Briefing on the Constitutional Court judgment in the Minister of Health v New Clicks (medicine pricing regulations)

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Created *2005/10/04 - 12:00am*
4 October, 2005 - 00:00 ? moderator

Highlights

- Constitutional Court (ConCourt) upholds pricing regulations scheme issued in terms of Medicines Act, but declares some key regulations unconstitutional
- Pharmacists? dispensing fees declared ?inappropriate? and sent back to Pricing Committee
- While pricing regulations remain largely in force, certain key provisions brought into line with Constitution by ConCourt itself
- ConCourt rules that Supreme Court of Appeal (SCA) had jurisdiction to hear pharmacists? appeal against earlier decision of Cape High Court
- Minister of Health reprimanded for disrespectful conduct in SCA:

"[The Minister] evinced a deplorable lack of respect for ? the highest court in this country in respect of all matters other than constitutional matters.?
(Former Chief Justice Chaskalson)
and
?it is just to reflect disapproval of the Minister?s failure to present argument on the merits in ? [the SCA by requiring] the Minister to bear the costs of the Pharmacies in full in that court.?
(The Court)

Introduction

On Friday 30 September 2005, the Constitutional Court handed down judgment in the medicine pricing regulations case, which pitted the Minister of Health and the Pricing Committee on the one hand against New Clicks and the Pharmaceutical Society of South Africa on the other. The decision is a victory for the public in that it affirms the state?s right ? and obligation ? to ensure that medicines are both affordable and available. At the same time, the decision will go some way towards ensuring that government consults appropriately before taking steps that have the potential to violate people?s rights of access to health care services.

While there was intransigence on both sides, the case was largely characterised by the Minister of Health?s refusal to consult appropriately with relevant stakeholders. It is not a coincidence that this is the third time the Constitutional Court has had to hear matters arising from the Minister?s refusal to properly consult with, and listen to the valid concerns of, stakeholders in health care. In addition, in December 2004 the Pretoria High Court, spoke in strong

language about her contempt of the public?s right of access to information. Had proper consultation taken place, the matter would most likely not have been taken to court and time and money would have been saved. As importantly, people?s right of access to affordable medicines would have been realised much earlier.

Because the affordability of medicines is a critical aspect of the right of access to health care, and because of our support for the government?s right to regulate the price of medicines, albeit in a reasonable fashion, the TAC sought to be ? and was ? admitted as amicus curiae (friend of the court) in the matter. In both the SCA and the Constitutional Court, the AIDS Law Project (ALP) represented the TAC.

The case was extremely technical and complex. This briefing assumes that readers have some background knowledge of the case. For those unfamiliar with the case, we recommend first reading our fact sheet: Minister of Health and the Pharmacists - An Updated Fact Sheet on the Medicines Act and the Pricing Regulations.

The ConCourt decided a number of issues relating both to the substance of the regulations and various other matters raised by the case.

Substance of the regulations

In general, the ConCourt upheld the structure and the vast majority of the pricing regulations. However, the key contested provisions ? those dealing with pharmacists? dispensing fees ? were declared invalid and sent back to the Pricing Committee to be redrafted. Of the 11 judges, six found ? for a range of reasons ? that the dispensing fees set in regulations 10 and 11 are not appropriate. The remaining five judges decided that, in general, the dispensing fees are appropriate, but not so in respect of rural and courier pharmacies. In other words, a unanimous bench found the dispensing fees inappropriate for rural and courier pharmacies, with a majority finding them generally inappropriate.

In addition, a number of individual regulations were amended directly by the ConCourt itself, using a combination of deleting certain words and inserting others. A good number of these dealt with unlawful delegations that gave powers to the Director-General of Health and Minister of Health that the Medicines Act does not permit. Instead, such powers are now to be exercised by the Minister on the recommendation of the Pricing Committee. In the absence of a recommendation, the Minister may not act.

Key legal issues raised by the case

When the matter came before the SCA, the Minister?s legal team argued that the court did not have jurisdiction to hear the matter and that it would therefore not address the merits of the appeal, as the SCA has instructed it to do. A unanimous ConCourt held that the SCA had jurisdiction to deal with the matter and to proceed with it in the absence of any argument by the state. Despite the state having chosen not to advance arguments in the SCA, a unanimous ConCourt decided to hear the Minister?s appeal against the SCA decision because it was in the public interest to do so, given the importance of the issues at stake.

A unanimous ConCourt also held that the Minister is to be penalised for not advancing argument on the merits at the SCA. She has to pay the full costs of the other parties in the SCA, but only half their costs in the Cape High Court and the ConCourt. This is not the first time the Minister?s conduct has attracted a punitive costs order. This is unbecoming of a Cabinet minister and demonstrates a worrying disregard for the law.

Promotion of Administrative Justice Act

The ConCourt was unable to come to a firm decision on the issue of whether the provisions of the Promotion of Administrative Justice Act (PAJA) are applicable to the regulation making process, which in this case included the recommendations of the Pricing Committee and the making of regulations by the Minister. Five judges held that the provisions of PAJA were applicable to the pricing regulations, one held them to be applicable only to the setting of the dispensing fee and the remaining five did not believe it necessary to come to a firm conclusion at all. Nevertheless, we recommend that government reads the judgment to indicate that it is only a matter of time before the ConCourt holds that the provisions of PAJA do in fact apply to regulation making.

Remedy

The Minister has 60 days within which to publish the pricing regulations, as amended by this decision. The ConCourt said that it was giving this long a period so that the dispensing fees can be revised in time and be published along with the rest of the regulations. While all interested parties should co-operate in the revision of the dispensing fees, the ConCourt did not set out how this should happen other than to say that they should ?provide any information required by the Pricing Committee or the Minister as fully and timeously as possible.? While there is no dispensing fee regulating the conduct of pharmacists in the interim, the ConCourt held that they cannot charge excessive dispensing fees, as this would constitute misconduct in terms of section 42 of the Pharmacy Act.

Conclusion

TAC and the ALP trust that this considered judgment by the ConCourt will put an end to the unnecessary conflict and pave the way for the outstanding issues to be resolved within the next few months. Leadership on this issue from the Minister of Health will result in lower medicine prices and benefit South African consumers.

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[END OF BRIEFING]

- Prices

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