TAKE GOVERNMENT TO CONCOURT – ETHICS EXPERT

The risk of a doctors' strike sacrificing some lives to win improved care so more lives can be saved in future was a questionable ethical approach when a more humanitarian alternative existed, a top bio-ethics expert says.

Professor Ames Dhai, head of the Steve Biko BioEthics Centre at the University of the Witwatersrand, suggests doctors take government to the Constitutional Court to address broken government promises and dismal patient care. She was asked how one allocates responsibility for patients during a strike, given the current context of dismal working conditions and salaries in an environment that forces doctors to deliver sub-optimal care.

The newly formed United Doctors Forum (UDF) held an abortive unprotected strike that some claim led to three patient deaths in mid-April. Dhai found it 'difficult' to condone this. The government's lack of support for doctors and patients 'shows they don't understand the Bill of Rights of the Constitution – what it means to respect life and human dignity'.

The Constitution guaranteed the progressive realisation of the right of access to health care while the National Health Act was the instrument. 'Not much has happened. It's wrong that the government holds doctors to ransom because of the lack of legal protection.'

By using the Patient Rights Charter in conjunction with the above two legal framesets, a sound argument could be made for improving matters.

Not quite so easy – constitutional law expert

However, a cautionary note was sounded by Elsabe Klink, a former SAMA legal advisor and constitutional law expert. Citing the 'within available resources' caveat to the Bill of Rights duty on the state to help people progressively realise access to health care, she said whether the non-implementation of the OSD related to limited resources or to administrative issues, or both, would be the pivotal argument.

In the recent pharmacists' dispensing fee case, the ConCourt regarded access to health care as not only being access to health care products (medicines), but also access to the professionals required to fulfil such rights.

Klink said it could then be argued that the failure to implement the OSD amounted to violations of Section 7 and 27 of the Constitution. However, the ConCourt would 'not easily' direct the state to implement specific steps that would have financial implications

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(Soobramoney case).[1] In the high-profile nevirapine case,[2] the court did so, after considering whether implementation would be possible with reference to counselling and the availability of formula feed, among other things.

That the OSD was to have been implemented prior to the current financial crisis could count against the state, but the reality of the current situation remained a major factor.

She said the ConCourt would also have to consider the implications of any ruling for others in a similar situation.

Chris Bateman

1. Soobramoney v Minister of Health (KwaZulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).
2. The Constitutional Court in July 2002 denied the government leave to appeal against a High Court order compelling it to provide anti-AIDS drugs in state hospitals. Chief Justice Arthur Chaskalson delivered the judgment, saying there was a pressing need to ensure that the loss of lives was prevented. 'The anxiety of the applicants (the Treatment Action Campaign) is understandable because one is dealing here with a deadly disease,' he said. Chaskalson said the order the Constitutional Court had made would require the government to revise its policy. A comprehensive and co-ordinated programme was necessary to help pregnant women combat HIV, and counselling and testing facilities should be provided at hospitals and clinics. He said doctors should be permitted to prescribe nevirapine in consultation with the hospital superintendent.