Designating private health services as an essential service in South Africa: A constitutional perspective

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Abstract

Section 71 of the Labour Relations Act 66 of 1995 provides for the designation of essential services. The constitutional right to strike of employees who render essential services is limited as a result of such a designation. In this brief report, Martin van Staden considers whether private health services should be designated as an essential service, bearing in mind that publicly funded private health services and public health services have already been so declared. The issue is approached from a constitutional perspective, specifically considering the values of human dignity and equality, and the rights to equality, human dignity, life, bodily integrity, access to healthcare, and the limitation of rights. The report concludes that private health services should be designated as an essential service, and that a limitation on the right to strike would be reasonable and justifiable according to the constitutional scheme.

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1. Introduction

The Essential Services Committee has invited comment on classifying among others private health services as an essential service in terms of section 71 of the Labour Relations Act 66 of 1995. Section 213 of the Act defines an essential service among other as "a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population." In this brief report, it is argued that private health services should be classified as an essential service. The reasons for this are constructed on the strength of various provisions and values evident in the Constitution of the Republic of South Africa.

2. Context: Healthcare in South Africa

South Africa's healthcare system today finds itself in an incredibly precarious position. The public healthcare sector in particular faces major challenges such as "negative staff attitudes, long waiting times, unclean facilities, medicine stock-outs, insufficient infection control and compromised safety and security of both staff and patients."[1] Strike action in the public healthcare sector is also a major problem, despite that service being deemed essential. Le Roux and Cohen write:[2]

> […] strikes by essential service employees in South Africa such as nurses, doctors, municipal workers and employees essential to electricity generation and distribution are commonplace, often violent and disruptive, and are seemingly pursued without any consequences for the participating employees.

This does not detract from the importance of the right to strike as entrenched in the Constitution, which must however be exercised responsibly.

The problems in the public sector, it is submitted, is a result of the perverted incentives inherent in that sector. The proposed National Health Insurance (NHI) will severely damage — if not outright destroy — the private healthcare sector by effectively bringing it under the stewardship of the public healthcare sector. The result would be to extend the low quality of the public sector into the private sector. The NHI is based on flawed and deceitful premises.[3]

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1 Malakoane B, Heunis, J.C., Chikobvu, P., Kogozi, N.G. & Kruger, W.H. 2020. Public health system challenges in the Free State, South Africa: A situation appraisal to inform health system strengthening. In *BMC Health Services Research* **20**(58), p. 1. DOI: https://doi.org/10.1186/s12913-019-4862-y.

2 Le Roux, R. & Cohen, T. 2016. Understanding the limitations to the right to strike in essential and public services in the SADC region". In *Potchefstroom Electronic Law Journal* **19**, p. 3. DOI: http://dx.doi.org/10.17159/1727- 3781/2016/v19i0a1161.

3 See generally: Van Staden, M. 2019. *Deceiving the public: A critical analysis of the impact assessment on the National Health Insurance White Paper*. Pretoria: AfriForum. Available at https://www.afriforum.co.za/wp-content/uploads/2019/11/SEIA-report-for-AfriForum-on-National-Health-Insurance-FINAL-ENG.pdf. Accessed on 10 August 2020.

This great quality deficit that exists between South Africa's public and private healthcare sectors is well-known. According to Statistics South Africa 92,6% of South Africans were very satisfied with the country's private healthcare facilities, whereas a mere 53,8% of South Africans were very satisfied with public healthcare facilities. 5,2% of South Africans were very dissatisfied with the public sector and only 0,6% were very dissatisfied with the private sector.[4]

In light of the aforementioned facts — that the private healthcare sector, which provides high-quality service, is under imminent threat within the broader context of a collapsing healthcare system — this report proceeds to motivate why private health services should be designated as an essential service.

3. Private healthcare as an essential service

3.1 The definition of an essential service

Internationally, the factors that are relevant in the determination of an essential service are the "probability, or even the possibility, that human life or public safety would suffer if a work stoppage interrupted the duties of these employees."[5] This is almost verbatim the definition of an essential service that appears in section 213 of the Labour Relations Act.

The Committee has already designated public health services and private health services funded by the public to be essential services.[6] The International Labour Organisation's Committee on Freedom of Association recognises the hospital sector as an essential service.

It is not necessary for all employees working in the private health sector to be caught within the ambit of the essential service designation.[7] It is important, however, that all those engaged in actually rendering healthcare services and those who render the necessary support services to the former, are covered by such a designation.

It is submitted that at this juncture, health services — whether public or private — qualify as an essential service by definition, and that this report could justifiably

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4 Statistics South Africa. 2018. General Household Survey 2018. Pretoria: Statistics South Africa, p. 25. Available at http://www.statssa.gov.za/publications/P0318/P03182018.pdf. Accessed on 11 August 2020.

5 Knäbe, T. & Carrión-Crespo, C.R. 2019. The scope of essential services: Laws, regulations, and practices. Geneve: International Labour Organisation, p. 10. Available at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_737647.pdf. Accessed on 11 August 2020.

6 Commission for Conciliation, Mediation and Arbitration. 2002. Essential services — Designations. Pretoria: Commission for Conciliation, Mediation and Arbitration. Available at https://www.labourguide.co.za/download-top/92-infosheetsessential20service20designations20-20jan2020022/file. Accessed on 11 August 2020.

7 Le Roux, R. & Cohen, T. 2016. Understanding the limitations to the right to strike in essential and public services in the SADC region". In *Potchefstroom Electronic Law Journal* **19**, p. 3. DOI: http://dx.doi.org/10.17159/1727- 3781/2016/v19i0a1161..

conclude here. This is because the definition specifically refers to the health of some or all of the population, something the private health sector is inherently occupied with. However, it is worth exploring some further constitutional justifications for why private health services ought to be regarded — and thus designated — as an essential service.

3.2 Constitutional considerations for designating private healthcare as an essential service

For the purposes of the present report, six provisions of the Constitution will be advanced as bases on which to designate private healthcare as an essential service. These are sections 1(a), 9(1)-(2), 10, 11, 12(2), and 27(1)(a).

3.2.1 Human dignity and equality

Section 1(a) of the Constitution provides that *inter alia* human dignity and equality are supreme values that underly the Constitution, and as a result the whole of the legal order. Sections 9(1)—(2) and 10 of the Constitution give concrete expression to these values, entrenching equality before the law and the recognition of human dignity as constitutional rights.

The importance of the ability to access one's (private) healthcare to ensure human dignity must be evident. Despondency and immense frustration are exceedingly likely if the only thing that stands between a patient and their treatment is a strike by employees of the provider — to the patient, a completely irrelevant factor. This is not to say the concerns of the employees are objectively irrelevant. Employees are still protected by the vast generosity of South African labour law. However, informing patients that they cannot be served — often with life-saving treatment — because of a strike, is not a feature of a constitutional order based on human dignity.

Equality as a constitutional value also steps prominently to the forefront. Public health services have already been declared an essential service, meaning that users of the public healthcare system would not have their right to have access to health (discussed below) interrupted or infringed by a strike, whereas in the case of private healthcare users, this benefit could not be enjoyed. This evidently has adverse implications for equality before the law, as guaranteed by the Constitution.

3.2.2 Life, bodily integrity, and access to healthcare

Section 11 of the Constitution entrenches the right to life. Sections 12(2) and 27(1)(a) reinforce this right. Section 12(2) provides that everyone has the right to bodily integrity, and section 27(1)(a) provides that everyone has the right to have access to healthcare services.

It is evident that strike action by those who render healthcare services is a direct threat to the rights to life, bodily integrity, and access to healthcare services.

Current and prospective patients requiring treatment and care, which must of necessity be of a good quality whether in the public or private sector, are denied that treatment and care if those expected to render those services are absent. Healthcare must be available to be accessed.

As discussed below, this is clearly an instance of rights that conflict with one another, which demands that some rights must give way to others.

4. Limiting the right to strike in terms of Section 36(1)

4.1 Generations of rights

When a new essential service is designated, the evident consequence is that the right to strike, ensconced in section 23(2)(c) of the Constitution, will be limited for those employed in that service. In the present context, per section 65(1)(d)(i) of the Labour Relations Act, if private healthcare is so designated, employees in the private healthcare sector will have their right to strike curtailed.

It must be borne foremost in mind that with a constitution like that of South Africa, which entrenches all three so-called "generations" of rights — first (liberty rights), second (welfare rights), and third (solidarity rights) — no constitutional right can be considered in isolation.[8] If, on the other hand, the Constitution merely adopted the first generation of rights, one could argue authoritatively that no "conflict" between rights within that generation is theoretically or practically possible, and that those rights must be respected to the full extent of the law.[9]

However, given the reality of the Constitution, it is now incumbent upon civil society, particularly the legal community, to be aware that the exercise of one right, particularly welfare or solidarity rights, could very easily tread on the ability of others to exercise their rights. This is the situation we are presently faced with. It is submitted that exercising the right to strike, which might be classified as either a second or third generation right, in this context, undeniably infringes upon the right to life, bodily integrity, and the right of patients and users of private healthcare to have access to healthcare services.

In such a situation, some constitutional rights must inevitably give way to others. It is submitted that rights closer to the first generation of rights — such as the rights to life, bodily integrity, and access to healthcare services — must be given

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[8] *State v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.

[9] See:

- Pound, R. 1961. Critique: W. Friedmann's 'Law in a Changing Society'. In *Minnesota Law Review* **46**, p 122. Available at https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=3275&context=mlr. Accessed on 17 August 2020.
- Van der Merwe, N.J. & Olivier P.J.J. 1980. *Die onregmatige daad in die Suid-Afrikaanse reg*. Fourth edition. Pretoria: JP van der Walt, p. 68.

preference in such an analysis.[10] This is because the first generation of rights remains the foundation upon which any rights-respecting dispensation is based, and in the absence of respect for the first generation of rights, the existence or meaningful exercise of any other type of right becomes impossible.[11]

It is against this background that section 36 of the Constitution becomes relevant.[12]

4.2 Section 36(1) analysis

For a constitutional right to be legitimately limited, the limitation must be justified in terms of section 36(1) of the Constitution. Here follows a brief section 36(1) analysis of a limitation on the right to strike in the private healthcare sector.

4.2.1 The limitation is reasonable and justifiable…

The first leg of the section 36(1) analysis is that the limitation must be accompanied by a justification that is reasonable.

This report as a whole should be regarded as a justification, with a particular emphasis on the definition of "essential service" in the Labour Relations Act, i.e., "a service the interruption of which endangers the life [or] health of the whole or any part of the population". A strike or work stoppage in any part or the whole of the private healthcare sector inherently poses a threat to the life and health of at least a part of the population.

Reasonableness has two meanings that could be intended by section 36(1). The usual meaning is that something is reasonable if the average or ordinary person, in ordinary circumstances, would regard the phenomenon as justifiable. On this conception of reasonableness, it is submitted that the ordinary person would regard a limitation upon the right to strike in the private healthcare sector as justifiable, given the sheer importance of keeping health services running.

The second meaning of reasonableness, most prominently known in administrative law, is that a measure or conduct is reasonable if it is rational and proportional.[13] This conception of reasonableness is discussed under headings 4.2.6 and 4.2.7 below.

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[10] See Van Staden (footnote 3 above), pp. 20—21 for a discussion on the right to have access to healthcare as an example of a liberty right.

[11] Sartori G. 1976. Liberty and law. *Studies in Law* **5,** p. 11—12.

[12] I argue elsewhere that statutory limitations on individual rights are illegitimate when approached from the perspective of the classical liberal conception of the social contract. I stand by this argument. South Africa's constitutional dispensation does, however, recognise constitutional rights, which traditionally would not be recognised as individual rights but which, in fact, might themselves infringe on individual rights when exercised. This demands that a different approach be adopted. The mechanism in section 36(1) of the Constitution is thus useful to analyse constitutional rights and determine their applicability *vis-à-vis* one another.

[13] Hoexter C. 2012. *Administrative Law in South Africa*. Second edition. Cape Town: Juta, p. 344.

4.2.2 … in an open and democratic society based on human dignity, equality, and freedom…

The second leg of the analysis is that the justification provided for the limitation must be compatible with an open and democratic society that is based on the values of human dignity, equality, and freedom.

It has been argued above that the values of human dignity and equality at the heart of the constitutional order might militate in favour of limiting the right to strike. The value of freedom gives rise to tension, because there are two competing freedoms at play. On the one hand, there is the freedom of employees to exercise their constitutional right to strike, and on the other, there is the freedom of current and prospective patients to freely choose services and providers and the freedom of private health institutions to provide those services.

It is submitted that the discussion under heading 4.1 is persuasive in this respect as well. The right to strike is closer to being a second or third generation right, whereas the rights to life, bodily integrity, and access to healthcare, are closer to a first generation right. Therefore, the latter, and its associated freedom, must be regarded as outweighing the former.

Finally, it is trite that the limitation of certain rights is compatible with an open and democratic society. An absolute exercise of all the rights contained in the Constitution would be impossible, as many of these are in direct conflict with one another in given situations such as the case under discussion.

4.2.3 … considering the nature of the right …

In determining whether the justification provided is, in fact, reasonable and justifiable in an open and democratic society, certain factors may be considered. These five factors listed in the Constitution, will be discussed under headings 4.2.3 to 4.2.7. Other factors besides these five may, however, also be considered. For the purposes of this report, only the listed factors will be considered.

The first factor to consider is the nature of the right that is being limited.

The nature of the right to strike is derivative. It depends on existing employment, which comes about only after another right, the right to enterprise,[14] has been exercised by, in this case, establishing a private health institution. It is also inherently dependent on an existing market for healthcare, where current and prospective patients exercise their right to have access to healthcare. As such, the

[14] There is no explicit right to enterprise in the Constitution. But there is an implied, cumulative right to enterprise. See Van Staden, M. 2018. Comment on the Competition Amendment Bill. Pretoria: Sakeliga, p. 17-19. Available at https://www.sakeliga.co.za/wp-content/uploads/2018/08/2018-08-17-Sakeliga-Submission_Compeition-Amendment-Bill-of-2018.pdf. Accessed on 11 August 2020.

right to strike is also a second- or third generation right which would lose all meaning in the absence of first-generation rights.

This does not, however, detract from the importance of the right to strike. Striking is an important tool in the collective bargaining process and enables employees — thought to have lesser negotiating power than employers — to put pressure on the latter to improve the terms and conditions of employment. It is submitted, however, that because of its derivative nature, the right to strike is of lesser importance than the rights to life, bodily integrity, and access to healthcare.

4.2.4 … the importance of the purpose of the limitation …

The second factor to consider is the importance of the purpose of the limitation.

The purpose of the limitation in the present context is to ensure the constitutional values and rights discussed under heading 3.2 above are not infringed upon when a strike is called. The importance of this purpose cannot be doubted. As previously explained, when there is a strike, current and prospective patients are denied their rights to life, bodily integrity, and access to healthcare.

4.2.5 … the nature and extent of the limitation …

The third factor to have regard to is the nature and the extent of the limitation.

The limitation severely impacts on the right to strike, but leaves the other labour rights enumerated in section 23 untouched. All the ordinary common law and statutory rules and protections of South African labour law remain in force.

4.2.6 … the relation between the limitation and its purpose; and…

The fourth factor is to consider the relationship between the limitation and its purpose. In other words, the rationality of the limiting intervention must be considered. The rationality test asks: "Is there a rational connection between the intervention and the purpose for which it was taken?"[15]

In the present matter, this question is answered easily in the affirmative. The purpose of the limitation is to protect the rights to life, bodily integrity, and access to healthcare from strikes or work stoppages at private healthcare institutions. By classifying private health services as an essential service, current and prospective patients will continue to be serviced with quality care, rather than suffering while employees are absent.

[15] *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 at par. 6.1.

4.2.7 … less restrictive means to achieve the purpose

The fifth and final factor to consider is whether there are less restrictive means to achieve the purpose of the limitation. This is a classic proportionality criterion.

The proportionality test holds forth that the bare minimum of interference with a right must, as an imperative, be preferred over a greater interference with the right. This inevitably means that if there are other avenues that interfere less with the right than the proposed avenue, those must be preferred.

In the present context, the only avenue of relevance is a limitation of the right to strike, as the purpose of the limitation is to keep healthcare employees at their posts, treating patients and providing necessary support services. There is no way to achieve this end other than to inform employees that they may not abandon their posts. As previously mentioned, however, a multitude of legal remedies and avenues remain available to employees to vindicate their section 23 rights.

5. Conclusion

If private healthcare services are not designated as an essential service, the definition of an essential service contained in both the Labour Relations Act and in the international discourse – which are effectively identical – will amount to dead letter law. Furthermore, it would entrench inequality of legal treatment between the public and private healthcare sectors. Finally, and most importantly, it would undermine various rights guaranteed to South Africans in the Constitution.

As such, it is put to the Committee that private health services be designated as an essential service in terms of section 71 of the Labour Relations Act.