



Response

3rd May 2023

Irrespective of Nationality or Documentation Status

On 14th April, the Gauteng High Court declared that certain regulations, published in General Notice 1426 in the Gauteng Provincial Gazette 4114 of 24th November 2021, were invalid to the extent that they required pregnant women, lactating mothers, and children under the age of six who were not beneficiaries of a medical aid scheme, to undergo a classification and fees assessment in circumstances where they had the right to free health care services. It went on to say that the Gauteng Department of Health must amend the Health Circular 27 of 2020 to expressly provide that all pregnant women, lactating mothers and children under six years, who were not members or beneficiaries of medical aid schemes, or who had not come into South Africa for the specific purpose of obtaining health care, were entitled to free health services at any public health establishment, irrespective of nationality or documentation status.

The court pointed out that any requirement for these groups to be subject to classification and fee determination processes was inconsistent with section 4(3)(a) of the National Health Act, and thus invalid. Since the National Health Act was national legislation which aimed “to ensure uniformity of norms, standards and policies concerning access to health care services across the country, as well as equitable access to health care services, it prevails over conflicting provincial legislation in terms of section 146(2) of the Constitution.” In addition, section 27(1) of the Constitution guarantees everyone the right to access health care services, including reproductive health care, and section 28(1)(c) affirms the right of every child to basic health care.

The court directed the Gauteng Health Department to prepare a circular by 23rd May 2023 advising of the above; and it instructed the national Minister of Health to provide posters at all health facilities nationally, carrying the same information with regard to free health care for those categories of people. Those charged with making this information available were required to furnish the court, on 23rd October 2023, with an affidavit setting out their compliance, or lack of it, in carrying out these requirements.

The case was brought by the public interest group, Section 27, and other organisations including the Jesuit Refugee Services, Doctors without Borders-SA, and the Southern African HIV Clinicians Society. A number of organisations, including the Centre for Child Law, intervened as *amici curiae*. They based their case on the fact that certain groups of pregnant women, lactating mothers and children under six were finding it difficult to access free health care, and that they were subject to a classification system. This applied particularly to asylum seekers and people affected by statelessness, many of whom had been harassed by officials at health facilities in addition to the harassment meted out by groups with a xenophobic agenda. They cited a case around which there had been considerable publicity, of a two year old boy who died after swallowing rat poison. His parents were unable to pay the R5 000 required for what was described as a very routine medical procedure which could have saved his life.

It should be remembered that civil society groups have long played a valuable role in advocating for equitable access to health care. In 2007, for example, they advocated for the right to ARVs for all people, irrespective of documentation. This case forms part of that long history, and shows the possibilities of what civil society advocacy can achieve.

Part of the history of the impugned provincial regulation lay in the time of the COVID pandemic, when many refugee permits expired. Their holders were then regarded as full paying patients because the Department of Home Affairs failed to inform the Department of Health that the validity of all expired documentation was extended by directive.

The judgement has been widely welcomed and has opened the way for free access to health care for the most vulnerable groups in our society, as envisaged by the Constitution. The special care for pregnant women and lactating mothers aligns local policies with international best practice, and will go a long way to reducing infant mortality and morbidity. It will also provide a firm foundation for the strengthening of migrants' rights to health care. Moreover, it is in the country's best interests to respond to health needs at the point of diagnosis, rather than to refuse basic services and then have to respond when the illness has spread more widely and requires more costly intervention.

We need to hear again the words of Nelson Mandela: "Health cannot be a question of income, it is a fundamental human right."

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