners only in such cases and under such conditions as it may deem fit to prescribe and held that it is for that reason that the right to choose a trade or occupation or profession is restricted to citizens by section 22 of the Bill of Rights.".

95. The Constitutional Court went further to state that the fairness enquiry also requires consideration of the provisions of section 22 of the Constitution.[52] It stated that it has held in many cases that the rights protected in Chapter 2 are mutually reinforcing and must be interpreted in that way. It referred to **Affordable Medicines Trust**,[53] in which section 22 was discussed in some detail, where the Constitutional Court held:

> *"[T]wo constitutional constraints define the scope of the regulation of the practice of a profession which is permitted under s 22. Legislation that regulates practice will pass constitutional muster if (a) it is rationally related to the achievement of a legitimate government purpose; and (b) it does not infringe any of the rights in the Bill of Rights. What the Constitution therefore requires is that the power to regulate the practice of a profession be exercised in an objectively rational manner. As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation inappropriate."*[54]

96. In the final analysis, the Constitutional Court held the discrimination was not unfair and does not breach the equality right threshold.[55] It found that the scheme was not a blanket ban on employment in general but is narrowly tailored to the purpose of screening entrants to the security industry. It held that the scheme is flexible and has the capacity to let in any foreigner when it is appropriate and to avoid hardship against any foreigner. It permits blanket exemption of categories of work within the industry and permits departure from the strict requirements of section 23(1)(a) on "good cause shown". The Constitutional Court stated that the discrimination is a legitimate

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51 ***Minister of Home Affairs and Others v Watchenuka and Another*** 2004 (4) SA 326 (SCA); 2004 (2) BCLR 120 (SCA).

52 See para 51 of the ***Union of Refugee Women*** case.

53 See footnote 1 above.

54 Id, at para 77.

55 See para 67 of the ***Union of Refugee Women*** case.

legislative choice on a highly prized public interest which is safety and security, in a country where security workers in that industry exceed the police and the army in number.

97. We are of the view that the test developed in *Harken v Lane* to determine whether a provision differentiates between people or categories of people and if so, whether the differentiation bears a rational connection to a legitimate government purpose, including the test to determine unfair discrimination in the *Union of Refugee Women* case may be relevant in the determination whether the categorisation of persons *(i.e. South African citizens, permanent residents, inmates, asylum seekers, refugees and illegal foreigners)* listed in Chapter 2 of the Bill who are eligible for access to health care services is constitutionally sound. Thus, an argument can be raised that the same principles enunciated by the Constitutional Court in the judgments referred to above may be applied to the justification of the categorisation of persons mentioned in Chapter 2 who are eligible to access health care services as envisaged in the Bill taking into account the available resources as contemplated in section 27(2) of the Constitution.

Children

98. Chapter 2 also provides for the registration of users with the Fund and the rights of the users of the Fund. These include, amongst others, the right to receive quality health care services free of charge from certified and accredited health care service providers and health establishments. A person who is registered as a beneficiary will receive the required services as purchased on his or her behalf by the Fund from certified and accredited health care service providers at no cost.

99. Clause 4(3) stipulates that all children, including children of asylum seekers and illegal foreigners are entitled to basic health care services as provided for in section 28(1)(c) of the Constitution. Section 28(1)(c) in turn reads that every child has the right to basic health care services and social services, amongst others.

100. We interpret basic health care services as distinguishable from and which amount to more services than emergency medical services which is defined in the Bill as "services provided by any private or public entity dedicated, staffed and equipped to offer pre-hospital acute medical treatment and transport for the ill or injured" and defined in the policy on the National Health Insurance for South Africa published in the *Gazette* on 30 June 2017 as health care services provided by—

> *"any private or state organisation dedicated, staffed and equipped to offer pre-hospital medical treatment and transport of the ill or injured and where appropriate the inter-health establishment referral of patients requiring medical treatment en-route, pre-hospital emergency medical services for events and the medical rescue of patients from medical rescue situations*[56]*."*

101. Clause 5(2) requires that a person eligible to receive health care services in accordance with the Bill must register his or her child as a user with the Fund but goes on to provide that a child born to a user is regarded as having been registered as a user automatically at birth. There may be children who fall outside of the purview of the above provision. The Bill therefore continues to make provision for other categories of children who may require health services including, children aged between 12 and 18 and children in child-headed households[57].

102. As far as we are able to ascertain, no further amendment to the Children's Act, 2005 (Act No. 38 of 2005) is required.

National Government Component

103. During deliberations on the Bill, members of the Portfolio Committee correctly, in our view, raised a concern relating to the correctness of clause 7(2)*(f)*(i) which provides that the Minister must, by regulation, designate central hospitals as national government components in accordance with section 7(5) of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

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56 At page 10 of *Gazette* No. 40955 dated 30 June 2017.

57 Clause 5(3) of the Bill.

To correct the defect, we propose that the Committee considers the below proposed provision for inclusion in an A-List which reads as follows–

> *"1. On page 10, from line 24, to omit subparagraph (i) and to substitute the following paragraphs:*
> *"(i) the Minister must request the Minister of the Public Service and Administration to consider and assist in the establishment of central hospitals as national government components in accordance with section 7(5) of the Public Service Act, 1994 (Proclamation No. 103 of 1994);*
> *(ii) where central hospitals are not established as national government components, the Minister must establish or designate central hospitals as an organ of state in an appropriate form."."*

Chapter 3

National Health Insurance Fund

104. Chapter 3 of the Bill provides for the establishment of the Fund as a national public entity as contemplated in the Public Finance Management Act, 1999 (Act No. 1 of 1999)("the PFMA"). The chapter also contains a list of powers and functions of the Fund. The functions of the Fund include the taking of all steps reasonably necessary to obtain universal health coverage. This we accept to be that all people and communities can use the promotive, preventive, curative, rehabilitative and palliative health services they need, of sufficient quality to be effective, while also ensuring that the use of these services do not expose the user to financial hardship.[58]

105. The definition of universal health coverage embodies three related objectives:

> *"(1) equality in access to health services - those who need the services should get them, not only those who can pay for them;*
> *(2) that the quality of health services is good enough to improve the health of those receiving health services; and*
> *(3) financial risk protection - ensuring that the cost of using care does not put the people at risk of financial hardship. Universal health coverage brings the hope of better health and protection from poverty for*

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58 At page 13 of *Gazette* No. 40955 dated 30 June 2017 "The World Health Organisation defines universal health coverage as ensuring that all people can use the promotive, preventive, curative, rehabilitative and palliative health services they need, of sufficient quality to be effective, while also ensuring that the use of these services does not expose the user to financial hardship.".

hundreds of millions of people- especially those in the most vulnerable situations.".[59]

106. There is no provision contained in the Competition Act which elevates the Act to enjoy a more superior status[60] than the NHI law should it be enacted by the Legislature. In light of this it may be concluded, as we do, that exemptions from the application of the Competition Act, 1998 (Act No. 89 of 1998) ("the Competition Act") is legally permissible when expressly provided or authorised in law.

107. In addition, section 3(1A) of the Competition Act, provides as follows:

> *"(1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.*
>
> *(b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21 (1) (h) and 82 (1) and (2).".*

108. In the Competition Act, 'regulatory authority' is defined as an entity established in terms of national, provincial or local government legislation or subordinate legislation responsible for regulating an industry, or sector of an industry and 'public regulation' means any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority.

109. We have interpreted section 3 of the Competition Act when applied to the National Health Insurance Bill to mean that the NHI Fund, as a regulatory authority, enjoys concurrent jurisdiction with the Competition Commission to regulate the conduct referred to and contemplated in the Competition Act.

110. Further, Chapter 2 of the Competition Act defines and regulates

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59 At page 13 of *Gazette* No. 40955 dated 30 June 2017.

60 Example of the provision contemplated reads as follows:
"In the event of any inconsistency between this Act and any other legislation, this Act prevails.".

practices which has the effect of substantially preventing or lessens competition in a market. However, the Competition Act provides that firms, as defined in the Act, may apply to the Competition Commission to be exempted from the application of Chapter 2[61]. It stands to reason therefore, that the Legislature intended exemptions of certain bodies and market activity from the application of the Competition Act and to grant certain regulatory bodies, other than the Competition Commission, the requisite authority and jurisdiction to regulate conduct within its industry or sector.

111. Clause 9 of the Bill establishes the NHI Fund as a Schedule 3A autonomous entity. The Bill also provides that the Board of the NHI Fund carries out its functions in accordance with the PFMA.

112. Sections 50 and 51 are, in our view, of utmost importance in the implementation of the NHI law if enacted. These sections detail specific duties and obligations applicable to the Board of the NHI Fund. Sections 50 and 51 stipulate the following:

> ***"Fiduciary duties of accounting authorities***
>
> ***50.*** *(1) The accounting authority for a public entity must—*
> *(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*
> *(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
> *(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*
> *(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.*
>
> *(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—*
> *(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or*
> *(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.*
>
> *(3) A member of an accounting authority must—*
> *(a) disclose to the accounting authority any direct or indirect personal or*

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61 See section 10 of the Competition Act which provides for exemptions from the application of Chapter 2 of the Act.

private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.

General responsibilities of accounting authorities

51. *(1) An accounting authority for a public entity—*

(a) must ensure that that public entity has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and costeffective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) must take effective and appropriate steps to—

(i) collect all revenue due to the public entity concerned; and

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

(c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;

(d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;

(e) must take effective and appropriate disciplinary steps against any employee of the public entity who—

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the public entity; or

(iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;

(f) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;

(g) must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and

(h) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.

(2) If an accounting authority is unable to comply with any of the responsibilities determined for an accounting authority in this Part, the accounting authority must promptly report the inability, together with reasons, to the relevant executive authority and treasury."

113. The statutory duties and obligations contained in the PFMA in our view respond to the concerns raised in the Portfolio Committee. The Act further contemplates the desirable degree of interaction between the Board and the relevant Minister. Finally, section 3(3) provides that in the event of a conflict between the PFMA and any other legislation (including the NHI law if enacted), the PFMA prevails. This, in the area of financial management and controls would subordinate a National Health Insurance Act to the PFMA.

114. We are satisfied that the provisions of the Bill especially those relating to the role and functions of the Fund are aligned with the PFMA and Competition Act and are constitutionally sound.

Chapter 4

Board of Fund

115. Chapter 4 makes provision for the establishment of an independent Board, which is accountable to Parliament and operates in accordance with the provisions of the PFMA and the Board's constitution. The Bill also provides for the composition and appointment of its members as well as the conditions under which the Minister may dissolve the Board after consultation with the Portfolio Committee.

116. Chapter 4 provides for the appointment of the Chairperson and Deputy Chairperson of the Board, and for the functions and powers of the Board. The Board must fulfil the functions of an accounting authority in terms of the provisions of the PFMA. The Board must advise the Minister on any matter concerning—

- the management and administration of the Fund;
- the improvement of efficiency and performance of the Fund in terms of universal purchasing and provision of health care services;
- terms and conditions of employment of Fund employees;
- collective bargaining; and

- the budget of the Fund.

117. In addition, Chapter 4 provides for the conduct and disclosure of interests by members of the Board, for the Board to determine its own procedures, and for the remuneration and reimbursement of members of the Board.

Chapter 5

Chief Executive Officer

118. Chapter 5 makes provision for the appointment of the Chief Executive Officer ("the CEO") of the Fund. The CEO is appointed on the basis of his or her experience and technical competence as the administrative head of the Fund in accordance with a transparent and competitive process. The CEO is directly accountable to the Board and his or her responsibilities include, amongst others—

- the formation and development of an efficient Fund administration;
- the organisation and control of the staff of the Fund;
- the maintenance of discipline within the Fund;
- the effective deployment and utilisation of staff; and
- the establishment of an Investigating Unit within the national office of the Fund.

119. Chapter 5 also provides for the relationship of the CEO with the Minister, the Director-General of the Department of Health and the Office of Health Standards Compliance. It further details the powers of the CEO in relation to the appointment and dismissal of the executive management officials of the Fund.

Chapter 6

Committees of Board

120. Chapter 6 empowers the Board to establish committees and, subject to such conditions as it may impose, delegate or assign any of its powers or duties to such committees. The Board may also establish technical committees, which will assist the Board to achieve the purpose of the Bill.

121. The authorisation contained in the Bill for the Board to establish committees to assist it to carry out its functions and to advise the Board are commonplace and often occur in legislation.

122. We are satisfied that the provisions of Chapters 4, 5 and 6 are constitutionally in order.

Chapter 7

Advisory committees established by Minister

123. Chapter 7 makes provision for the appointment by the Minister, after consultation with the Board, of a Benefits Advisory Committee, a Health Care Benefits Pricing Committee and Stakeholder Advisory Committee.

124. The Chapter also provides for the disclosure of interests by members of these committees, their composition, functions and working procedures, remuneration and vacation of office by members of a committee.

125. Two types of committees are contemplated in the Bill. Chapter 6 provides for the appointment of committees by the Board of the National Health Insurance Fund. The committees contemplated in the Bill, we submit, are the internal and often technical committees commonly provided for in legislation. These committees are regarded as mechanisms to assist the

Board with carrying out the responsibilities of the Board, its governance and management, in the most efficient and effective manner. See by way of example section 10 of the Health Professions Act, 1974 (Act No. 56 of 1974)[62] and section 10 of the Allied Health Professions Act, 1982 (Act No. 63 of 1982)[63].

126. Chapter 7, in comparison, contemplates and instructs the Minister to establish certain advisory committees. Specifically, clauses 25 and 26 provides that a Benefits Advisory Committee and a Health Care Benefits Pricing Committee must be established. These advisory committees deal with seemingly the most important aspects of the national health insurance, i.e. the benefits afforded by the NHI to its users and the prices of health goods and services. The subject matter intended to be dealt with by these committees may be regarded as the aspects of the NHI that generates the widest public interest. Given the importance of the work of these committees, the conventional power of a Minister to establish a panel of experts to investigate and make recommendations to him or her has now been expressly provided for in the Bill to the extent that the Bill compels the Minister to establish a committee of experts to consider which benefits will be afforded to users as well as the pricing of health goods and services. The work of these statutory advisory committees is intended to inform decisions taken.

127. Chapter 7 must be read with clause 57 of the Bill to inform the purposive interpretation and true meaning of the provisions. The substance of Chapter 7 and clause 57 are contained in the NHI policy instrument. The

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62 "**Committees**

10. (1) (*a*) The council may establish such committees as it may deem necessary, each consisting of so many persons, appointed by the council, as the council may determine but including, except in the case of an appeal committee referred to in subsection (2), at least one member of the council, who shall be the chairperson of such committee.

(*b*) The council may, subject to the provisions of subsection (3), delegate to any committee so established or to any person some of its powers as it may from time to time determine, but shall not be divested of any power so delegated.

63 **Other committees of council**

10. (1) The council may from time to time establish such other committees, constituted as prescribed, as it may deem necessary, to investigate and report to the council on any matter falling within the scope of its functions.

(2) (*a*) Subject to the provisions of subsection (3), the council may delegate to any committee established under subsection (1) such of its powers as the council may from time to time determine.

(*b*) The council shall not be divested of any power so delegated and may amend or set aside any decision of any such committee made in the exercise of any such power.

relevant sub-clause reads as follows:

> *"(3) In Phase 1 the Minister may establish the following interim committees to advise him or her on the implementation of the National Health Insurance:*
>
> *(a) The National Tertiary Health Services Committee which must be responsible for developing the framework governing the tertiary services platform in South Africa.*
>
> *(b) The National Governing Body on Training and Development which must, amongst others—*
>
> *...*
>
> *(c) The Ministerial Advisory Committee on Health Care Benefits for National Health Insurance, which must be a precursor to the Benefits Advisory Committee and which must advise the Minister on a process of priority-setting to inform the decision-making processes of the Fund to determine the benefits to be covered.*
>
> *(d) The Ministerial Advisory Committee on Health Technology Assessment for National Health Insurance, which must be established to advise the Minister on Health Technology Assessment and which must serve as a precursor to the Health Technology Assessment agency that must regularly review the range of health interventions and technology by using the best available evidence on cost-effectiveness, allocative, productive and technical efficiency and Health Technology Assessment."* (our emphasis)

128. We note and acknowledge that there are various ways of drafting committee provisions. The preferences of the Portfolio Committee may be given effect to by way of an A-List if more detailed provisions or alternative provisions are desired. Notwithstanding, we hold the view that the current clauses reflected in the Bill are not legally offensive.

Chapter 8

129. Chapter 8, amongst others, provides for the role and responsibilities of the Minister in relation to the governance and stewardship of the national health system and the governance and stewardship of the Fund.

Conflict of interest

130. During deliberations, the question relating to whether a conflict of interest exists was often raised. The question was posed especially in relation to the role of the Minister in the leadership and operations of the NHI.

131. Conflict of interest is said to refer to a conflict between interest and duty or, duty and duty. Persons who are bound by the rules against conflicts of interest have a core duty to act in the interests of the other party, sometimes referred to as the duty of loyalty. The aforesaid core duty has been defined in a positive manner, as a duty to advance the beneficiary's interests or as a duty to act with the proper motive, or in a negative manner, as a duty to abstain from acting self-interestedly.[64]

132. In order for a potential conflict of interest to exist, there must be a reasonable possibility of such conflict, not merely an appearance. In the United Kingdom case of *Marks and Spencer plc v Freshfields Bruckhaus Deringer*[65] the court stated that the cases establish that the potential conflict must be a reasonable apprehension of a potential conflict, not a mere theoretical possibility.

133. In the context of the instant discussion, a conflict of interest involves a clash between competing influences or loyalties and the interests of the public that a functionary serves, which has the potential to sway the functionary and compromise the exercise of his or her competent judgment.[66] Conflict of interest interferes with the exercise by public functionaries of their duties in that their objectivity and judgment are likely to be compromised. The law relating to the doctrine of fiduciary duties regulates the manner in which one person exercises discretion or power over another's interests.

134. Paul Miller[67] states as follows:

> *"Fiduciary duties are critical to the integrity of a remarkable variety of relationships, including those between trustee and beneficiary, director and corporation, agent and principal, lawyer and client, doctor and patient, parent and child, and guardian and ward. Notwithstanding their variety, all fiduciary relationships are presumed to enjoy common characteristics and to attract a core set of demanding legal duties, most notably a duty of loyalty."*

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64 Valsan Remus, *Understanding fiduciary duties: conflict of interest and proper exercise of judgment in private law*, 2012 McGill University, page 11.

65 [2004] 3 All ER 773 at 777.

66 See Dr MJ Mafunisa, *Conflict of Interest: Ethical Dilemma in Politics and Administration*, South African Journal of Labour Relations: Winter 2003, page 5.

67 Paul B. Miller, *Justifying Fiduciary Duties*, (2013) 58:4 McGill LJ 969.

135. The decision in *Phillips v Fieldstone Africa (Pty) Ltd and Another*[68], indicates that the full extent of the fiduciary duty is that of a duty to avoid a conflict of interest. The Organisation for Economic Co-operation and Development (OECD) Guidelines for Managing Conflict of Interest in the Public Service[69] states as follows:

> *"In most countries there are increasing expectations from ordinary citizens, business leaders and civil society that governments should deliver higher standards of integrity in the civil service, public institutions, public services, government-controlled corporations, and government itself. In this context, conflict of interest in its various forms should become a significant consideration in the day to day work of those who occupy any position of trust...*
> *Conflicts of interest in the public sector are particularly important because, if they are not recognised and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, agencies, and governments. 'Integrity' is used in the public sector to refer to the proper use of funds, resources, assets, and powers, for the official purposes for which they are intended to be used. In this sense the opposite of 'integrity' is 'corruption', or "abuse".".*

136. Accordingly, the management of conflicts of interest is important to safeguard the integrity of officials or their decisions and to prevent abuse of power or corruption.

137. In *Volvo (Southern Africa) (Pty) Ltd v Yssel*[70], the court stated that the role of the person in an organisation, and not the existence of contractual privity, is determinative of his fiduciary duties. The court further stated that there is no closed list of relationships where a fiduciary duty is owed; the matter would be decided depending on the particular circumstances and whether a duty of trust was present. The court referred to the Canadian case of *Hodgkinson v Simms*[71], where the court reasoned that fiduciary relationships can be established as a matter of fact out of the particular circumstance by stating:

> *"In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at*

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68 2004 (3) SA 465 (SCA), at para [36].
69 OECD Guidelines for Managing Conflict of Interest in the Public Service available at https://www.oecd.org (accessed on 2 March 2023).
70 2009 (6) SA 531, at para [19].
71 (1994) 3 SCR 377 (SCC) ((1995) 117 DLR (4th) 161) at 176*f*-177*b*.

issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination. Thus, outside the established categories, what is required is evident of a mutual understanding that one party had relinquished its own self-interest and agreed to act solely on behalf of the other party. This idea was well-stated in the American case of Dolton v Capital Federal Sav, and Loan Ass'n 642 p 2d 21 (Colo. App. 1982), at pp23-24, in the banker-customer context, to be a state of affairs "...which impels or induces one part 'to relax the care and vigilance it would and have ordinarily exercised in dealing with a stranger' ... [and]... has been found to exist where there is a repose of trust by the customer along with an acceptance or invitation of such trust on the part of the lending institution.'".

138. In *Frame v Smith*[72] the court found three characteristics which would help determine whether it would be appropriate in the circumstances to impose a fiduciary duty. The Court stated that '[r]elationships in which fiduciary obligations have been imposed seem to possess three general characteristics– (1) The fiduciary has scope for the exercise of some discretion or power; (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.'

139. From the above we hold the view that the Minister holds a duty of loyalty to act and to exercise his or her powers in the best interests of the users of and those regulated by the NHI. We further opine that we are unable to find any provision in the Bill that creates a conflict of interest or a reasonable possibility of a conflict of interest.

140. It is important to point out the extent and scope of some of the key functions of the Minister under the National Health Act. In terms of section 3 of the National Health Act the Minister is entrusted with the overall responsibility of administering the Act. The Minster, or his nominee, is the chairperson of the National Health Council as provided for in section 22. Section 92 of the National Health Act empowers the Minister, after consultation with the National Health Council, to establish such number of advisory and technical committees as may be necessary to achieve the

72 (1987) 42 DLR (4th) 81 @ p102.

objects of the Act. The Minister must establish the National Consultative Health Forum as provided for in section 24 of the National Health Act. Section 35 empowers the Minister to classify all health establishments into appropriate categories. Section 41 also provides for the power of the Minister in respect of the provision of health services at public health establishments and the power to make regulations regarding health services at non-health establishments and at public health establishments other than hospitals as provided for in section 43 of the National Health Act. In terms of section 51 of the National Health Act, the Minister may, in consultation with the Minister of Education, establish academic hospitals and may make regulations relating to human resources within the national health system as provided for in section 52 of the Act. Chapter 11 of the National Health Act empowers the Minster, after consultation with the National Health Council, to make regulations on the matters listed in paragraphs *(a)* to *(w)* of section 90, including subsections (2) to (4).

141. Medical schemes registered in terms of the Medical Schemes Act, 1998 (Act No 131 of 1998), or any other voluntary private health insurance scheme, are in accordance with the National Health Insurance Policy for South Africa, will provide only complementary cover for health care service benefits that are not purchased by the Fund on behalf of users. Clause 57 (Transitional arrangements) of the Bill provides that one of the objectives of Phase 1 in the implementation of the NHI law is the initiation of legislative reforms required to introduce the NHI. The Medical Schemes Act is expressly referred to as one of the legislative reforms required. It is therefore envisaged that the necessary amendments to the Medical Schemes Act must be enacted to enable the introduction of the NHI.

Freedom of trade, occupation and profession

142. Clause 39 of the Bill provides for the accreditation of health care service providers and health establishments by the Fund. The accreditation criteria is set out in clause 39(2) which reads as follows:

*"**39.** (2) In order to be accredited by the Fund, a health care service provider or health establishment, as the case may be, must—*

(a) be in possession of and produce proof of certification by the Office of Health Standards Compliance and proof of registration by a recognised statutory health professional council, as the case may be; and

(b) meet the needs of users and ensure service provider compliance with prescribed specific performance criteria, including the—

(i) provision of the minimum required range of personal health care services specified by the Minister in consultation with the Fund and published in the Gazette from time to time as required;

(ii) allocation of the appropriate number and mix of health care professionals, in accordance with guidelines, to deliver the health care services specified by the Minister in consultation with the National Health Council and the Fund, and published in the Gazette from time to time as required;

(iii) adherence to treatment protocols and guidelines, including prescribing medicines and procuring health products from the Formulary;

(iv) adherence to health care referral pathways;

(v) submission of information to the national health information system to ensure portability and continuity of health care services in the Republic and performance monitoring and evaluation; and

(vi) adherence to the national pricing regimen for services delivered.".

143. A legally binding contract must be entered into between the Fund and an accredited health care service provider or health establishment on performance expectation, management of patients, the volume and quality of services delivered and access to such services. In terms of clause 39(6) of the Bill sanctions must be applied in respect of any deviation from the contractual obligations and in terms of clause 39(8), the Fund may withdraw or refuse to renew the accreditation every five years based on the grounds referred to in paragraphs *(a)* to *(k)*. In addition to the above, in terms of clause 39(11), the Fund may issue directives relating to the listing and publication of accredited health care service providers and health establishments.

144. In our view, the provision of access to health care services as envisaged in clause 39 of the Bill, is consistent with section 27(1)(a) and (2) of the Constitution. The clause in our view purports to respond to the objectives of access to health care services, to the desirable quality of health care services offered and provided. In our view, the legislative framework for the

provision of health care service set out in the Bill facilitates access to health care services by those who are or have been unable to access quality health care services.

145. It has been raised by members of the Portfolio Committee that the provisions of the Bill divests persons of their constitutional right to choose their trade, occupation or profession freely. We offer that section 22 consists of two components. The first is the award of the right to choose a trade, occupation or profession freely. The second, is the authorisation to regulate the practice of a trade, occupation or profession by law. We hold the view that the provisions of the Bill, in so far as it provides for the accreditation of health care service providers and health establishments, is a mechanism or scheme employed to regulate the practice of a trade, occupation or profession and a means by which the objectives of access to and quality of health care services find expression.

146. Important in the evaluation of the meaning of section 26 of the Constitution and related to an evaluation of section 22 in this context, *Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC)*, at paragraph 42 Madala J, concurred with Chaskalson CJ, and held as follows:

> *"[42] The Constitution is forward-looking and guarantees to every citizen fundamental rights in such a manner that the ordinary person-in-the street, who is aware of these guarantees, immediately claims them without further ado – and assumes that every right so guaranteed is available to him or her on demand. Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.*
>
> *[43] However, the guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the State must take reasonable legislative and other measures, within its available resources "to achieve the progressive realisation of each of these rights." In its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources. In the*

present case the limited haemodialysis facilities, inclusive of haemodialysis machines, beds and trained staff constitute the limited or scarce facilities." .(footnotes omitted)

147. In *Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)*, the Constitutional Court held as follows:

> *"[35] A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis. In Grootboom the relevant context in which socio-economic rights need to be interpreted was said to be that—*
>
> > *"[m]illions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted . . ."*
>
> *[36] The State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the State are reasonable. As this Court said in Grootboom, "[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations*
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> .....
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> *[38] Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.*
>
> *[39] We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to "respect, protect, promote and fulfil" such rights. The rights conferred by sections 26(1) and 27(1) are to have "access" to the services that the State is obliged to provide in terms of sections 26(2) and 27(2).".*

148. The framework for the provision of access to health care services as outlined in the Bill is underpinned by the right to access health care services and equality as enshrined in the Constitution. In terms of the Bill, the Fund will ensure a fair and just health care system that aims to achieve sustainable and affordable universal health care services.

149. Clause 6 of the Bill delineates the rights of users whereas clause 7 of the Bill provides for health care services coverage. Both provisions affirm the right of users to access quality health care services free at the point of care from an accredited health care service provider or health establishment.

150. Section 22 of the Constitution reads as follows:

> *"**Freedom of trade, occupation and profession***
>
> **22.** *Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.".*

151. As in the case of Parliament's general law-making powers, the power to regulate a profession is likewise subject to constitutional control.[73] In Affordable *Medicines Trust judgment*[74], the Constitutional Court put it as follows:

> *"Legislation that regulates practice will pass constitutional muster if (a) it is rationally related to the achievement of a legitimate government purpose; and (b) it does not infringe any of the rights in the Bill of Rights. What the Constitution therefore requires is that the power to regulate the practice of a profession be exercised in an objectively rational manner. As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate."*

152. The two constraints mentioned above form the basis of the test to determine whether the regulation of the practice of a profession falls within the parameters of section 22 of the Constitution. In *Affordable Medicines Trust*[75] the standard was formulated as follows:

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73 *Affordable Medicines Trust*, supra, at par 73.
74 *Affordable Medicines Trust*, supra, at par 77.
75 *Affordable Medicines Trust*, supra, at par 80.

> *".....if the regulation of the practice of a profession is rationally related to a legitimate government purpose and does not infringe any of the rights in the Bill of Rights, it will fall within the purview of section 22. Where the regulation of a practice, 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, and must therefore meet the test under section 36(1). Similarly, where the regulation of practice though falling within the purview of section 22, but limits any of the rights in the Bill of Rights, it must meet the section 36(1) standard."*

153. Thus, in order to determine whether the regulation of a practice of a trade, occupation or profession, falls within the purview of section 22 of the Constitution, the following applies:

(a) If the said regulation, viewed objectively, is likely to have a negative impact on the choice of profession, in other words, on the right contained in the first component of section 22, the regulation will limit that right and the limitation will have to be tested against section 36 of the Constitution;

(b) If there is a rational connection between the regulation of the practice and a legitimate government purpose and the regulation does not infringe any rights in the Bill of Rights, such regulation would pass constitutional muster;

(c) If there is a rational connection between the regulation of the practice and a legitimate government purpose and the regulation infringes or limits any rights in the Bill of rights, such regulation will have to be tested against section 36 of the Constitution.

154. What is clear from the exposition in the previous paragraph is that, in the application of section 22 of the Constitution there is a tension between the power to regulate a profession (provided for in the second component of section 22) and the right to choose a profession (provided for in the first component of section 22). If regulating a profession limits the right freely to choose an occupation, the limitation will have to be measured against section 36 of the Constitution. In this regard Cheadle et al. mentions the following:[76]

> "*The difficulty of drawing a line between the regulation of 'choice' and regulating of 'practice' is an unavoidable one...What the difficulty does*

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76 Cheadle, MH et al. South African Constitutional Law: The Bill of Rights (2nd edn. 2005 LexisNexis), p 17-4 &5. See also *Affordable Medicines Trust*, supra, at par 93.

highlight, is the need to scrutinise the particular restrictive provision to determine if there is a rational basis for its regulatory features. If there is, and it has no demonstrable direct or indirect impact on the effective choice of economic activity, that should be the end of the enquiry. If there is a rational basis for the restriction but it also restricts the effective choice of participating in an economic occupation, the provision's legitimate regulatory characteristics will not end the debate. The curtailment of the right of choice should still be subject to all the requirements of section 36 (of the Constitution).".

155. Section 36(1) of the Constitution provides as follows:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.".

156. In deciding whether a limitation is justifiable, the following approach was adopted by the Constitutional Court in *S v Makwanyane and Another*[77]:

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1)[78]*. The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.".*

157. In *S v Manamela* the Constitutional Court stated the following in relation to section 36(1)[79]:

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77 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), par 104.
78 Section 33(1) (of the interim Constitution) is the predecessor of section 36(1) of the Constitution.
79 *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), par 32 - 33. Footnotes omitted.

> *"In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected….*
>
> *Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting.".*

158. Thus, the consideration of the reasonableness of a limitation on a constitutional right involves the weighing up of competing values. Ultimately, it must be decided whether there is sufficient proportionality between the infringement and the benefits it seeks to achieve.

159. Our analysis thus involves the following:

(a) Do the provisions of the Bill affect one's right to choose freely a profession or do the provisions amount to the regulation of the practice of a profession?

(b) Is there a rational connection between the freedom to choose or regulation of the profession and a legitimate government purpose?

(c) Are any rights granted in the Bill of Rights infringed?; and

(d) If a limitation does indeed occur, does the limitation meet the standards of section 36 of the Constitution?

160. The stated governmental purpose for the introduction and enactment of the Bill is to achieve universal access to quality health care services in the Republic. We hold the view that the provisions of the Bill, especially clause 39 thereof, is a mechanism employed to ensure all eligible users of the NHI are granted access to health care services and that health care services provided are of an appropriate quality. In our view, clause 39 is not novel to South African law. Examples abound of laws that set out requirements that must be met before registration as or to practice as professionals. The

mechanism or scheme therefore, in our view, is rationally connected to a legitimate government purpose. The objectives of access and quality further persuades that the provisions of the Bill purports to regulate the practice of the profession, rather than ones right to choose a profession freely. From the above then, we hold the view that the Bill lawfully regulates the practice of a trade, occupation or profession.

161. If, however, a court indeed finds that the right to freely choose a profession is infringed by the Bill, we hold the view that the limitation would fall within the parameters of section 36 of the Constitution as the Bill is a law of general application and the limitation of section 22 is reasonable and justifiable in an open and democratic society.

Chapter 9

162. Chapter 9 provides that an affected natural or juristic person, namely a user, health care service provider, health establishment or supplier, may lodge a complaint with the Fund and the Fund must deal with such complaint in a timeous manner and in terms of applicable law.

163. Chapter 9 deals with the lodging of appeals to the Appeal Tribunal against a decision of the Fund relating to a complaint, the powers of the Appeal Tribunal, the designation of the secretariat of the Appeal Tribunal and the remuneration and procedures of the Appeal Tribunal.

Chapter 10

164. Chapter 10 makes provision for the sources of income of the Fund. The South African Revenue Service will undertake all revenue collection related to the Fund, including the collection of any supplementary health taxes or levies, if applicable. The National Treasury will, in consultation with the Minister of Finance, the Minister and the Fund, determine the budget and allocation of revenue to the Fund on an annual basis.

165. Chapter 10 provides for the chief source of income of the Fund and the auditing of the books of the Fund by the Auditor-General.

166. The provisions contained in the Bill which relate to the financing of the Fund follow precedents which have been employed previously in our law. The following are examples of the above:

Example 1: ROAD ACCIDENT FUND ACT, 1996 (ACT NO. 56 OF 1996)
Long title: To provide for the establishment of the Road Accident Fund; and to provide for matters connected therewith.

"Financing of Fund

5. *(1) The Fund shall procure the funds it requires to perform its functions—*
(a) by way of a Road Accident Fund levy as contemplated in the Customs and Excise Act, 1964; and
(b) by raising loans.
(2) The Road Accident Fund levy paid into the National Revenue Fund in terms of the provisions of section 47 (1) of the Customs and Excise Act, 1964, less any amount of such levy refunded under that Act, is a direct charge against the National Revenue Fund for the credit of the Fund.".

CUSTOMS AND EXCISE ACT, 1964 (ACT NO. 91 OF 1964)
Long title: To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax and an environmental levy; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto.

"Payment of duty and rate of duty applicable

47. *(1) Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods, all environmental levy goods, all fuel levy goods and all Road Accident Fund levy goods in accordance with the provisions of Schedule No. 1 at the time of entry for home consumption of such goods: Provided that the Commissioner may condone any underpayment of such duty where the amount of such underpayment in the case of—*
(a) goods imported by post is less than fifty cents;
(b) goods imported in any other manner is less than five rand; or
(c) excisable goods is less than two rand.".

EXAMPLE 2: SKILLS DEVELOPMENT ACT, 1998 (ACT NO. 97 OF 1998)
Long title: To provide an institutional framework to devise and implement national, sector and work-place strategies to develop and improve the skills of the South African workforce;...

""National Skills Fund

27. *(1) The National Skills Fund is hereby established.*

(2) The Fund must be credited with—

(a) 20 per cent of the skills development levies, interest and penalties collected in respect of every SETA, as required by sections 8 (3) (a) and 9 (a) of the Skills Development Levies Act;

(b) the skills development levies, interest and penalties collected by the Commissioner from employers which do not fall within the jurisdiction of a SETA, as required by section 8 (3) (c) of the Skills Development Levies Act.

(c) money appropriated by Parliament for the Fund;

(d) interest earned on investments contemplated in section 29 (3);

(e) donations to the Fund; and

(f) money received from any other source.".

SKILLS DEVELOPMENT LEVIES ACT, 1999 (ACT NO. 9 OF 1999)
Long title: To provide for the imposition of a skills development levy

"Imposition of levy

3. *(1) Every employer must pay a skills development levy from—*

(a) 1 April 2000, at a rate of 0,5 per cent of the leviable amount; and

(b) 1 April 2001, at a rate of one per cent of the leviable amount.

(2) and (3) ...

(4) ...".

EXAMPLE 3: UNEMPLOYMENT INSURANCE CONTRIBUTIONS ACT, 2002 (ACT NO. 4 OF 2002)
Long title: *To provide for the payment of contributions for the benefit of the Unemployment Insurance Fund and procedures for the collection of such contributions and to provide for matters connected therewith.*

"Administration of Act

3. *(1) This Act must be administered by the Commissioner, in accordance with the provisions of the Tax Administration Act.*

(1A) Administrative requirements and procedures for purposes of the performance of any duty, power or obligation or the exercise of any right in terms of this Act are, to the extent not regulated in this Act, regulated by the Tax Administration Act.

(2) In addition to section 9 of the Tax Administration Act, and in accordance with section 10 of that Act, the Commissioner may delegate any power or assign any duty which relates to the collection of—

(a) contributions payable to the Unemployment Insurance Commissioner in terms of section 9; and

(b) any information to be submitted by employers in terms of this Act, to the Unemployment Insurance Commissioner."

"Duty to contribute to Fund

5. *(1) Every employer and every employee to whom this Act*

applies must, on a monthly basis, contribute to the Unemployment Insurance Fund.

(2) The contributions must be paid by the employer either to the Commissioner in terms of section 8 or to the Unemployment Insurance Commissioner in terms of section 9, whichever is applicable to the particular employer.

Payment of amounts collected by Commissioner into National Revenue Fund

11. *(1) The contributions, interest and penalties collected by the Commissioner in terms of this Act must, after deduction of any refunds, be paid into the National Revenue Fund.*

(2) The total amount of contributions, interest and penalties paid into the National Revenue Fund in terms of subsection (1) is a direct charge against the National Revenue Fund for the credit of the Unemployment Insurance Fund.

(3) The Director-General must, within 14 days after receipt of the notice from the Commissioner in terms of section 8 (4), authorise the transfer of the amount of the contributions, interest and penalties paid into the National Revenue Fund to the Unemployment Insurance Fund.".

167. We are satisfied that the provisions in the Bill directed at the funding of the National Health Insurance Fund are administrative provisions which will at a later stage require the initiation and introduction of a Money Bill by the Minister of Finance. It is important to note that the initiation and introduction of legislation envisaged in Chapter 10, is in line with clause 3(4) of the Bill which provides that the "Act does not in any way amend, change or affect the funding and functions of any organs of state in respect of health care services until legislation contemplated in sections 77 and 214, read with section 227, of the Constitution and any other relevant legislation have been enacted or amended".

168. The Board, as the accounting authority of the Fund, must submit to the Minister an annual report on the activities of the Fund for each financial year. Furthermore, the Chapter makes provision for the requirements of the annual report in terms of its content and the obligation on the Minister to table the annual report in the National Assembly and the National Council of Provinces without delay.

Chapter 11

169. Chapter 11 provides for the delegation and assignment of the duties and powers of the Minister, subject to the PFMA, to any person in the employ of the Fund, and the protection of confidential information.

170. Chapter 11 also creates a list of offences and penalties in instances where a natural or juristic person contravenes specific provisions in the Bill, and makes provision for the powers of the Minister to make regulations.

171. The Fund has the general power to issue directives relating to the implementation and administration of the Bill.

172. The transitional arrangements in respect of the Bill contain provisions for the periodic phasing in of the National Health Insurance Policy and Act. In terms of Phase 1, amongst other things, the continuation with the implementation of health system strengthening initiatives, including alignment of human resources with that which may be required by users of the Fund will take place. During Phase 1, various ministerial committees must be established to assist in the phased implementation of the national health insurance. There will be migration of central hospitals that are funded, governed and managed nationally as semi-autonomous entities, and the initiation of legislative reforms in order to enable the full implementation of the national health insurance. This entails amendment of various pieces of legislation, many of which are identified in clause 57 of the Bill.

173. In terms of Phase 2 there will be a continuation of health system strengthening initiatives on an on-going basis, the mobilisation of additional resources where necessary and the selective contracting of health care services from private providers. The objectives that must be achieved in Phase 2 include the establishment and operationalisation of the Fund as a purchaser of health care services through a system of mandatory prepayment.

174. We note that the period stipulated in Phases 1 and 2 for the commencement of each phase must be amended in view of the time lapse since the introduction of the Bill into Parliament in 2019. Therefore an amendment for the substitution of the periods must be inserted in the A-list to ensure the implementation of the transitional arrangements envisaged in clause 57 of the Bill.

175. The first tranche of repeals and amendments to relevant laws are reflected in the Schedule to the Bill.

176. Clause 58 of the Bill provides for the repeal or amendment of the legislation listed in the Schedule to Bill and reads as follows:

> *"**Repeal or amendment of laws***
>
> ***58.*** *(1) Subject to this section and section 57 dealing with transitional arrangements, the laws mentioned in the second column of the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.*
>
> *(2) The repeal or amendment of any law by this Act does not affect—*
>
> *(a) the previous operation of such law or anything done or permitted under such law;*
>
> *(b) any right, privilege, obligation or liability acquired, accrued or incurred under such law; or*
>
> *(c) any penalty, forfeiture or punishment incurred in respect of any offence committed in terms of such law.".*

177. Before the Bill was introduced into Parliament, the Bill was approved by the Cabinet. Apart from the legislation that the Minister of Health is responsible for, please see table below for the details of the Cabinet members consulted in respect of the legislation they are responsible for as listed in the Schedule:

CABINET MEMBER	**LEGISLATION**
Minister of Employment and Labour	Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993)
Minister of Transport	Road Accident Fund Act, 1996 (Act No. 56 of 1996)

Minster of Trade, Industry and Competition	Competition: Competition Act, 1998 (Act No. 89 of 1998)
Minister of Justice and Correctional Services	Correctional Services Act, 1998 (Act No. 111 of 1998)
Minister of Social Development	Prevention of and Treatment for Substance Abuse Act, 2008 (Act No. 70 of 2008)

178. In terms of the wording of clause 58, the Schedule to the Bill forms part of the entire Bill. Therefore, the Portfolio Committee may consider, deliberate and adopt amendments to any of the legislation listed in the Schedule to the Bill in the same manner as in the case of the other parts of the Bill (i.e. long title, preamble, Arrangement of sections of Act and clauses 1 to 59 of the Bill).

179. Rule 286(1) and (2) of the NA Rules provides for the legislative process in a committee of the National Assembly, as follows:

> "***Process in committee***
>
> ***286.*** *(1) If a Bill has been published for public comment in terms of Rule 276 or 295, the Assembly committee to which the Bill is referred must give interested persons and institutions an opportunity to comment on the Bill.*
> *(2) If a Bill has not been published for public comment and the committee to which the Bill is referred considers public comment on the Bill to be necessary, it may by way of invitations, press statements, advertisements or in any other manner, invite the public to comment on the Bill.".(our underlining)*

180. In terms of Rule 286 of the National Assembly Rules, a committee must give interested persons, the public and institutions an opportunity to comment on a Bill i.e. ensuring public involvement and participation in the legislative process of the NA. This is in line with, and gives effect to, section 59(1)*(a)* of the Constitution.

181. The abovementioned Rules illustrate the extent of compliance by the NA with sections 57 and 59 of the Constitution. In terms Rule 286[80] of the Rules of the NA, the Bill was published for public comment and public

80 Rule 286 provides for the process in the Committee.

hearings were held where interested persons and institutions were granted an opportunity to comment on the Bill (including the Schedule to the Bill).

182. In terms of Rule 286 (4)(b) and (c), during the process of inquiring into the Bill the Portfolio Committee—

> *"(b) may seek the permission of the Assembly to inquire into extending the subject of the Bill;*
> *(c) if the Bill amends provisions of legislation, must, if it intends to propose amendments to other provisions of that legislation,* seek the permission of the Assembly to do so;*". (Our underlining)*

183. Taking into account, the provisions of Rule 286 (4)(b) and (c), once the permission of the NA has been received, further public hearings may be called for by the Portfolio committee, depending on the extent of proposed amendments to the legislation amended or repealed in the Schedule to the Bill. Our Constitution supports the principle of participatory democracy which necessitates proper consultation with the relevant stakeholders, especially those whom may be critically affected by the Bill.

184. In the matter of *Matatiele Municipality and Others v President of the Republic of South Africa and Others*[81] the Constitutional Court explained that the system of democracy established by the Constitution is partly representative and partly participative in nature. The Constitutional Court explains this principle as follows:

> **"[59]** *The representative and participative elements of our democracy should not be seen as being in tension with each other. They are mutually supportive, as we pointed out in Doctors for Life International: In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and to become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and*

81 2007 (6) SA 477 (CC).

effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.

[60] *What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy.". The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process."*[82] (Footnotes omitted). (Underlining is our emphasis)

185. In *Merafong Demarcation Forum v President of the Republic of South Africa*[83] the Constitutional Court explained that while the system of public participation envisaged by the Constitution is supposed to supplement and enhance the democratic nature of general elections and majority rule, it is not supposed to conflict with or even overrule or veto them. The Constitutional Court further found that "there is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of government"[84]. While government can be expected to be responsive to the needs and wishes of minority or interest groups, our system of government would not be able to function if the legislature were bound by these views.

186. Further, in the Constitutional Court judgment in the case of *South African Veterinary Association v Speaker of the National Assembly and Others*[85] the Constitutional Court stated the following:

"[38] …when this Court considers the reasonableness of public involvement, it will examine the self-same factors that Parliament ought to consider when deciding how public participation will be facilitated. These factors include: the Parliamentary rules regarding public participation, the nature of the legislation and any need for urgency in its adoption.". (Underlining is our emphasis)

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82 *Matatiele Municipality and Others v President of the Republic of South Africa and Others* at par 59-60

83 CCT) 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008).

84 *Merafong Demarcation Forum v President of the Republic of South Africa* (*supra*), at par. 50.

85 2019 (3) SA 62 (CC).

187. The Committee's attention is drawn to the Constitutional Court judgments in *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*[86] ("LAMOSA 1") and *Speaker of the National Assembly and another v Land Access Movement of South Africa and others*[87] ("LAMOSA 2").

188. In LAMOSA 1, the Restitution of Land Rights Amendment Act, 2014 (Act No. 15 of 2014) (" Amendment Act "), was challenged on numerous grounds including that the National Council of Provinces' ("NCOP")'public participation procedure in approving the Amendment Act, was not constitutionally valid. The court considered sections 72(1)*(a)*, 59 and 118 of the Constitution.

189. Section 72(1)*(a)* of the Constitution imposes an obligation on the NCOP to facilitate a consultative process with the public during law making. Section 72(1)*(a)* provides that "the National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees." Sections 59 and 118 of the Constitution impose parallel obligations on the NA and provincial legislatures to facilitate public participation.

190. The Constitutional Court in determining the standard to be applied in determining whether Parliament met its obligation of facilitating public participation considered the judgment in *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others*[88] which held as follows:

> *"The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.".*

191. The Constitutional Court in LAMOSA 1 held that the standard to be applied in determining whether Parliament met its obligation of facilitating

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86 2016 (5) SA 635 (CC).
87 2019 (5) BCLR 619 (CC)
88 2006 (2) SA 311 (CC).

public participation is one of reasonableness. The Constitutional Court went on to state the following:

> *"[60] ...The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.*
>
> *[61] Relevant factors that Parliament ought to consider when determining how it will involve the public in its legislative process include: the rules it has adopted for this purpose; the nature of the legislation in question; and any need for its urgent adoption. These too bear relevance to the courts' determination of the reasonableness of Parliament's conduct.". (Underling is our emphasis).*

192. In LAMOSA 1, the Constitutional Court after considering the procedures followed by the provinces, found that the public participation process adopted by the NCOP was inadequate[89]. The Constitutional Court ordered that Parliament had failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(a) of the Constitution[90]. The Amendment Act was declared invalid from the date of judgment; and the Commission on Restitution of Land Rights was interdicted from processing in any manner whatsoever, land claims lodged from 1 July 2014[91].

CONCLUSION

193. We considered the provisions of the Bill to ensure that it is aligned with the provisions in the Constitution, case law and other relevant legislation. We are satisfied that the provisions of the Bill do not infringe on any fundamental rights contained in the Bill of Rights. We are of the opinion that there is a rational connection between the proposed legislation and scheme which it seeks to adopt and the achievement of a legitimate government purpose; i.e. to establish the Fund in the Republic, in order to achieve sustainable and

89 LAMOSA 1 at para 50.
90 *Ibid*, at para 93.
91 *Ibid.*

affordable universal access to quality health care services by serving as the single purchaser and single payer of health care services and ensure the equitable and fair distribution and use of health care services.

194. The policy adopted and legislative instrument introduced purports to ensure the sustainability of funding for health care services within the Republic and to enable equity and efficiency in funding by the pooling of funds and strategic purchasing of health care services, medicines, health goods and health related products from accredited and contracted health care service providers.

195. We are therefore satisfied that Parliament, in passing the proposed legislation, would not be acting capriciously and arbitrarily, in violation of the Rule of Law, thereby rendering such legislation inconsistent with the Constitution.

Yours sincerely

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