

PRESENTATION FOR THE HOSPITAL ASSOCIATION CONFERENCE ON 29 APRIL 2010

EMERGING TRENDS IN SOUTH AFRICAN HEALTH CARE

Let me start by saying the following, which is actual a quote from a book entitled *Regulating Entrepreneurial behaviour in European Health care systems* :

"One can also anticipate that, as the overall entrepreneurial level increases within health systems, the range, scope and capacity of state regulation will have to increase with it. ... an increase in market-oriented activity in the health sector necessarily generates an increase in the State-based regulatory response. It appears safe to predict that, while the methodology of regulation will be improved and refined and new regulatory tools will be developed, tested and adopted, the basic process of regulating – the regulatory rules of the road –will remain as important as ever. The challenge to policy-makers will thus be to concentrate their energies on designing a better framework with which to conduct that supervision."¹

In my view it is trite to say that the South African healthcare market place is a dynamic place in which to operate. Therefore, addressing a topic involving the general trends in such a market place is indeed a brave move on my behalf. Generally speaking, however, I submit to you that there are primarily two trends that will remain a constant in the South African healthcare sector: the first is the continued existence of the influence of the constitutional obligation on the State to provide access to healthcare services. This obligation arises, as you are aware, out of section 27(1)(a) of the Constitution² and sits together with other legislative obligations in respect of the provision of medical services to the aged, children and emergency medical care. A related trend is that anything may change at any time in respect of the determination and the implementation of policy. This trend may be described as unpredictable regulation. The best example of this is the debate surrounding the so-called National Health Insurance Scheme, which ran wild toward the end of 2009 and that has died

¹ R B Saltman & R Busse "Balancing Regulation and Entrepreneurship in Europe's Health sector: Theory and Practice" in R B Saltman, R Busse & E Mossialos (eds) *Regulating Entrepreneurial Behaviour in European Health Care Systems* (2002) at 49

² The Constitution of the Republic of South Africa, 1996

down, at least within the press and media, for the better part of 2010. The second trend is continued entrepreneurship in the healthcare sector.

The two areas that I have referred to characterise the South African healthcare market place in respect of the trends that may be discerned generally in this market place. However, I wish to submit to you today that there are indeed other areas in which trends may emerge and in respect of which attention must be paid in order to understand where the South African market place intends to be relative to the needs of its population in respect of healthcare services.

The difficulty, however, is, as always, identifying a trend and the basis for such a trend. To this end, I have relied on statements made by the Department of Health in strategic plans, to the World Health Organisation in respect of the strategy for South Africa and the annual report for the Department of Health.³ These documents appear to indicate, in as clear a form as can be expected in the circumstances, what the priorities are of and what trends may be defined by the Department of Health. I must emphasise at this point that the contents of this paper constitute many of my own views and in no way express definitively an agenda determined by or to be followed by any person in the healthcare sector.

On 24 March 2010, the Department of Health Strategic Plan and Budget for 2010 and 2011 was presented to the Committee on the Strategic Plan for 2010/11. At this presentation, it was stated that health "formed one of the five key priorities of Government, and the Department of Health ... had formulated a 10-point plan that attempted to meet the priorities, and a 20-point set of goals that detailed and attempted to address the challenges that health faced, over the medium term, up to 2014." The primary thrust of the plan by the Department of Health remains an emphasis on the burden of disease in South Africa, increased attention to maternal and peri-natal mortality, the integration of care for tuberculosis and HIV patients and the availability of professional skills.

In respect of the proposed 10-point plan by the Department, in his presentation to the Committee, the Minister of Health noted that two vehicles were to be used to address the burden of disease that South Africa faced. These two vehicles are the national

³ Published in terms of the Public Finance Management Act No. 1 of 1999, as amended

health insurance scheme and a review of the 1996 National Drug Policy. The emphasis therefore falls back to the issue of policy. The Department of Health has emphasised the role of policy since the publication of the National Drug Policy in 1996. The National Drug Policy, you will recall, sets out those priorities to be achieved by the Department of Health in order to realise the constitutional objectives of section 27(1)(a), being the right to access health services. Therefore, the implementation of the national health insurance scheme and the review of the National Drug Policy would be used to address priorities determined by the Department, which the Minister described in his presentation to the Chairperson of the Committee on the Strategic Plan for 2010/2011 as "[t]he maternal mortality ratio should be zero, but continues to be as high as 625 deaths per 100 000 live births[,] [t]he number of children born HIV-positive should be zero, but this remained a challenge, partly due to poor adherence to ante-natal care goals for malaria, termination of pregnancy, post-natal care, the integration of care for TB and HIV, and the importance of exercise to help combat disease such as diabetes 2". These items were all described as issues with which the Department of Health wishes to deal. However, the trend is and will be to deal with those issues with effective policy.

In respect of the human resources available to the Department of Health, the Minister advised the Committee on the Strategic Plan that "[b]y the end of 2010/11 a human resources plan would be in place to address increasing the productivity of [primary health care] workers, such as environmental health practitioners, infection control workers and other mid-level workers." The Minister did admit that there is a need for increased numbers of primary health care providers especially in relation to the fact that "more patients private than public health care, although the public service in South Africa had some of the most competent doctors." Other areas touched on by the Minister in his presentation to the Committee on the Strategic Plan included:

- the youth health strategy;
- the vaccination of the population against tuberculosis, polio, measles, H1N1 and counselling for HIV;
- the budget for the Department; and
- the provision of funds for emergency medical services for the 2010 World Cup event.

In addition, the Minister "noted that the DoH intended to achieve the improved delivery of infrastructure through Public-Private Partnerships ... which would achieve construction and refurbishment of five hospitals in various provinces".

Within the context of the presentation by the Minister to the Committee for the Strategic Plan, the emphasis is given to the role of the national health insurance scheme remains strong - in so far as it will be used as a vehicle by which the majority of the goals outlined by the Department will be achieved. This is enforced by the statement by the erstwhile Deputy Minister of Health at the media launch of the World Health Organisation's Strategy for South Africa for 2008 to 2010. Whilst the priorities of the World Health Organisation are set out in this statement, the Department of Health's priorities are described as follows:

- the provision of strategic leadership and the creation of a social compact for better health;
- the implementation of the national health insurance scheme;
- improving the quality of health services;
- overhauling the health system and improving its management;
- improved human resources planning, development and management;
- revitalisation of healthcare infrastructure;
- accelerating the implementation of the HIV and AIDS and sexually transmitted infections national strategic plan for 2007-11 and increased focus on the control of TB and other communicable diseases;
- mass mobilisation for better health for the population;
- a review of drug policy;
- strengthening research and development.

The introduction of the national health insurance scheme remains a trend that will be developed by the Department of Health over both the short and the long term in so far as the long-term is defined as at 2014. The Department will no doubt advocate the priorities identified by the World Health Organisation for 2008 to 2013 of which Priority 1 is the strengthening of health policies and systems "to minimize inequities in access for the poor and vulnerable".

Obviously, difficulties remain within the context of the implementation of a national health insurance scheme for South Africa as the manner of implementation of such a scheme continues to be debated amongst various stakeholders. The parameters of such a scheme remain unknown and the socio-economic effects of such a scheme within the context of the specific characteristics of the South African health care market remain a matter of debate and conjecture at this time.

Policy and regulation remain the focus of the Department. Underscoring the existence of this trend is that during the course of 2009, a number of pieces of legislation were tabled by the Department including legislation to effect amendments to the Medical Schemes Act⁴ and the National Health Act⁵. These Bills were not brought into law and the legislation question remains unamended. In addition, the actions taken by the Department of Health in respect of the publication and determination of a National Health Reference Price List, which has been challenged in court and a judgment is awaited, also indicate a trend of regulation going beyond that of regulating healthcare practice but pricing per se. However, notwithstanding the current status of health care legislation, which is designed to mirror policy implemented by the Department, the Minister states in the Department of Health's Annual Report for 2008/09 that "key pieces of legislation were processed to Parliament in 2008/09 to promote public health and to strengthen the functioning of the health system. These include the Medicines and Related Substances Bill and the Tobacco Products Control Amendment Bill, which were passed by Parliament. The Medical Schemes Amendment Bill and the National Health Amendment Bill were tabled in Parliament." Therefore, within the context of the Bills that affect the Medical Schemes Act and the National Health Act, these Bills continue to be described by the Department as key pieces of legislation in respect of the promotion of public health objectives. Whether or not such legislation will, in fact, be passed by

⁴ No. 131 of 1998, as amended

⁵ No. 61 of 2003

Parliament within the next two years, remains, as with other issues, a matter of conjecture.

In his statement in the Annual Report, the erstwhile Director-General of Health, Mr Mseleku states, after assessing the achievements of the Department, that "the Department made progress towards the key priorities for the 2008/09 financial year. There are also diverse areas where limited progress was made. In addition to the under-funding of the health sector, other key challenges experienced by the health sector included: the triple burden of disease (communicable diseases, non-communicable diseases, injuries and trauma); impact of social determinancy of health and insufficient human resources for health (at clinical and management levels)." In the Annual Report reference is also made to the strategic health programmes to be adopted by the Department of Health, which include maternal, child and women's health and nutrition, HIV and AIDS and STI management, TB control and management, communicable disease control, non-communicable disease control, mental health and substance abuse. Further along in the Annual Report, certain areas are described as "important policy decisions and strategic issues facing the Department". These are described as follows:

- "a) decreasing the burden of disease from both communicable and non-communicable diseases, as well as injuries and trauma;
- a) ensuring more targeted recruitment, especially to under-served areas as well as a more robust retention strategy to create a consistent supply of health professionals, who are properly trained and highly motivated to provide a quality service;
- b) poverty, unemployment, low education levels, poor transport infrastructure, social cohesion issues. These determinants of health lie outside the health sector, but have a significant impact on health outcomes;
- c) poor health infrastructure, coupled with inadequate resources for expanding and upgrading clinics, community health centres and hospitals. This is notwithstanding the progress made with the implementation of the Hospital Revitalisation Project."

Certainly, it is difficult to isolate trends within the Department of Health in respect of the manner in which the issues faced by the Department of Health are to be dealt with the over short term. Within the context of the nature of the issues that I experience on a day-to-day basis, within the practice of healthcare law, then the emphasis changes to one of entrepreneurship-

- the private sector continues to focus on the concerns around the delays in respect of the registration of substances as medicines;
- the downward pressure being exerted by the Department on healthcare costs including medicine costs and health costs in general through mechanisms such as the National Health Reference Price List;
- the introduction of economic measures to deal with health expenditure including the proposed Risk Equalisation Fund and collective bargaining within the context of proposed amendments to the National Health Act;
- the introduction of those sections of the National Health Act, which are yet to come into force, including the sections relating to the Certificate of Need; and
- the introduction of marketing measures in respect of medicines and Scheduled substances; and
- the formal regulation of complementary and alternative medicines.

These may not be trends as one would normally describe trends but they have all one common thread: a concern about the effect of regulation on making money in health care i.e. the challenges to overall trend of entrepreneurship in so far as they concern changes to legislation and the legal environment in health care.

In light of the increased amount of regulation plaguing the health care sector, the law is becoming a more important determinant of health care trends than health care issues. Regulatory interventions within the health care sector have increased exponentially since the turn of the century with more and more pieces of health care legislation being introduced in order to amend existing pieces of health care legislation and introduce new legislation. Such legislation includes not only statutes but also regulations that deal with more acute regulatory issues such as the scope of practice of various healthcare

professions, the pricing of medicines, the control of communicable diseases and consequent amendments to quarantine and isolation laws (currently out for public comment), the control of tobacco products, healthcare pricing and measures for the control of medical schemes.⁶

Notwithstanding all of the greyness of legislation, I have had cause recently to discuss matters of the South African health care sector with investment bankers from Europe. For one or another reason, I have received a number of telephone calls from investment banks in Europe to discuss the health care sector in South Africa. Such discussions are interesting in so far as one is able to entertain and assess the views of foreigners to the status of South African healthcare issues.

The questions posed are not necessarily too in-depth but come from informed sources as a great deal of research obviously precedes the telephone calls in question. The questions, however, remain preoccupied with two primary issues: the first is the status of national health insurance and the second is political stability. I am qualified to speak, on an expert basis, about neither of these issues other than in relation to what the law may or may not provide. Other than for current South African politics being what it is and never really changing, coupled now with a robust understanding of freedom of

⁶ This is confirmed as part of the conclusions and recommendations by LG Mpedi, N Smit and E Klinck, "Health Care in South Africa" in *Introduction to Social Security* M P Olivier, N Smit, E R Kalula and G C Z Mhone (eds) (2004) at pages 251 to 252: The South African health system is currently under serious efforts of reform, including but not limited to –

- Proposals relating to a National/Social Health Insurance System.
- The National Health Bill of 2003.
- New medicines legislation aimed at reducing the costs of medicine, instituting the compulsory substitution of medicines with generics under certain circumstances and aiming to eradicate unfair profiteering from medicines.
- Enhanced regulation of the medical scheme industry.
- Inspections of and standard-setting for the public hospital system and the establishment of private wards in more public hospitals.
- Attempts to educate patients on their rights and what they can legitimately expect from health care providers, facilities and funders.

The purpose of reforms should be to deliver acceptable services to all citizens and other persons in the country, to accommodate the marginalized groups and also to align the South African health care policy, and practices with international norms and standards. The high costs that are faced by individuals trying to obtain coverage in the private sector are a further source of concern.

Although various stakeholders have taken a number of important initiatives, buy-in from all constituents has not yet been achieved and various proposals by government face firm opposition and possible constitutional challenges. An important precondition for successful reform attempts is the acceptance by privileged South Africans of the principle of solidarity and willingness by health care professionals, owners of health care facilities, the Department of Health and patients to take co-ownership of health care reforms."

expression, the introduction of a national health insurance scheme has a lot of people jittery.

Based on my recent discussions and my interaction with third parties, especially those with money such as investment bankers, the isolation of trends in healthcare has become ironically easier. If I therefore were to select one primary trend that would take the day for all stakeholders in the South African healthcare sector, it would be the introduction of national health insurance. I realise that laconically selecting national health insurance as the winner in the healthcare-trend race is about as comforting as an address by Julius Malema, I am inexorably drawn to this conclusion by the consistency of the repetition of this issue in all of the documents that I have considered, in all of the conversations that I have had and in all of the matters that I have dealt with over the last year and continue to deal with into the future, both from the point of view of discussing policy nationally and internationally and conducting litigation in the healthcare sector.

The debate about national health insurance has occurred to date in measures of hysteria. In so far as I am correct and this trend will continue to develop, the debate must become more focused and it must become more about what the issues are in relation to South African health care than what they should be in relation to any one stakeholder – either the State or private healthcare funders and providers. Without a good understanding of what it is that the private health care sector intends to achieve for itself over the short term, the spectre of national health insurance will continue to haunt the private sector and potentially marginalise it within the context of the way in which healthcare services will be geared and function into the future.

There is a nice fit between national health insurance and the constitutional prerogatives that are held out as ensuring access to healthcare for all. Such an argument is emotional but it is also one that is easily adopted by all South Africans. Healthcare remains an emotional issue but also a political issue that will be debated not only from the benches of Parliament but around boardroom tables of listed companies. However, the debate must refer to the Constitution – the supreme law of our country and the set of goals that we have set for ourselves as a society: if you buy into the Constitution because it gives you comfort about hate speech then you also buy into the Constitution in so far as it promotes a particular system of healthcare.

Therefore if one accepts that the emerging trend in healthcare is toward national health insurance, then one must also accept the necessary corollary to that trend and that is the crafting of good, decent, productive and level-headed regulation, which I accept is not an applicable characterisation of developing trends in other areas of our society.

Neil Kirby
Director: Healthcare and Life Sciences Law
Werksmans Incorporating Jan S. de Villiers Attorneys
21 April 2010