

An Analysis of Foreigners' Right to Health Services as Enshrined in the South African Constitution

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ABSTRACT The South African Constitution provides for access to socio-economic basic rights, one of which is the right to health care services. This paper examines whether foreigners residing in South Africa are eligible to access health care facilities in South Africa. There have been a considerable number of judicial interpretations on the issue, hence this paper will shed more light on the jurisprudence emanating from courts in order to evaluate the extent of foreigners' entitlement to health care services. In advancing an argument based on the need for foreigner to be availed this right, this paper highlights how the judiciary interprets who should be entitled to this right. The role being played by the public service personnel in the health care industry was tested against the legislative frameworks and the South African Constitution which expressly provides that everyone is entitled to health care in South Africa. The essence of this is to make the health personnel have a clearer understanding of how to discharge their responsibilities

INTRODUCTION

The constitutional protection of socio-economic rights in South Africa has to be seen in the context of the debate that has often characterised the justiciability of such rights (Mubangizi 2006). By including uncontested social economic rights in the Bill of Rights as stated in the South African Constitution, it thus mean that the debate has now effectively come to an end (Mubangizi and Mubangizi 2005). The current debate is on the interpretation of who should be entitled to the rights. (de-Wet 1996). It has been argued that socio-economic rights were inherently non-justiciable and not suited judicial enforcement (Christiansen 2006). It has also been debated that the protection of such rights should be a task for the legislature and executive and that constitutionalising them would have the inevitable effect of transferring power from these two branches of government to the judiciary, which lacks the democratic legitimacy necessary to make decisions concerning allocation of social and economic resources (Currie and de Waal 2005). Others have argued however, that there is no principled objection to the inclusion of socio-economic rights in a justiciable Bill of Rights (Pieterse 2000), but that the vital issue is the

extent and nature of their inclusion (Pieterse 2004).

The above arguments were considered in the First Certificate Judgement Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) in which the Constitutional Court held that although socio-economic rights are not universally accepted as fundamental rights, they are, to some extent justiciable; and at the very minimum can be negatively protected from invasion. The Court conceded that socio-economic rights might result in courts making orders that have direct budgetary implications, but hastened to point out that the enforcement of certain civil and political rights would often also have such implications (Mubangizi 2006).

Against the backdrop of the decision above, socio-economic rights as provided for in the Constitution are applicable to everyone regardless of their citizenship or nationality thereby giving foreigners the right to also enjoy these rights for as long as they are in South Africa (Landau and Ramjathan-Keogh 2005). Section 7(1) of the Constitution provides that:

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

This section points out that every person's rights in South Africa is protected under the Constitution irrespective of where the person

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comes from (Ngwato and Jinnah 2013). The Preamble explicitly articulates the belief of the people of South Africa and states that “*We the people of South Africa; believe that South Africa belongs to all who live in it, united in our diversity.*”

To further ensure that these rights are protected and respected, section 7(2) of the Constitution of the Republic of South Africa Act 108 of 1996 goes on to place an obligation on the State to respect, protect, promote and fulfil the rights in the Bill of Rights (Bilchitz 2003). The provision in section 2 reinforces these obligations as the State does not have discretion as far as the application of the Bill of Rights is concerned. It is pertinent to point out that not all the rights in the Bill of Rights are applicable to foreigners. However, there are certain rights that can only be enjoyed by the citizens such as political rights in terms of Section 19, Citizenship in terms of Section 20, residency and passport in terms of Sections 21(3) and (4) freedom of trade, occupation and profession in terms of Section 22 of the Constitution respectively.

The National Health Act 61 of (2003) and the Patient’s Rights Charter as well as all existing official policy documents are silent on the right of access to health services of foreigners. To this end, foreigners find themselves caught up in a situation where those who are supposed to provide the much needed health care are unable to do so due to uncertainty on whether foreigners are entitled to it or not (Berend et al. 2011). The only document that deals with the rights of foreigners is an internal memorandum that only allows everyone to be treated in emergency situations and given antiretroviral treatment without first requesting for an identification document to be produced (Veary 2008). By implications, it is only if any of the situations arise in the memorandum that a non-national will be treated (Veary 2008). This is considered discriminatory and undermines the right to health care which has an impact on an individual’s right to human dignity as well as the right to equality (Donnelly 2013). Denying non-nationals treatment on the grounds of citizenship and turning away sick people because they do not have valid travel documents is considered inhumane and degrading treatment (Taylor 2000).

Therefore in order to ensure that South Africa acts in accordance with the provisions of the International treaties that it is party to human rights protections, it is pertinent to ensure that

health care providers are well educated and informed on how to treat non-nationals as well as enlightening them on which benefits non-nationals are entitled to (Sunstein 2001).

The first case dealing with foreigners’ vulnerability in South Africa was *Larbi-Odam and Others v Member of the Executive Council for Education (North -West Province)* where the court said that citizenship was an unspecified ground of discrimination in terms of the equality clause under the interim Constitution because foreign citizens are a minority in all countries, and have little political muscle; citizenship is a personal attribute which is difficult to change, and incidents of threats and intimidations faced by non-citizens increased their vulnerability. The appellants before the Court consisted of both permanent residents and temporary residents. The Court held that when competing parties for an employment position are citizens and permanent residents then exclusion on the ground of citizenship would be discriminatory. This same criterion should be considered in attempts to adjudicate socio-economic rights. This is a commendable approach that was taken by the courts.

METHOD

The methodology for this paper involved the application of qualitative research method against quantitative method of research. An analysis of and engagement with contemporary literature in the field of socio-economic rights was used such as case laws, articles, journals and books. The traditional method of citation, analysis of cases and other sources are the main scientific methods in legal scholarship. Therefore analysis of and engagement with contemporary literature in the field of law were used. Other relevant statutory, legislative and policy frameworks were also thoroughly examined.

Literature Review

The issue of foreigner’s right to health care and services has continued to generate heated debate in South Africa (Polzer 2010). It has been advocated that foreigners should have equal right to health care and facilities because it is guaranteed under the Constitution hence everyone is entitled to it as it is a protected right under the Constitution (Sripati 2007). A number of papers have been written on this aspect which

has mainly focused on educating people on what their socio-economic rights entail as well as how they can enforce such rights (Mubangizi 2012). Scholars have written extensively on who is responsible for the provisions, realisations and delivery of the right to the people. According to Seleokane (2001), basic elements like water, health care and food are essential for the realization of decent and dignified humanity. Brand and Heyns (2005) made extensive references to human rights law standards relating to the entitlement of socio-economic rights. They submitted that such standards have been influential in shaping both the socio-economic rights provisions of the Constitution and the jurisprudence that have developed around them. They also emphasised that the inclusion of socio-economic rights in the Constitution has made it clear that such rights are justiciable and has shed new light on the obligations of States to respect, protect, promote and fulfil the rights. It is however pertinent to point out that few international human rights instruments make reference to socioeconomic rights and for those that did, they only gave the possibility of complaints and nothing more (Keith 1999). Towards this end, Brand and Heyns (2005) noted that there was limited opportunity at the international level for enforcement of these rights and how they should be translated into practice. South Africa has developed the norms and started implementing some of them.

Of particular interest, therefore, is reference to the rights that are often seen as the more controversial socio-economic rights, for example, the rights to food, water and environmental rights. Here the experience in the South African courts is invaluable. For example, while some may argue for a specific right to food, it is interesting to note that in the South African context the interpretation of the right to food is more or less embedded in other rights such as health and dignity and therefore seldom directly protected (Donnelly 2013). Lack of adequate food and nutrition has implication on health which can lead to severe sicknesses that requires serious treatment.

The present situation in South Africa especially with the nationwide persistent xenophobic attacks on non-nationals poses a major concern in the light of the core values of the Constitution and our belief contained in the preamble that 'South Africa belongs to all who live in it (Friebel et al. 2013). Klaaren (2001) applying the

criteria in the Larbi-Odam's case to temporary residents pointed out that they also constitute a political and largely powerless minority. This makes them vulnerable to threats and intimidations. Furthermore, when it comes to citizenship 'temporary residents have even less control over (their) status than do permanent residents, some of whom have the option to naturalise but choose not to (Pieterse 2004). However, failure to become a citizen or naturalise should not be ground to deny foreigners' health care.

THE LEGAL FRAMEWORK IN SUPPORT OF FOREIGNERS' RIGHT TO HEALTH SERVICES

The Constitution

The right to health care is contained in the Constitution in section 27(1)(a) which provides that: "*Everyone has the right to have access to health care services, including reproductive health care.*" This section entitles every person in South Africa to have access to health care services (Willes 2012). This right has serious implications on the right to life as in certain situations getting access to these health care services could make the difference between life and death for an individual (Smedley et al. 2000). In considering this right the competing interests and rights of foreigners and citizens cannot be ignored. More often than not foreign nationals from neighbouring countries have been known to cross their country's border to South Africa in search of health care services as their own country's health care system have broken down (Pfeiffer 2003). As a result of such influxes, the resources become over stretched thereby making it difficult for the Government to efficiently provide such services to foreigners and citizens alike (Steinberg 2011). This does not however mean that those in South Africa should be denied access to health care. What should be done is to tighten security at the neighbouring border posts and deny entry to foreigners who intentionally want to enter the country for the main purpose of accessing health care facilities.

The National Health Act 61 of 2003

The National Health Act (NHA) was enacted to give effect to the provision of section 27(2) of the Constitution which provides that: "*The state must take reasonable legislative and oth-*

er measures, within its available resources, to achieve the progressive realisation of each of these rights.”

In terms of section 3(1)(e) of the NHA, the Minister of Health must, within available resources, “ensure the provision of essential health services, which must at least include primary health services, to the population of the Republic as may be prescribed after consultation with the National Health Council.”

Then, section 4 of the NHA provides that:

- “(1) The Minister, after consultation with the Minister of Finance, may prescribe conditions subject to which categories of persons are eligible for such free health services at public health establishments as may be prescribed.*
- (2) In prescribing any condition contemplated in subsection (1), the Minister must have regard to –*
- (a) the range of free health services currently available;*
 - (b) the categories of persons already receiving free health services;*
 - (c) the impact of any such conditions on access to health services; and*
 - (d) the needs of vulnerable groups such as women, children, older persons and persons with disabilities.”*

Therefore it is incumbent on the Minister to take such a decision and communicate it to health care providers at all levels in order for foreign nationals to have equal access as the citizens to health care services especially, taking into account that they are vulnerable people and constantly exposed to threats and intimidations (McIntyre and Klugman 2003).

In terms of section 5 of the NHA, no one may be refused emergency medical treatment by public or private health care providers, workers or establishments. The Act further contains several provisions pertaining to the manner in which health care must be rendered, which spells out patients’ rights to autonomy and bodily integrity (Veary 2008). More importantly, section 6 of the NHA requires that patients be informed, in a language and manner that they can understand, of their health status and available treatment options. Moreover, section 12 of the NHA mandates the wide dissemination of information on, among other things, the kinds of health services available; the extent of their availability; procedures through which available health services

may be accessed; procedures for complaining about delivery of available services and the rights and obligations of patients.

International Treaties

The International Covenant on Economic, Social and Cultural Rights (ICESCR 1966) in terms of Article 2(1) provides as follows:

“Each State Party to the present Covenant undertakes to take steps individually and through international assistance and co-operation especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

However, in respect of the civil and political rights, the States undertook to respect and ensure these rights, no express limitations were placed on this obligation. Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR 1996) provides as follows:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The distinction is also reflected in the enforcement measures provided for in the covenants. The ICCPR was adopted together with an optional protocol establishing an individual complaints mechanism known as Optional Protocol to the International Covenant on Civil and Political Rights adopted by United Nations (UN) General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York (Dennis and Stewart 2004). No such mechanism was put in place in respect of the ICESCR. This was based on the misconception that the obligations engendered by the rights in the ICESCR were incapable of judicial enforcement (Mbazira 2007[PDF]). They would only be realised through international cooperation and through the work of intergovernmental organisations (Udombana 2007). This is because it was thought that these rights required extensive state action (Liebenberg 2005). It was observed in the case of *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of*

South Africa, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) paragraph 78 that not only are socio-economic rights fully justiciable but in the case of *Government of the RSA v Grootboom*, 2001 (1) SA 46 (CC), paragraph 23 and 24 the court emphasized that socio-economic and civil and political rights are inter-related and mutually supporting.

Access to Health Services by Foreign Nationals

The constitutional rights of access to health care services and emergency medical treatment are afforded to "everyone". This implies that criteria such as citizenship may not pose barriers to access, unless such barriers may be justified in terms of the general limitations clause in section 36 of the Constitution (Dowell 1988).

However, statutory or policy-based elaboration of the right of access to health care services are silent on this aspect of the right, with neither the NHA, the Patient's Rights Charter or any other official policy document containing provisions pertaining to access to treatment by non-nationals (Pieterse 2010). Instead, the rights of foreigners are spelt out in an internal memorandum and a directive by the National Department of Health respectively, both of which determine that public hospitals may not insist on possession of national identity documentation as prerequisite for access to specific kinds of medical treatments, notably antiretroviral and emergency treatments (Veary 2008). However, implementation of these directives varies drastically from hospital to hospital, with several hospitals insisting on presentation of South African identity documentation as an absolute requirement for access to health care services (Pieterse 2000).

Foreigners therefore enjoy severely unequal access to services in comparison to citizens which, Departmental directive, they should be entitled to (Pieterse 2010). This is partly due to the obscure nature and lack of legal status of the relevant directives and the fact that they do not clearly provide for individual entitlements and obligations, or means through which to insist on compliance (Pieterse 2010).

Jurisprudence on Socio-economic Rights

There have been various cases before the courts pertaining to socio-economic rights as different groups of people seek redress for the infringement of their constitutionally entrenched

rights (Liebenberg 2005). It is through these decisions that there have been huge strides in ensuring and guaranteeing the justiciability of socio-economic rights (Mbazira 2006).

In the case *Government of the RSA v Grootboom*, 2001 (1) SA 46 (CC), paragraph 83; the court observed:

"(t)he proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account is taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with (socio-economic rights) is determined without regard to the fundamental constitutional value of human dignity...(i)n short, I emphasise that human beings are required to be treated as human beings."

In the case of *Khosa v Minister of Social Development*; 2004 (6) 505 (CC) paragraph 52, the court also confirmed the importance of inherent human dignity and equality in the socio-economic context.

In *Grootboom* (2001), the Constitutional Court introduced the standard of reasonableness for review, which it regards as appropriate to test legislation aimed at achieving the progressive realisation of socio-economic rights for constitutional compliance. The standard posits several requirements for legislative and executive translation. According to the Court, measures aimed at the progressive realisation of socio-economic rights have to be reasonable both in their conception and their implementation. This means that measures have to "clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available for the implementation of the right", and that legislative measures have to be "supported by appropriate, well-directed policies and programmes implemented by the Executive". Further measures have to be balanced, flexible, inclusive, and have to cater for short, medium and long-term needs, especially those "whose needs are most urgent and whose ability to enjoy all rights therefore is in great peril."

The reasonableness standard was appropriated in relation to health policy in *Minister of*

Health v Treatment Action Campaign (TAC) 2002 (5) SA 721 (CC), where State policy on the use of anti-retroviral medication to prevent mother-to-child-transmission of human immunodeficiency virus (HIV). In addition to employing all elements of the reasonableness test devised in Grootboom, the TAC Court held that reasonableness also required socio-economic policy to be transparent and to be communicated effectively to all concerned with its implementation as observed in the case of Minister of Health v Treatment Action Campaign, paragraph 123:

“In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately”.

The policy was challenged and found to be unreasonable, primarily because of the rigid and seemingly arbitrary manner in which it restricted the availability of an essential drug to a limited number of designated sites, notwithstanding the need and capacity to make it accessible (Pieterse 2008).

However, due to the focus of the reasonableness approach on the content of laws and policies, it is less clear whether it can be perceived as translation failures which results from the failure to pass laws or policies in the first place (Pieterse 2006). Liebenberg (2010) has argued that the failure to bring into operation legislative provisions by proclaiming relevant regulations (such as that which currently impedes the implementation of much of the National Health Act) falls foul of the insistence of the reasonableness standard that legislative measures be supported by appropriate executive programmes and policies. The transparency standard inherent in the reasonableness approach may further be useful in countering translation failures occasioned by obscure and inadequately communicated policies such as the directives on access to anti-retroviral medication by non-citizens (Liebenberg 2010). Where translation failures result from ambiguity created by legislative silences such as that in relation to positive obligations imposed by the right not to be refused emergency medical treatment or the parameters of conscientious objection to terminations of pregnancy, reasonableness is likely to be of limited use (Pieterse 2008).

OBSERVATIONS

Access to Government-funded Social Services

There has been little progress in ensuring that foreigners have ample access to health, education, and other social services (Landau 2006). The provision of basic social and economic rights is critical to non-nationals living healthy lives of dignity that allow them to contribute to the communities in which they live. Furthermore there is no coordinated or coherent programme for improving service access for non-citizens (Liebenberg 2005).

Health Treatment Denial

While everyone in the Republic is entitled to life-saving medical care, emerging reports indicate that many foreign nationals are refused access to treatments at clinics and hospitals (Landau 2007). This is due to the fact that health care workers may refuse to give services due to confusion about what service and payment foreigners are entitled to, or because of outright discrimination (Leong 2009). Despite improvements in promoting access to HIV services, refugees, asylum seekers and other migrants are, on a daily basis, encountering significant challenges in accessing the anti-retroviral treatments (ART) to which they are entitled (CRMSA 2007).

CONCLUSION

There is need for all the stakeholders to work together in order to ensure that foreigners in South Africa are able to enjoy the right of access to health care services through raising awareness and educating people on the various provisions in the laws that speak directly to this. It should be borne in mind that by turning away these foreigners without giving them treatments, the health care system does not only failed them, but also failed the citizens as this could result in the spread of diseases that could have been cured.

The health care industry is very important and should be able to take care of everyone as failure and shortcomings could mean the end of life for those who become victims of the system. It should also be noted that requiring a foreign national to produce valid documentation of stay in South Africa could also be considered unfair

as the foreigner might have fallen sick whilst awaiting a response on the application from the Home Affairs Department.

RECOMMENDATIONS

Department of Health

The Department must ensure that there is standardisation of administrative procedures for foreigners which should be made known clearly to health care providers to ensure that foreigners are able to access public health care services without undergoing unnecessary stress or denial of services as a result of ignorance of the health providers.

There is also a need to enhance capacity building and training of administrative and health care workers to include specific components addressing issues of xenophobia and the rights of different groups of foreigners to health care services.

The Department should also consider procuring interpreters to enhance the ability of foreign nationals to communicate their ailments to the health care providers to prevent cases of misdiagnosis.

It would also be in the country's best interest to ensure that foreigners have access to voluntary HIV testing and counselling on and that HIV positive refugees have access to anti-retroviral treatment. Testing of HIV would assist foreigners know their status and counselling would enlighten them about virus, how they can reduce the risk of infecting others with the virus if positive, reduce the risk of getting infected if negative and live a healthy and responsible life.

Department of Home Affairs

The Department needs to educate service providers, other government departments, the public sector and potential employers about foreigners' rights especially to health care services.

It should also clarify the procedure for dealing with foreigners who are unaccompanied minors and those without the necessary documentations with the aim of limiting unnecessary infringements of right.

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