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CONDOLENCES TO TSHABALALA-MSIMANG?S FAMILY, CHILDREN AND THE AFRICAN NATIONAL CONGRESS

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Recent calls for Dr. Manto Tshabalala-Msimang to face genocide charges have largely been replaced in recent days by pleas for forgiveness from some quarters and muted criticism from others. Nothing has changed except that the former Minister of Health passed away on 16 December, ironically our day of reconciliation.

I never liked her. I liked her policies even less. But I don?t celebrate her death. Like the hundreds of thousands of South Africans who died under her watch, she too leaves behind grieving family members: a husband, two daughters and grandchildren. As a respected HIV clinician so eloquently stated, ?[t]he family should be allowed to grieve in privacy.?

But showing respect for mourners does not, and should not, translate into an airbrushing of history. Understandably, many have called for her entire life?s work to be considered ? not just the nine-year period in which she executed former President Mbeki?s brief with vigour, determination and loyalty. But those nine years do matter, and thus deserve better scrutiny.

In an otherwise excellent obituary (?Legacy on AIDS overshadows high ideals?, 17 December 2009), Tamar Kahn states that Tshabalala-Msimang "determinedly drove through a raft of legislation aimed at making healthcare more accessible to the poor that won her support within the ANC." She continues: "She took on multinational pharmaceutical companies over SA?s right to import and sell cheap generic medicines, increased regulation to cut drug prices, and implemented tough anti-tobacco laws."

It?s important to give credit where credit is due. In respect of Tshabalala-Msimang?s work on anti-tobacco legislation, both domestic and international, I am in agreement with Kahn. But that?s where we part ways. Let me start with the so-called "raft of legislation aimed at making healthcare more accessible to the poor".

I'm not sure to which legislation Kahn is referring, but I can only think of a possible three: the Medicines Amendment Act 90 of 1997 (more on this later), the National Health Amendment Bill, 2008 (which is deeply flawed and lying moribund in Parliament) and the Medical Schemes Amendment Bill, 2008 (a technically sound and progressive bill that is unlikely to become law).

While in the main a good piece of legislation, the National Health Act 61 of 2003 ? which was enacted under Tshabalala-Msimang?s tenure ? is not primarily aimed at increasing access to health care services. Having said that, however, there are some provisions that could have made a significant impact on access had regulations been promulgated to give effect to them.

In this regard, consider the late Minister's failure to determine what constitutes "essential health services", and to give effect to the constitutional right not to be refused emergency medical treatment. That right, which has simply been included in section 5 of the National Health Act without further detail, will remain difficult to realise in the absence of

implementing regulations.

What about generics?

Act 90 of 1997 was introduced under Dr. Dlamini-Zuma's tenure. Tshabalala-Msimang only came into office about 18 months after the Pharmaceutical Manufacturers? Association (PMA) and its members had sought an interdict to prevent former President Mandela from bringing the statute into force. At that point, the law was already on ice.

The PMA and its co-applicants effectively got what they wanted ? the Act was not brought into force until much later, in large part because of delays caused by the Department of Health itself. As the record shows, it was the Treatment Action Campaign?s intervention in that case that ultimately got the PMA to withdraw the action ? on terms that the department never made public.

Thereafter, a further amendment to the Act was taken through Parliament in 2002, with both amendments ? 1997 and 2002 ? being brought into force in 2003. While access to medicines sits at the heart of Act 90 of 1997, the statute and its subsequent amendment have little to do with access to generics before patent expiry.

The sole provision of Act 90 of 1997 relating to the right to import and/or manufacture generic versions of patented medicines was never implemented. Indeed, neither the 2003 General Regulations nor the 2004 Pricing Regulations ? both brought into effect to implement the two amendments ? deals with the issue.

In short, section 15C(a) of the Medicines Act ? the so-called compulsory licensing provision ? remains without implementing regulations. Granted, it is a poorly drafted provision. But not only has it never been implemented, but an existing and much better drafted provision in the Patents Act that could achieve a similar purpose was also never used.

In addition, neither Tshabalala-Msimang nor any other minister of state has even threatened to use section 4 of the Patents Act to license companies to import and/or produce generic medicines. The fact that many companies are now licensed to market generic antiretrovirals has much to do with civil society activism and legal action and nothing to do with Tshabalala-Msimang's work.

Finally, what about regulation to cut drug prices?

Instead of really tackling the drug companies, the Pricing Regulations focused undue attention on pharmacists. The nature of the attack was such that up to today, dispensing fees in private pharmacies remain unregulated. We continue to hear reports of some people being charged uncapped mark-ups in the range of 50%. An attempt to over-regulate has resulted in no regulation.

In addition, we have now inherited a labour-intensive price control system that still fails to get the best prices available. Further, the Pricing Committee does not have the human and financial resources necessary to operate efficiently and effectively. But even if it were to be allocated sufficient resources, it would still lack the regulatory tools necessary for discharging its mandate.

In the end, Tshabalala-Msimang?s legacy as Minister of Health will mean that she will certainly be remembered, but not missed. The truly committed cadre that some amongst us now remember has long since left the building.

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