THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

15 JUNE 2022 .....

DATE SIGNATURE

Case Number: 61844/21

In the matter between:

SOLIDARITY TRADE UNION	First Applicant
ALLIANCE OF SOUTH AFRICAN INDEPENDENT PRACTITIONERS ASSOCIATIONS	Second Applicant
SOUTH AFRICAN PRIVATE PRACTITIONER FORUM	Third Applicant
BARBARA PRETORIUS	Fourth Applicant
CHRISTA ROLLIN	Fifth Applicant
BREAAN SPIES	Sixth Applicant
ANJA HEYNS	Seventh Applicant

and

MINISTER OF HEALTH First Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Second Respondent

DIRECTOR-GENERAL, NATIONAL DEPARTMENT OF HEALTH Third Respondent

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JUDGEMENT

BOKAKO AJ

INTRODUCTION

1. This is an application in terms of Section 172(1) of the Constitution, the applicants seek an order declaring sections 36 to 40[1] of the Health Act

[1] Certificate of need 36. (I) A person may not- (a) establish, construct, modify or acquire a health establishment or health agency; (by increase the number of beds in, or acquire prescribed health technology at, a health establishment or health agency; (c) provide prescribed health services; or (do continue to operate a health establishment or health agency after the expiration of 24 months from the date this Act took effect, without being in possession of a certificate of need. (2) A person who wishes to obtain or renew a certificate of need must apply to the Director-General in the prescribed manner and must pay the prescribed application fee. (3) Before the Director-General issues or renews a certificate of need, he or she must take into account- (a) the need to ensure consistency of health services development in terms of national, provincial and municipal planning; (0, the need to promote an equitable distribution and rationalisation of health services and health care resources, and the need to correct inequities based on racial, gender, economic and geographical factors; (c) the need to promote an appropriate mix of public and private health services; (d) the demographics and epidemiological characteristics of the population to be served; (e) the potential advantages and disadvantages for existing public and private health services and for any affected communities; (f) the need to protect or advance persons or categories of persons designated in terms of the Employment Equity Act, 1998 (Act No. 55 of 1998), within the emerging small, medium and micro-enterprise sector; (g) the potential benefits of research and development with respect to the improvement of health service delivery; (h) the need to ensure that ownership of facilities does not create perverse incentives for health service providers and health workers; (I) if applicable, the quality of health services rendered by the applicant in the past; (j) the probability of the financial sustainability of the health establishment or health agency; (k) the need to ensure the availability and appropriate utilisation of human resources and health technology; (I) whether the private health establishment is for profit or not; and (mi if applicable, compliance with the requirements of a certificate of non- (4) The Director-General may investigate any issue relating to an application for the issue or renewal of a certificate of need and may call for such further information as may be necessary in order to make a decision upon a particular application. compliance. (5) The Director-General may issue or renew a certificate of need subject to- (a) compliance by the holder with national operational norms and standards for (by any condition regarding health establishments and health agencies, as the case may be; and (I) the nature, type or quantum of services to be provided by the health (ii) human resources and diagnostic and therapeutic equipment and the establishment or health agency; deployment of human resources or the use of such equipment; 5 10 15 20 25 30 35 40 45 so 46 No. 26595 GOVERNMENT GAZETTE, 23 JULY 2003 Act No. 61,2003 NATIONAL HEALTH ACT,2003 (iii) public

invalid. These provisions establish and regulate the 'certificate of need' scheme. In terms of the scheme, every health care establishment, health agency, and health care personnel providing prescribed health services must obtain a 'certificate of need' before such a facility or person may operate or provide health care services. The Health Act

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private partnerships; (iv) types of training to be provided by the health establishment or health (v) any criterion contemplated in subsection (3). (6) The Director-General may withdraw a certificate of needagency; and (a) on the recommendation of the Office of Standards Compliance in terms of section 79(7)(6); (b) if the continued operation of the health establishment or the health agency, as the case may be, or the activities of a health care provider or health worker working within the health establishment, constitute a serious risk to public health; (c) if the health establishment or the health agency, as the case may be, or a health care provider or health worker working within the health establishment, is unable or unwilling to comply with minimum operational norms and standards necessary for the health and safety of users; or (d) if the health establishment or the health agency, as the case may be, or a health care provider or health worker working within the health establishment, persistently violates the constitutional rights of users or obstructs the State in fulfilling its obligations to progressively realise the constitutional right of access to health services. (7) If' the Director-General Refuses an application for certificate of need or withdraws a certificate of need the Director-General must within a reasonable time give the applicant or holder, as the casc may be, written reasons for such refusal or withdrawal. Duration of certificate of need 37. A certificate of need is valid for a prescribed period, but such prescribed period may not exceed 20 years. Appeal to Minister against Director-General's decision 38. (1) Any person aggrieved by a decision of the Director-General in terms of section (2) Such appeal must36 may appeal in writing to the Minister against such decision. (a) be lodged within 60 days from the date on which written reasons for the decision were given by the Director-General or such later date as the Minister permits; and (b) set out the grounds of appeal. (3) After considering the grounds of appeal and the Director-General's reasons for the decision, the Minister must as soon as practicable- (a) confirm, set aside or vary the decision; or (bj substitute any other decision for the decision of the Director-General. (4) The Minister must within a reasonable time after reaching a decision give the appellant written reasons for such decision. Regulations relating to certificates of need 39. (1) The Minister may, after consultation with the National Health Council, make regulations relating to- (a) the requirements for the issuing or renewal of a certificate of need (b) the requirements for a certificate of need for health establishments and health (c) the requirements for a certificate of need for health establishments and health agencies existing at the time of commencement of this Act; agencies coming into being after the commencement of this Act; and 5 10 15 20 25 30 35 40 45 48 No. 26595 GOVERNMENT GAZETTE:, 21 JULY 2004 Act No. 61,2003 NATIONAL HEALTH ACT.2003 (d) any other matter relating to the granting of a certificate of need and the inspection and administration of health establishments and health agencies. (2) Regulations made under subsection (1)- (a) must ensure the equitable distribution and rationalisation of health, with special regard to vulnerable groups such as woman, older persons, children 5 and people with disabilities; renewal of certificates of need; issuing and renewal of certificates of need, and the information that must be 10 submitted with such applications; jd) must ensure and promote access to health services and the optimal utilisation of health care resources, with special regard to vulnerable groups such as woman, older persons, children and people with disabilities; (e) must ensure compliance with the provisions of this Act and national 15 operational norms and standards for the delivery of health services; (fl must seek to avoid or prohibit business practices or perverse incentives which adversely affect the costs or quality of health services or the access of users to health services; (8) must avoid or prohibit practices, schemes or arrangements by health care 20 providers or health establishments that directly or indirectly with, violate or undermine good ethical. and professional practice; and (h) must ensure that the quality of health services provided by health establishments and health agencies conforms to the prescribed norms and standards. jb) may prescribe the fees payable in respect of applications for the issuing and (c) must prescribe the formats and procedures to be used in applications for the Offences and penalties in respect of certificate of need 40. (1) Any person who performs any act contemplated in section 36(1) without a certificate of need required in terms of that section is guilty of an offence. (2) Any person convicted of an offence in terms of subsection (1) is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

empowers the Director-General to issue, renew or refuse a certificate of need. If granted, the Director-General is also empowered to impose conditions on the certificate, including the 'nature, type or quantum' of services that may be provided at a health establishment or agency, the deployment of human resources, and the use of diagnostic and therapeutic equipment. The respondents failed to enter into a notice of opposition, the matter was set down on the unopposed roll before this court. I shall deal with this aspect when dealing with preliminary issues.

2. The applicant's primary contention is that the scheme is unconstitutional for four reasons The scheme violates the separation of powers, the scheme is irrational, the scheme prescribes impermissibly vague criteria, the scheme unjustifiably limits several constitutional rights, namely:

3. Section 10 of the Constitution which provides that everyone has inherent human dignity and the right to have their dignity respected and protected. Section 21 of the Constitution which guarantees everyone the right to freedom of movement and the right of every citizen to reside anywhere in the Republic. Section 22 of the Constitution which guarantees every citizen the freedom to choose their trade, occupation or profession freely. Section 25(1) of the Constitution which provides that no person may be deprived of property except in terms of a law of general application and no law may permit the arbitrary deprivation of property. Section 25(2) of the Constitution which provides that property may only be expropriated in terms of a law of general application and subject to compensation that must either be agreed to or decided or approved by a court. Section 27(1) of the Constitution which provides that everyone has the right to have access to health care.

PRELIMINARY ISSUES RAISED BY THE APPLICANTS

4. The applicant initiated its submissions in addressing the court with the following preliminary points.
5. Counsel for the Applicant gave a historical background regarding its attempts in communicating with the respondents without success. Court was also referred to a number of attached correspondence directed to a number of respondents, such did not bear any fruits. It was submitted that, although the government has not opposed the matter, this Court has jurisdiction to hear the application and grant the relief.
6. They referred to the decision in *South Africa Liquor Trading Association v Chairperson, Gauteng Liquor Board*.[2] In this matter, the Constitutional Court confirmed the High Court's declaration of constitutional invalidity against provisions of a statute in circumstances where the government did not oppose the application. Therefore, it is competent for a High Court to declare a statutory provision unconstitutional notwithstanding the absence of the state.
7. However, even though the matter proceeds unopposed, the court should provide reasons. In paragraph 15 of the *South Africa Liquor Trading Association* matter, on behalf of a unanimous Court, O'Regan J held that:

[2] [2006] ZACC 7; 2009 (1) SA 565 (CC).

"No reasons were given by the High Court for its order as it was by consent. It is an undesirable practice for a court not to give reasons where an order is made declaring provisions of an Act of Parliament or provincial legislation to be inconsistent with the Constitution. There are two reasons for this: firstly, given the intense separation of powers concerns that arise whenever a court declares an act of a democratic legislature to be inconsistent with the Constitution, the constitutional principle of accountability requires a court to give its reasons for its order, even where that order is unopposed. Secondly, a decision of that sort requires confirmation by this Court. In determining whether that order should be confirmed, the reasons of the court that made the original order are often of great assistance. Accordingly, once the applicants approached the Constitutional Court seeking confirmation of this order, this Court requested the High Court judge to furnish reasons for his decision, which he did. We are grateful for the assistance."[3]

8. It was submitted that it is a sound principle that the High Court should have jurisdiction to hear an application for constitutional invalidity if unopposed. If this were not the case, the state could effectively prevent the hearing of all constitutional challenges. Such an approach should be avoided as it would deprive individuals of their right to approach a court of law in order to vindicate their constitutional rights.
9. Further submitted that, although the Health Act has been validly promulgated (i.e. it was passed by Parliament and signed by the President), the President of the Republic of South Africa, even though

[3] ibid para 15.

President have not proclaimed the commencement date of the impugned provisions. The provisions are therefore not in operation. Indeed, it is a striking feature of this case that the impugned sections have remained inoperative for nearly two decades. This, notwithstanding, the High Court has jurisdiction to hear the application and grant an order of invalidity. Applicant further referred the court to two decisions of the Constitutional Court which held that it was permissible for a court to declare invalid enacted but not yet operative statutory provisions.

10. In *Khoza v Minister of Social Development*,[4] the Constitutional Court declared unconstitutional statutory provisions that were enacted but had yet to come into operation. On behalf of the Court, Mokgoro J wrote:

"Section 81 of the Constitution provides:

"A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act." The [Legislation] has been signed by the President and is therefore an Act of Parliament within the meaning of section 81 of the Constitution In terms of section 172(2)(a) a court may make an order concerning the constitutional validity of an Act of Parliament. Thus, the fact that [the section] has not yet been brought into force should not remove it from the jurisdiction of this Court to determine its constitutionality. This is

[4] [2004] ZACC 11; 2004 (6) SA 505 (CC).

similar to the position in Canada and the United States where a provision can also be challenged if it has not yet been brought into force."[5]

11. The position was confirmed in the decision of *Doctors for Life v Speaker of the National Assembly*.[6] In upholding the position expressed in *Khoza*, the Constitutional Court noted that:

"section 172(2)(a), which empowers the Court to declare Acts of Parliament invalid, does not distinguish between Acts of Parliament that have been brought into force and those which have not. The Khoza decision added that in the case of a provision that has not yet been brought into force, the legislative process is complete and there is a duly enacted Act of Parliament".[7]

12. Further contending that, the Applicants have legal standing to institute the application and seek the declaration of invalidity.
13. The first to third applicants have standing on three grounds: (i) associations acting in their own interests; (ii) associations acting in the interests of its members; and (iii) the public interest. The fourth to seventh applicants who are health care personnel and owners of health establishments (or agencies) within the meaning of the Health Act have standing to bring the application in their own interest.
14. The founding affidavit was silent on whether any of the applicants participated in the public consultation forums before the promulgation

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5 ibid para 90 (own emphasis).
6 *Doctors for Life International V Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC).
7 ibid para 62.

of the Health Act (which would have been before 2003). But, assuming that they did not participate, this does not deprive the applicants of their standing in this matter.

15. There is no requirement that an applicant participates in the legislative process as a prerequisite to launching a constitutional attack against a statutory provision. Indeed, this is not a requirement set out in section 38 of the Constitution. Moreover, no other provision in the Constitution prescribes such a requirement. And, to Applicant`s knowledge, no court has prescribed such a requirement.
16. Counsel submitted that it would be highly undesirable if such a requirement existed. It would effectively deprive large segments of the population of the opportunity to vindicate their constitutional rights in a court of law. The Constitution's purpose would be undermined, and, as a result, it was contended that the Court should refrain from making such a ruling. Indeed, most constitutional attacks arise only after the state seeks to enforce a statutory provision (which, up to such a point, the individual was probably unaware of the statutory provision).

Service and the Respondents' Failure to Respond

17. The respondents have unaccountably refused to participate in these proceedings. This is despite, without a shadow of a doubt, being aware of the proceedings. Before launching the litigation, the first applicant sent the respondents a comprehensive seventeen-page letter stating

why the impugned provisions were unconstitutional.[8] In the letter, the applicants asked the President not to bring the impugned provisions into operation until the courts have made a final pronouncement on the constitutional validity of the sections.[9] The respondents did not respond to the letter.[10]

18. As a result, the applicants launched the application in December 2021. The application was served via the sheriff. In addition, to ensure publicity, the application was also emailed to multiple people in the Presidency, the National Department of Health, and the State Attorney.[11] A Rule 16A notice was also published.[12] A particularly troubling aspect of this matter is that the State Attorney refused to accept service because the application allegedly did not have a reference number. It is unknown under what rule or policy a State Attorney may refuse service on the basis that it has no reference number. In any event, when a reference number was requested, the State Attorney ignored the request.[13] Yet, despite service and multiple emails, the respondents remained silent. Although not required in terms of the Uniform Rules of Court, the applicants' attorney reached out to the state on two occasions after filing the application.
19. On 10 January 2022, the applicants' attorney emailed the State Attorney to enquire whether the state intended to oppose the

8 FA, "STU4", p01-59.
9 FA, "STU4", p01-76, para 12.2.
10 FA, p01-11, para 14.
11 Service Affidavit, p02-1.
12 Rule16A notice,
13 Service Affidavit, p02-4, para 4.1.

application.[14] Despite being received and read, the State Attorney did not respond.

20. On 31 January 2021, the applicants' attorney sent to the State Attorney another email in which it confirmed its intention to set the matter down on the unopposed roll.[15] The email was read, but no response was forthcoming.

21. The state did not respond to the applicants' notice of intention to set down the matter on the unopposed roll, and it did not respond when the matter was enrolled for hearing on the unopposed roll. It is worth emphasising that all of the state's decisions in the litigation process are exercised pursuant to a public power.[16] Any decision must therefore be lawful, rational and in the public interest. Even if the state does not intend to oppose the application, given its nature, it should have informed the applicants and the Court of such a fact. It would also be preferable perhaps even an obligation under the principle of legality that the state provides its reasons for not opposing the application.

22. It is trite that the state "*bears extra constitutional obligations*" in litigation.[17]

23. Section 34 of the Constitution guarantees everyone the right to access the courts, and every organ of state is bound to comply with the right. Accordingly, the state has a duty not to hinder access to the court. In addition, the state must actively ensure that the litigation is conducted

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14 Service Affidavit, p02-04, para 4.2.

15 Service Affidavit, para 4.3.

16 See Dodek, Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law (2010) *Dalhousie Law Journal* (Volume 33:1) at 18.

17 *Department of Transport v Tasima* [2016] ZACC 39; 2017 (2) SA 622 (CC) para 158.

fairly. Fairness means that the government must comply with time limits and not stand in the way of litigants wishing to bring their dispute to court.

24. In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*,[18] writing on behalf of the majority of the Constitutional Court, Cameron J observed that—

"there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.[19]

25. In *Kalil v Mangaung Metropolitan Municipality*,[20] a unanimous Supreme Court of Appeal held that:

"This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be

18 [2014] ZACC 6; 2014 (3) SA 481 (CC).
19 ibid para 82.
20 [2014] ZASCA 90; 2004 (5) SA 123 (SCA).

coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in Gauteng Gambling Board and another v MEC for Economic Development, Gauteng, *our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional right*."[21]

26. In light of the above, it is inappropriate to excuse the failures of the various state agents. During argument, it was asked whether the state's failure could be excused on account of the fact that the application cited three respondents (instead of one). It was suggested that citing three respondents may have caused each respondent to assume that the other was seized with the application and would respond on behalf of all the respondents. Assuming for the sake of argument that this is what indeed took place, it would not be a good or lawful excuse.
27. The Applicants cited the three respondents because each had a direct and substantial interest in the outcome of the matter. The Minister of Health is responsible for administering the Health Act; the Director-General of the National Department of Health's powers would be adversely affected if the impugned provisions were set aside; the President has the authority to proclaim the scheme's commencement

[21] ibid para 30 (own emphasis).

date. There would have been a material risk of non-joinder if the applicants had not cited each respondent.

28. Further stated that, the Minister of Health is responsible for the Health Act. He is ultimately responsible for defending the legislative scheme in court. There is absolutely no reason why the Minister could have taken the view that other members of the executive government would respond to the application.

29. Further opposing that, the higher duty on the state, as set out above, would have required each of the respondents, at the very least, to enquire who would be responding to the application. Indeed, it would be palpably irrational for the one state entity to merely assume that another state entity would respond to the litigation without making such an enquiry.

BACKGROUND

30. The first applicant is the Solidarity Trade Union (Solidarity), a trade union registered in terms of the Labour Relations Act 66 of 1995. The second applicant is the Alliance of South African Independent Practitioners Association (ASAIPA). The third applicant is the South African Private Practitioners Forums (SAPPF). The fourth to seventh applicants are health care providers and owners of health care establishments (or agencies). The first respondent is the Minister of Health (Minister). The Minister is the cabinet member responsible for the administration of the National Health Act 61 of 2003 (Health Act). The second respondent is the President of the Republic of South Africa (President). The third respondent is the Director-General of the National Department of Health (Director-General). On 30 August 2021,

the Applicant requested the President to provide an undertaking not to proclaim the commencement date of the impugned provisions. The content of the correspondence to the President provided an explanation as to why the scheme was said to be unconstitutional. Such letter was also sent to the Minister and the Director-General. All said Respondents did not respond to the letter.

31. Counsel for the Applicant Ms Margaretha Engelbrecht SC, in detail provided a primary background regarding the issue at hand in that the above mentioned scheme covers the entire health care industry and that the questioned scheme if it comes into operation, every health care establishment, health agency, and health care personnel providing prescribed health services must obtain a certificate of need before such a facility or person may operate or provide health care services. Emphasising that the contemplated scheme suggests that, it is a criminal offence to operate without a valid certificate, that being so, the certificate of need must be viewed and treated as a licence.

32. The core of the scheme is section 36 of the Health Act. The Director-General of the National Department of Health is empowered to issue or renew a certificate. The Director-General is also empowered to impose conditions on the licence. For example, the Director-General may compel “public-private partnerships”, impose conditions on the use of medical equipment, and restrict the “nature, type of quantum” of service provided at a health establishment.

33. The scheme's purpose is to centralise direct control over the entire health care industry in the office of the Minister and Director-General of the National Department of Health. This includes controlling the private health care industry. In addition, the centralisation of the power permits the Minister and Director-General to reallocate and redistribute health care facilities, personnel and equipment.

SUBMISSIONS REGARDING LEGAL STANDING OF THE APPLICANT`S.

34. The Applicant made a number of submissions, which this court will deal with them in summary. In addressing the aspect of the legal standing of the Applicants. Counsel for the Applicants contended as follows: The First Applicant (Solidarity) alluded to a fact that they are entitled and rightly so to bring this application on three grounds, namely (i) as an association in its own interests, (ii) as an association acting in the interests of its members and (iii) in the public interest. The First Applicant has approximately 200 000 members in all occupation fields, including more than 5 200 members in the medical sector. It provides workplace assistance to its members at more than 20 offices countrywide. This includes collective and professional assistance, it also manages the Solidarity Guild for Health Care Practitioners and the Solidarity Occupational Nursing Guild. The Guilds aim to protect health care practitioners, provide opportunities for young professionals to build their careers, and serve as watchdog's overs matters that may adversely affect health care practitioners. The members of the Guilds share a vision of creating safe working environments where health care practitioners can deliver sustainable care to their patients in terms of a fair funding system.
35. Further submitted that the First Applicant is committed to the South African Constitution, and actively seeks to safeguard the constitutional rights of its members, and, more generally, the public. Solidarity also supports a free market economy in terms of which a balance is struck between the various role players in the economy.

36. The Second Applicant is the Alliance of South African Independent Practitioners Association (ASAIPA). This is a national network and representative organisation of 14 Independent Practitioner

Associations across South Africa. It serves the interest of approximately 1000 health practitioners. Its mission includes protecting the interests of independent practitioners in private practice and supporting quality and cost-effective patient healthcare outcomes. For these reasons, ASAIPA has standing to bring the application as an association in its own interests, an association acting in the interests of its members and in the public interest.

37. The Third Respondent SAPPF's objective is to provide a representative and effective platform to support specialist medical practitioners in private practice by optimising service conditions and improving access to healthcare in South Africa. SAPPF has standing to bring the application as an association in its own interests, as an association acting in the interests of its members and in the public interest.
38. The fourth to seventh applicants are health care personnel and owners of health establishments (or agencies) within the meaning of the Health Act. They have standing to bring the application in their own interests.

39. It is imperative that I deal with this aspect of standing at the onset. It is trite that an Applicant who lacked a personal interest would have no 'locus standi', or 'standing', to be before the court.[22] The notion of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication[23].

[22] Bagnall v The Colonial Government (1907) 24 SC 470 ('Bagnall'); Patz v Greene & Co 1907 TS 427, 433–435 ('Patz'); Director of Education v McCagie & Others 1918 AD 616, 621–2, 631 ('McCagie'); Cabinet for the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A), 389I ('Cabinet for the Transitional Government'); Shifidi v Administrator-General for South West Africa & Others 1989 (4) SA (SWA) 631, 637 D-F('Shifidi'); Milani & another v South African Medical and Dental Council & another 1990 (1) SA 899 (T), 902D–903G; Waks en Andere v Jacobs en 'n Ander 1990 (1) SA 913 (T), 917B–919C; Natal Fresh Produce Growers' Association & Others v Agroserve (Pty) Ltd & Others 1990 (4) SA 749 (N), 758G–759D. As to what constitutes sufficient interest, see Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A); Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others 1998 (2) SA 1115 (SCA), 1998 (6) BCLR 671 (SCA).

[23] Marla E Mansfield 'Standing and Ripeness Revisited: The Supreme Court's Hypothetical Barriers' (1992) 68 North Dakota LR 1, 6, citing Steven L Winter 'The Metaphor of Standing and the Problem of Self-Governance' (1988) 40 Stanford LR 1371.

40. Section 38 of the Constitution provides: “Anyone listed in the section has the right to approach a competent court, alleging that the right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group of class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.” The section is to all intents and purposes identical to its predecessor under the interim Constitution, Act, No. 200 of 1993 (“the interim Constitution”). Accordingly, the case law that has developed around section 7(4) of the interim Constitution is directly applicable in respect of the interpretation of section 38 of the Constitution. Cases decided thereunder can be used to give content to section 38 of the Constitution.

41. Section 38 only applies in cases where an infringement of or a threat to a right in the Bill of Rights is alleged. In this regard the applicants stated in their founding papers: “the scheme is unconstitutional for four reasons The scheme violates the separation of powers, the scheme is irrational, the scheme prescribes impermissibly vague criteria, the scheme unjustifiably limits several constitutional rights”. Prior the introduction of the Interim Constitution in 1994 South African courts adopted a restrictive attitude towards the issue of standing. They required a person who approached the court for relief both to have a personal interest in the matter and to have been adversely affected by the wrong alleged. An Applicant who lacked a personal interest would have no 'locus standi', or 'standing', to be before the court.

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42. This court is satisfied that the Applicants stated above are competent and have the right to approach this court. They have laid all the necessary basis in their submissions that certain rights in the Bill of Rights has been infringed or threatened, and this court may grant appropriate relief. It is also indicative that they are persons that are acting in their own interest; they are also acting on behalf of another person who cannot act in their own names; they are also acting as members and in the interest of a group or class of persons; they are also acting in the public interest; and some are associations acting in the interest of its members.

43. The First Applicant (Solidarity) is an association in its own interests, acting in the interests of its members and in the public interest[24]. It also manages the Solidarity Guild for Health Care Practitioners and the Solidarity Occupational Nursing Guild. It seeks to safeguard the constitutional rights of its members. The Second Applicant is the Alliance of South African Independent Practitioners Association (ASAIPA), this is a national network and representative organisation of 14 Independent Practitioner Associations across South Africa. The Third Respondent SAPPF's objective is to provide a representative and effective platform to support specialist medical practitioners in private practice[25]. The fourth to seventh applicants are health care personnel and owners of health establishments (or agencies) within the meaning of the Health Act[26].

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[24] The essence of a class action, or representative action as it is known in many countries, is that one person may bring an action in the interest of a class of persons all having the same cause of action

[25] 1996 (1) SA 283 (C), 301G–H, 1995 (9) BCLR 1191 (C). See also Ferreira (supra) at para 165 (Chaskalson P); Bafokeng Tribe V Impala Platinum Ltd & Others 1999 (3) SA 517 (B), 549E–551A, 1998 (11) BCLR 1373 (B); and National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government & Another 1999 (1) SA 701 (O), 704A–E.

[26] a person acting in his or her own interest. However, in Van Huyssteen v Minister of Environmental Affairs and Tourism Farlam J held that the term 'interest' was 'wide enough' to include the interest of a trustee in maintaining the value of a property. The court seemed to assume that the interest referred to in FC s 38(a) could be broader than that interest referred to at common law.

44. In the matter, Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government[27], it was held that the applicants did have standing to bring an application of behalf of a large number of persons whose social welfare grants had been cancelled by welfare authorities without compliance with the requirements of procedural fairness. Froneman J had no doubt that the suspension of the payment of social benefits without affording the beneficiaries a hearing was an infringement of the constitutional right to just administrative action and that a class action was therefore competent in terms of FC s 38(c).

45. Further noting that in Van Rooyen & Others v The State & Others, a magistrate and the Association of Regional Magistrates of South Africa were held by the High Court to have locus standi in terms of FC s 38(d) to attack the validity of legislation which they contended undermined the independence of the magistrates' courts guaranteed by the Final Constitution. Southwood J held that it was clearly in the public interest that the issue of the independence of the courts should be addressed and resolved[28].

HIGH COURT JURISDICTION TO HEAR AN APPLICATION FOR CONSTITUTIONAL INVALIDITY.

46. Jurisdiction means the power or competence of a court to hear and determine an issue between parties[29]. Applicants submitted that, although the government has not opposed the matter, this court has jurisdiction to hear the application and grant the relief. It is also imperative that I highlight that, the Constitutional Court makes the final

[27] 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E) ('Ngxusa I').
[28] This matter went on to the Constitutional Court for confirmation of the declaration of invalidity and on appeal, but locus standi was not in issue before the Constitutional Court. See Van Rooyen & Others v The State & Others (General Council of the Bar Intervening) 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC).
[29] Gcaba v Minister for Safety and Security [2009] ZACC 26, 2010 (1) SA 238 (CC), 2010 (1) BCLR 35 (CC) at para 74, citing Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) All SA 448 (A), 1950 (2) SA 420 (A) at 424. See further Ewing McDonald & Co Ltd V M&M Products 1991 (1) SA 252 (A) at 256G.

decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

47. In reference to Powers of courts in constitutional matters Our constitution is clear in that according to:

Section 172. (1) When deciding a constitutional matter within its power, a court

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[Par (a) substituted by s. 7 of the Constitution Seventeenth Amendment Act of 2012.]

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

48. It is also imperative to indicate that the jurisdictions of courts are not necessarily limitless. As Watermeyer CJ held, 'limitations may be put upon such power in

relation to territory, subject matter, amount in dispute, parties[30]'. These limitations can be found in statutes[31],the common law,[32] or as is the case for the Constitutional Court, in constitutions[33]. There are a number of writers and scholars subscribing and consenting that, without jurisdiction, a court cannot lawfully decide the merits of a matter. If it does so, its order is unlawful[34]. Hence the Constitutional Court has described jurisdiction as a 'threshold requirement' before the Court can determine anything in respect of a matter, including leave to appeal[35]. Based on the above this court is satisfied that it may adjudicate on this matter.

ISSUES TO BE DETERMINED AND SUBMISSIONS OF THE APPLICANT`S

1. The applicants seek to invalidate the impugned scheme because it unjustifiably infringes several constitutional rights, alluding to a fact that in public interest matters such as these, the Constitution prescribes a "*general and expended approach to standing*".[36] Further submitted that this court is required to adopt a two-stage approach and that this court must first decide whether the scheme

[30] Graaff-Reinet Municipality
[31] The most obvious examples being the jurisdictional limits placed on Magistrates' Courts by the Magistrates' Courts Act 32 of 1944
[32] For instance, under common law a court's jurisdiction is generally limited to the territory of the Republic. See Ewing McDonald (note 5 above) at 256G.
[33] The extent to which statutory or common law limitations on the jurisdiction of courts, especiall Superior Courts, are constitutional is beyond the scope of this article. But, for example, Parliament cannot legislate in a manner that undermines the independence of the judiciary by passing laws that contradict constitutional provisions protecting the independence of the judiciary. It similarly cannot undertake to regulate or usurp functions that fall within the pre-eminent domain of the judiciary. Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law V President of Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of Republic of South Africa & Others [2011] ZACC 23, 2011 (5) SA 388 (CC), 2011 (10) BCLR 1017 (CC) at para 68.
[34] 2 The majority of the Constitutional Court held in Department of Transport v Tasima (Pty) Limited [2016] ZACC 39, 2017 (1) BCLR 1 (CC), 2017 (2) SA 622 (CC) that a court order, even if unlawfully issued, is valid and binding until set aside. The Constitutional Court (at para 190) explained that older case law, which held that an order issued by a court without jurisdiction was a nullity, considered unlawful orders in the context of res judicata (that is, when that unlawful order was being considered by another court).
[35] S v Boesak [2000] ZACC 25, 2001 (1) BCLR 36, 2001 (1) SA 912 (CC) at para 11; Fraser v ABSA Bank Limited [2006] ZACC 24, 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 35; Loureiro v Imvula Quality Protection (Pty) Ltd [2014] ZACC 4, 2014 (5) BCLR 511 (CC), 2014 (3) SA 394 (CC) at para 31.
[36] *Ferreira v Levin NO v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC) para 229.

infringes constitutional rights. If the Court finds that the scheme infringes constitutional right(s), the court must determine whether the infringement is reasonable and justifiable in terms of section 36 of the Constitution.[37] In addition, if the court concludes that the statutory provisions are an unjustifiable limitation, the court must declare the statutory provisions invalid and order a just and equitable remedy.[38]

The scheme infringes six constitutional rights.

Human dignity (section 10)

50. In that Section 10 of the Constitution declares that "*every person has human dignity and has the right to have their human dignity respect*". The case law on section 10 provides that: The right to human dignity is the right to be treated with inherent and infinite worth, which includes each person's right to be treated as an individual capable of setting and pursuing their own goals and ambitions.[39] Section 10 is therefore the foundation of many other rights.[40] The obligation of the state is to respect the decisions that each person has made for themselves. The state must treat each person as ends in themselves and not merely as a means to an end.[41] This right also safeguards a person's reputation built upon their own individual achievements.[42] Therefore, the

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37 See *South African National Defence Union v Minister of Defence* [1999] ZACC7; 1999 (4) SA 469 (CC) para 18; *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC) paras 26-27.

38 Section 172(1) of the Constitution provides:

"When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with eh Constitution is invalid to the extent of its inconsistency.

(b) *may make any order that is just and equitable….".*

39 *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC) para 144.

40 Ibid.

41 Justice LWH Ackermann `The Legal Nature of the South African Constitutional Revolution' (2004) 4 New Zealand Law Review.

42 *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) para 27.

scheme impairs the human dignity of health care personnel. This is because the impugned provisions vest in the state the power to override the choices that health care personnel have made for themselves and their families.

51. This includes choices regarding the profession they joined, their decision to work in the private sector, their decision to pursue the operation of a business in the private sector, their decision regarding the nature, type and quantity of work they will perform, and their choice not to seek to work for or in partnership with the state. The scheme also tramples on the choices that healthcare personnel have made for their own lives. This includes where they want to reside, the places they wish to send their children to school, and the communities to which they belong.

52. It was also submitted that the said scheme also undermines the professional reputations that health care personnel have built for themselves in their community. Health care personnel often trade on their reputations. The scheme permits the Director-General to undermine the goodwill and reputation of health care personnel in their chosen community on which health care personnel trade in the private sector by relocating them to new areas where they are unknown.

53. Further alluded that the scheme gives zero regard for the choices that healthcare personnel have made and would want to make in the future. It is telling that section 36 of the Health Act does not require the Director-General to consider how a certificate of need will impact and override the wishes of health care personnel. In essence, the scheme permits the Director-General to view healthcare personnel as inanimate pawns in pursuit of the state's objectives. This is a violation of section 10 of the Constitution.

The right to freedom of movement and residence (section 21)

54. Section 21(3) of the Constitution safeguards the right of citizens to reside anywhere in the Republic. This means that each person is entitled to choose their place of residence. The scheme impairs section 21 of the Constitution. The impugned scheme empowers the Director-General to compel health care personnel to work (and therefore reside) in places against their choice.

The right to choose a trade, occupation and profession (section 22)

55. Section 22 of the Constitution guarantees the right of every citizen to "choose their trade, occupation or profession freely." While the state is permitted to regulate the practice of an occupation or a profession, the constitutional right is impaired when the state takes measures that restrict (i) access to an occupation, profession and trade and (ii) the choices that persons can make in the fulfilment of their occupation, profession and trade.[43]. The right to trade, profession and occupation is closely linked to the right to human dignity. This is because section 22 does not only encompass the right to make a living. Section 22 includes the freedom to choose to pursue a vocation that every person believes they are prepared to undertake as a profession and make that

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[43] In *JR 2013 Investments CC and Others V Minister of Safety and Security and Others* 1997 (7) BCLR 925 (E) at 930, the High Court, per Jones J held that section 22 must be interpreted within its historical context:
"In the pre-Constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions upon where and for how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens of the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs. Any lawful pursuit which qualifies as a trade, occupation or profession is now open to all in the sense that all are free to choose it."

vocation the basis of their life and personal existence.[44] This is true for many health care personnel who choose healthcare because of their personal desire to heal and otherwise assist people in our community. Therefore, this scheme strikes at the heart of section 22 of the Constitution. The entire purpose of the scheme is to relocate health establishments, health agencies, and health care practitioners to new locations and institutions and restrict the type and quantity of health services that such a facility and persons may offer to their patients. The scheme also contemplates the deprivation of property used to pursue the vocation. This removes the choices they have enjoyed in the past, and denies them the freedoms enjoyed by the members of virtually all other occupations and professions.

56. To demonstrate the severity of the infringement on the right, it is worth noting that there is no other trade and profession in the private sector that is subject to this degree of control and restriction. To compound matters, the Director-General is given the power to refuse to issue a certificate of a need. They accordingly have the power to prevent an entity or person from conducting their chosen trade. This reduces competition in the private healthcare sector.

57. In the circumstances, the right is infringed to the extent that people may only practice their chosen trade, occupation or profession to the extent permitted by law.

The right not to be arbitrarily deprived of property (section 25(1))

[44] *The Pharmacy Case* 7 *B Verf GE* 377 (1958). In this matter, the German Federal Constitutional Court emphasised the connection between the right to choose a trade, occupation and profession and the value of individual autonomy. In this smatter, it was held that work "shapes and completes the individual over a lifetime of devoted activity … it is the foundation of a person's existence".

58. Section 25(1) of the Constitution provides that no person may be deprived of property except in terms of a law of general application, and no law may permit the arbitrary deprivation of property. A deprivation occurs when property (including the rights therein) is taken away or significantly interfered with.[45] This includes extinguishing a right previously enjoyed.[46] The deprivation of this kind is only lawful if it can be shown not to be arbitrary. The scheme impairs section 25(1) of the Constitution. It is palpably arbitrary. A distinct feature of the scheme which is regulated through the issuing and withholding of licences is that it does not protect vested rights (i.e. rights that existed at the time the scheme commenced). The scheme permits the Director-General to take away vested rights. It is arbitrary and irrational to insist that health care establishments, agencies and health care personnel comply with after-the-fact requirements, failing which these establishments, agencies and personnel will have to stop practising. This is particularly irrational and arbitrary. It cannot be the purpose of (or the effect of) the Health Act to reduce the number of health facilities and personnel. Health establishments and agents require the property to perform health services. This includes premises and medical equipment. The scheme however threatens to deprive health establishments and agents of their premises and equipment, for example, the Director-General would impair the right if they refuse to renew a certificate of need thereby leaving the establishment and agency with fixed property and equipment that it cannot use. The right is also unduly impaired if the Director-General restricts the rights of

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45 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others V Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng,* [2004] ZACC 9; 2005 (1) SA 530 (CC) at para 32; *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC) para 48.

46 *First National Bank of SA Ltd V Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC) para 57.

an operator to provide particular types and quantities of health services to patients.

59. The deprivation is also arbitrary because the scheme is impermissibly vague. If the law is unclear about when, why and the extent to which property may be deprived which is the case in this matter the law must be considered arbitrary because it will inevitably give rise to arbitrary outcomes.

Impermissible expropriation of property (section 25(2))

60. Section 25(2) of the Constitution provides that property may not be expropriated without compensation. In addition, section 25(2) provides that compensation must either be agreed or determined by a court. The scheme permits the Director-General to compel health establishments, health agents and health care providers in the private sector to share their human resources and diagnostic and therapeutic requirement with the public sector. The scheme also empowers the Director-General to order the creation of public-private partnerships. Therefore, the scheme violates section 25(2) of the Constitution for two reasons.

61. First, the Health Act does not contemplate providing affected facilities and persons just and equitable compensation for the use of their property and other resources. Secondly, the scheme does not contemplate an agreement process or a referral of the matter to the courts to determine just an equitable compensation.

Right to access healthcare (section 27(1))

62. Section 27(1) of the Constitution guarantees everyone the right to access healthcare services, which includes safeguarding existing access to health care

services. This constitutional right is the most important right to the dispute at hand. The Director-General will impair the constitutional right if it decides not to renew a certificate of a health care practitioner or establishment. It will take away an existing patient's right to choose the health care establishment and health care provider of their choice.

63. The applicants understand the government's intention to make healthcare services progressively available to a greater portion of the South African population. But that constitutional requirement cannot be met by depriving those who enjoy access to healthcare services of their existing rights. It is no use reducing the effectiveness of that which is working in a purported attempt to improve healthcare services in areas where it is not working. That is not an improvement of healthcare services; it is only the shuffling of the cards already there. This will, in all likelihood, result in the lowering of health care quality in an area.

64. In this way, section 36 to 40 is inconsistent with the purposes of the National Health Act, which is intended to realise healthcare services progressively to larger portions of South African society. It is worth noting that the preamble of the Health Act provides that one of its purposes is to realise the right to healthcare progressively.

65. In the end, the government must motivate young, intelligent people to enter the healthcare industry. They must want to be employed in an industry that assists the government in realising section 27(1) of the Constitution. But, when government imposes a scheme that has all of the problems identified in the founding affidavit, it disincentives new entry into the profession. It operates

directly against the attainment of greater healthcare services for the community. The court should take notice of the fact that doctors are leaving the country. The government cannot promote the right to healthcare by making it undesirable for existing practitioners and new practitioners to render healthcare services.

66. It is telling that the scheme makes no provision for existing health care users of a health care establishment or agency to participate in the decision-making process on whether to issue or renew a certificate of need.

The Scheme <u>Unjustifiably</u> Limits the Constitutional Rights.

Section 36(1) of the Constitution provides:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including, —

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

67. The fact that the court must consider all relevant factors means that section 36 limitation enquiry is a global judgment on proportionality.[47] The courts are

[47] *S v Manamela* [2000] ZACC 5; 2000 (3) SA 1 (CC) para 32.

required to compare, on the one hand, the purpose, effects and importance of the infringing legislation on the one side, and, on the other side, the nature and adverse effects caused by the legislation to constitutional rights. The more substantial the inroad into the constitutional rights, the more persuasive the grounds of justification must be.[48]

68. The state bears the onus of demonstrating that the rights-infringing legislation is justifiable.[49]

69. Even though the state does not oppose the application, the court must nevertheless consider whether the scheme is justifiable based on the information provided.[50] Even so, only a cursory form of limitation analysis needs to be undertaken when the state has put up a half-hearted or inadequate (or no) case for justification.[51] In such cases, the court does not need to devote much energy to the issue.[52] After all, it is a strong indication that the law is unjustifiable when the state is unwilling to defend its legislation. In this matter, the limitations of the rights are unjustifiable because:

70. On the one hand, the scheme impairs the core of several constitutional rights for the reasons set out above. The limitations of the constitutional rights are severe, permanent and extensive whilst on the other hand, for all the reasons set out in the in their papers, there are multiple reasons why the limits on the

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48 *S v Bhulwana* [1995] ZACC 11; 1996 (1) SA 38 (CC) para 18.

49 *Makwanyane*, surpa, para 102.

50 See *National Coalition for Gay and Lesbian Equality V Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 SA (CC).

51 See *S v Niemand* [2001] ZACC 11; 2002 (1) SA 21 (CC) para 26; *Moise v Greater Germiston Transition Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC) para 21; *Johncom Media Investments V M* [2009] ZACC 5; 2009 (4) SA 7 (CC) para 25

52 Currie & de Waal, The Bill of Rights Handbook (Juta, Sixth Edition, 2013) p 154 (which references the decision of *Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC)* para 26 where the Constitutional Court accepted the state's concession that the law was unjustifiable and therefore only dealt with the issue in one sentence).

constitutional rights are not reasonable and justifiable given the purported purpose of the scheme. The means to achieve the scheme is irrational. It is not rational to proclaim the desire to increase healthcare access and then promulgate legislation that operates against that purpose. The Health Act is intended to promote access to healthcare and realise the right progressively over time. The scheme has the opposite effect. The scheme cannot achieve its purported objective for the reasons set out in the founding affidavit.

71. If the court concludes that the scheme is rational, there are less restrictive means to achieve the scheme's purpose. For example, the state has failed to improve the work conditions at healthcare facilities or financially incentivise healthcare personnel to relocate to under-serviced areas which is done in other countries. The state has also persistently refused to issue work visas to foreign doctors.

72. The scheme also fails to properly regard the nature of the constitutional rights involved and the severe way in which the scheme impairs them. At the very least, the scheme is unconstitutional because the Act does not require the Director-General to consider whether the issuing or renewal of a certificate of needs impacts the constitutional rights mentioned above. It is a striking feature of the scheme that the criteria listed in section 36(2) of the Health Act and the conditions listed in section 36(5) do not require the decision-maker to consider the rights and interests of health establishments, health agents and health care personnel. As it reads, sections 36(2) and 35(5) do not require the Director-General to regard the family and community ties of a health care personnel or the property invested by a health establishment or agency. In this matter, the fourth to seventh applicants who are health care personnel have provided this

court accounts of how this scheme may adversely affect their practices and community and family life.

73. The scheme also makes no provision for the Director-General to consider the constitutional rights of existing health care users. The scheme provides no appropriate protection for the rights of existing patients.

74. There is also a problem with the constitutional division of powers between the national and provincial spheres of government. Schedule 4 of the Constitution provides that health services, are functional areas of concurrent national and provincial legislative competence. Yet, the scheme ignores the powers of the provinces. Instead, it gives the Director-General the exclusive power to allocate resources in the provinces without regard to a province's views and preferences.

75. The scheme disregards the constitutional and statutory powers and responsibilities of the provinces. The scheme excludes the provinces from the decision-making. It does not even require the Director-General to consider the preferences of a province or consider their experience or needs. In other words, the provinces have no say in whether a certificate of need is issued or renewed, including the conditions on which the certificate is issued.

76. The scheme is irrational for ignoring the views of the provinces given that the provinces play a crucial role in the delivery of healthcare services. In many ways, the provinces are best suited to identify where resources are needed.

77. As a final submission in our constitutional scheme, it is open for the state to demonstrate that an impairment of a constitutional right is reasonable and justifiable. But herein lies the rub. The applicants have made out a case for

constitutional invalidity. However, the respondents have not responded to the application. It has not done so in the proceedings. The state has decided not to participate in the proceedings, and to put forward evidence to show why the severe limitations on the above mentioned constitutional rights is justifiable in an open and democratic society. In the absence of a justification offered by the state, the applicants contend that it must follow that the infringement of the rights is not justifiable.

Remedy as contemplated by the Applicants

78. Under section 172(1)(a) of the Constitution, when a court hears a constitutional matter, it must "*declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency*". The Constitutional Court has observed that section 172(1)(a) is a mandatory provision and does not provide the courts with a discretion.[53] In other words, if the court finds that section 36 to 40 of the Health Act is unconstitutional because it unjustifiably impairs constitutional rights, it must declare the provisions invalid.

79. For the reasons set out above, sections 36 to 40 of the Health Act are inconsistent with the Constitution in their entirety. Therefore, this Court is therefore required to make an order of invalidity.

80. The next question is the issue of the remedy. In terms of section 172(1) of the Constitution, the court is empowered to make any just and equitable remedy.

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[53] *Dawood v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC) para 59. In this matter, the Constitutional Court held that

"It is clear from this provision [i.e. section 172 of the Constitution] that a court is obliged, once it is having concluded that a provision of a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution. In addition, the court may also make any order that it considers just and equitable including an order suspending the declaration of invalidity for some time".

81. In this matter, the most appropriate remedy is an order severing sections 36 to 40 from the Health Act.[54] This is because: Sections 36 to 40 of the Health Act must be read together, and they cannot be untangled from one another. Section 36 is the heart of the scheme. If that provision is struck down, sections 37 to 40 will have no purpose and must accordingly suffer the same fate. Sections 36 to 40 of the Health Act can be struck from the Health Act without affecting any other provision. In other words, "*the good is not dependent on the bad*",[55] meaning the impugned sections can be cut from the Health Act without adversely affecting the operation, administration and purpose of the remainder of the Health Act. This is clear from the fact that impugned sections are not yet in operation, and the other provisions in the Health Act have operated without the scheme being in place.

82. In this case, it is impossible to sever some words and add others to the impugned provisions. It is not possible to attempt "*textual surgery*" in an effort to save the impugned provisions.[56] And, it is submitted, the court would not be able to undertake such an exercise given the state has put up no submissions on the appropriate remedy. The scheme as a whole is unconstitutional. It is therefore necessary to strike down sections 36 to 40 of the Health Act in its entirety.

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54 The test for severance has two parts: first, is it possible to sever the invalid provisions and second, if so, does what remains give effect to the purpose of legislative scheme'. (See *Coetzee v Government of the Republic of South Africa* [1995] ZACC 7; 1005 (4) SA 631 (CC) para 16).

55 *Coetzee,* supra, para 16.

56 *Case v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC) para 71. In this matter, the Constitutional Court invalidated the provision as a whole because:

For this Court to attempt that textual surgery would entail it departing from its assigned role under our Constitution. It is trite but true that our role is to review, rather than re-draft, legislation. This Court has already had occasion to caution against judicial arrogation of an essentially legislative function in the guise of severance".

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83. Since the President has not yet proclaimed the commencement of the impugned provisions, the Honourable Court does not need to be concerned with the practical effect of declaring invalid the provisions. Indeed, in terms of section 167(5) of the Constitution, a declaration of invalidity has no effect until confirmed by the Constitutional Court.[57] To facilitate this process, Rule 16(1) of the Rules of the Constitutional Court require the Registrar of the court which has made an order of constitutional invalidity to lodge a copy of the order with the Registrar of the Constitutional Court within 15 days.[58] Therefore, while not strictly necessary, it is convenient that such direction be made as part of the order. They concluded in that Sections 36 to 40 of the Health Act are unconstitutional. The applicants accordingly seek an order in the following terms:

1. It is declared that sections 36 to 40 of the National Health Act 61 of 2003 are invalid in their entirety and are consequently severed from the Act.

2. In terms of section 167(5) of the Constitution and Rule 16 of the Rules of the Constitutional Court, the Registrar of this Court is directed to lodge a copy of the order and judgment, within 15 days of the order, with the Registrar of the Constitutional Court.

3. The respondents are ordered to pay the applicants' costs, including the costs of two counsel.

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57 Section 167(5) of the Constitution provides:

"The Constitutional Court makes the final decision on whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force".

58 Rule 16(1) of the Constitutional Court Rules provides:
"The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such an order."

84. In respect of costs the Applicant contended that even though the matter proceeded unopposed, it is appropriate to award the applicants their costs. The applicants have raised constitutional issues of great importance. And, it is submitted, the applicants have been successful in that regard. The general rule that the costs should follow the result must be applied in this case. There is no reason why an applicant who has successfully pursued constitutional relief against the state should not be awarded their costs even though it proceeded unopposed.[59] Another reason for the costs order is the respondents' attitude to this litigation. This is no ordinary application. The applicants raised serious and compelling arguments why the impugned provisions are unconstitutional. The respondent's silence is unacceptable in the circumstances. An application of this nature should not proceed without the state's views (even if that entails the state providing reasons why it does not oppose the litigation). Therefore, it is appropriate for the Honourable Court to show its displeasure with the costs order.

ANALYSIS

85. It became clear from the papers that there is no single correspondence nor relevant papers filed by the Respondents. Section 34 of the Constitution guarantees everyone the right to access the courts, and every organ of state is bound to comply with the right. Accordingly, the state has a duty not to hinder access to the court. In addition, the state must actively ensure that the litigation is conducted fairly.

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[59] See *Premier of the Western Cape Province v the Public Protector* [2022] ZASCA 16 (7 February 2022) para 42. In this matter, the SCA awarded costs despite the fact that the matter was unopposed by the respondents. This was because the applicant had to protects her constitutional interests through litigation (which she succeeded with), and, in the circumstances, the SCA found that "there is therefore no basis for a departure from the general rule that costs follow the result".

86. Fairness means that the government must comply with time limits and not stand in the way of litigants wishing to bring their dispute to court. The state`s conduct in this case its indescribable, this speaks of a disapproval for people and process to access courts. The first applicant sent the respondents a comprehensive seventeen-page letter stating why the impugned provisions were unconstitutional. In the letter, the applicants asked the President not to bring the impugned provisions into operation until the courts have made a final pronouncement on the constitutional validity of the sections. The respondents did not respond to the letter.

87. Organs of state are not free to litigate as they please The Constitution has subordinated them to what Cameron J, in Van Niekerk v Pretoria City Council called 'a new regimen of openness and fair dealing with the public'. The very purpose of their existence is to further the public interest and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust. It is expected of organs of state that they behave honourably that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so *in casu* the Applicants seek to invalidate the impugned scheme because it unjustifiably infringes several constitutional rights.

88. This court finds it disturbing that the State Attorney refused to accept service because the application allegedly did not have a reference number. State Attorney plays a vital role and or very important function in reference to rule 4(9), service of court process on the State and on

ministers and deputy ministers in the national government as representative of the departments which they head may legitimately take place by service on the State Attorney. If that office is dysfunctional, a court cannot be confident that the process in question has come to the attention of responsible officers within the department concerned.

89. There are extensive analysis and number of judgments dealing with the conduct of public officials This court will not dwell much on the aspect of the State organs failure to execute their functions. To highlight a few: Tuchten J in 2013 in Tasima (Pty) Ltd v Department of Transport and Others[60].

90. In 2005 in Kate v MEC for Department of Welfare, Eastern Cape Froneman J expressed the view that Individual public responsibility, in contrast to nominal political responsibility, could be enhanced by forcing individual public officials to explain and account for their own actions, as parties to the litigation[61]

91. Bertelsman J in 2014 in Minister of Rural Development and Land Reform v Griffo Trading CC; In Re: Griffo Trading CC v Minister of Rural Development and Land Reform[62] . It is clear that the applicant department has been exceptionally poorly served by the legal representatives it is obliged to employ in terms of section 3 of the State Attorney Act, 56 of 1957. Nothing has changed since the court drew the

[60] 2013 (4) SA 134 (GNP)
[61] 2005 (1) SA 141 SE at [11]
[62] (12440/11) [2014] ZAGPPHC 666 (2 September 2014

completely unacceptable level of service delivery in the S A's office to the attention of the responsible authorities in the above quotation.

92. In the unforgettable Nyathi decision, Madala J said the following about the connection between our democracy and the manner in which state functionaries performed their functions:

"Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That, in my view, means at the very least that there should be strict compliance with court orders.

93. The state's function is to execute its duties in terms of the relevant legislation. The failure of the state to edify its functionaries about the very legislation which governs their duties is unacceptable. It may be true that the problem lies with the officials who do not know what their responsibilities are and, regrettably, with legal representatives who do not know who the responsible functionaries are. However, this ignorance is no justification for their failings. It may explain the cause of the problem, but it constitutes neither a good excuse nor a justification thereof and cannot serve to protect the state from being held responsible".

94. The provisions 36 - 40 of the National Health Act has a purpose to meet the government's constitutional obligations of progressive and access to healthcare. Health legislation creates certainty with respect to what is expected from various role-players and what the user of health services can expect. More generally it plays an essential public health role, 'which translates into public health terms the idea of making health accessible to all. It is clear that the said scheme covers the entire health care industry. I'm of a similar view with the Applicant in that should the questioned scheme come into operation, every health care establishment, health agency, and health care personnel providing prescribed health services must obtain a certificate of need before such a facility or person may operate or provide health care services. The scheme is also clear in that failure to comply or adhere to the scheme, it is a criminal offence to operate without a valid certificate. This being the case, the certificate of need must be viewed and treated as a licence.

95. Having that in mind it's important not to lose focus that health legislation creates certainty with respect to what is expected from various role-players and what the user of health services can expect. This court is also cogent that whilst it's imperative to take reasonable legislative measures to ensure that everyone has access to health care services, such ought to be within the ambit of our constitution, making health care legislation is to ensure equitable access, and explicit constitutional obligation must be reasonable and justifiable. However, there are anticipated limitations as submitted by the Applicant`s in that legislation plays a critical role in achieving health reform goals, and has a multi-

purposed and dialogic relationship with current policies. On the one hand, legislation depends on the development of policy to guide its nature and content. It is also notable that a legislation can also “express and formulate health policies”, and through statutes and regulations it can shape the way that health policy is translated into health programmes and services, also legislation plays a distinct role from policy, and serves to coordinate health sector activities, and to create a ‘management and administrative framework for the development of health care systems’.

96. The basis of Section 36-40 is the classification of health establishments into categories and then the introduction of a 'certificate of need’ for all such establishments. This is intended to allow for all health establishments, whether public or private, to be registered by the Department of Health. The controversial element is that these certificate of need is intended to ensure that such establishments are distributed equitably. As argued by the Applicant not only will all new or enlarged facilities have to obtain this certificate, but all established facilities would need to obtain this certificate. Such certificates will be valid for a prescribed period, not exceeding 20 years. Section 36(3) prescribes the factors that the Director-General must take into account when deciding whether or not to issue or renew this certificate

97. This court shares the sentiments of the Applicants in that, the Director-General is given the power to refuse to issue a certificate of a need. They accordingly have the power to prevent an entity or person from conducting their chosen trade. This reduces competition in the private

healthcare sector. In the circumstances, the right is infringed to the extent that people may only practice their chosen trade, occupation or profession to the extent permitted by law. As correctly stated by the Applicant that The right not to be arbitrarily deprived of property (section 25(1)). Section 25(1) of the Constitution provides that no person may be deprived of property except in terms of a law of general application, and no law may permit the arbitrary deprivation of property. A deprivation occurs when property (including the rights therein) is taken away or significantly interfered with.[63] This includes extinguishing a right previously enjoyed.[64] The deprivation of this kind is only lawful if it can be shown not to be arbitrary.

98. It is common amongst health sector that the said legislation is s controversial aspect related to the implementation of the National Health Act was the issuing of a Promulgation Notice, bringing section 36 to 40 of the Act into effect, which was issued by the President on 31 March 2014. Sections 36 to 40 deal with the certificate of need for health establishments. Read together, the sections criminalised the provision of health services without a properly issued certificate of need. Such is not practical in that the absence of Regulations, makes it impossible how these provisions would be implemented. Number of Health sectors, and practitioners are among the few health providers and facilities that

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63 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others V Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng,* [2004] ZACC 9; 2005 (1) SA 530 (CC) at para 32; *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC) para 48.

64 *First National Bank of SA Ltd V Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC) para 57.

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would require anything like a certificate of need before they can be opened, moved or altered, this is heavily contested.

99. By July 2014, the Director-General of Health was indicating that the Department would delay implementation in order to craft such Regulations[65]. Despite such assurances, the South African Dental Association and the Hospital Association of South Africa brought the issue to the attention of the Presidency, noting that the promulgation was premature. The President then approached the Constitutional Court directly to declare the Proclamation invalid in terms of section 172(1)(a) of the Constitution. The applicants maintained that the decision to bring the sections into operation was as a result of a bona fide error, and was thus irrational in law. The respondents supported the relief sought. The unanimous court granted direct access, as well as the relief to set the Proclamation aside, as the legislative process to remedy the situation would have been lengthy and burdensome.[66] The court held that the premature decision to issue the Proclamation was not rationally connected to the implementation of a national regulatory scheme for healthcare, or any other governmental objective, echoing its earlier decision on a similar issue in Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others [2000] ZACC 1.

[65] Kahn T. Plans to regulate where doctors work put on ice. Business Day, 30 July 2015. URL: http://www.bdlive.co.za/national/ health/2014/07/30/plans-to-regulate-where-doctors-workput-on-ice

[66] President of the Republic of South Africa and Others v South African Dental Association and Another [2015] ZACC 2 (CCT 201/14).

100. Also a recent Constitutional Court challenge has resulted in similar 'need' provisions being declared ultra vires[67]. General Regulation 18 to the Medicines and Related Substances Act was intended to assist the Director-General in deciding whether an applicant for a dispensing licence had shown the 'need' for such a service in a particular setting. J. Ngcobo noted that government's intended purpose for these provisions was to "enhance the scope for efficient utilisation of resources … [and] allow the government to plan and implement its health programme more effectively" (paragraph 113). Noting also that the provisions of Regulation 18 that related to the demonstration of 'need' were consistent with the National Drug Policy, the Constitutional Court nonetheless found them ultra vires, as the policy was "not discernible from the Medicines Act" (paragraph 119). The parallels with the certificate are clear, although the policy intent is perhaps more clearly stated in the Health Act itself.

101. It may be argued that this scheme gives the Minister wide-ranging powers to improve the quality of care in both the public and private sectors, it is imperative though such powers are constitutional. This court is also in support that the Director-General will prejudice the constitutional right if it decides not to renew a certificate of a health care practitioner or establishment. It will take away an existing patient's right

[67] The Affordable Medicines Trust v the Minister of Health and Others 2004(6) SA 387 (T) (the High Court judgment) and 2005 JOL 13932 (CC) (The Constitutional Court judgment). URL: http://www.constitutionalcourt.org.za/uhtbin/hyperionimage/J-CCT27-04

to choose the health care establishment and health care provider of their choice.

102. It is also evident that section 36 (3). intentions may force medical practitioners to practise where they do not wish to, and force health establishments to move to areas that are not compatible. As correctly stated by the Applicants that they understand the government's intention to make healthcare services progressively available to a greater portion of the South African population, but that constitutional requirement cannot be met by depriving those who enjoy access to healthcare services of their existing rights. It is no use reducing the effectiveness of that which is working in a purported attempt to improve healthcare services in areas where it is not working. That is not an improvement of healthcare services; it is only the shuffling of the cards already there. This will, in all likelihood, result in the lowering of health care quality in an area.

103. Whilst this court takes a view that the governments approach is to ensure that health facilities are distributed evenly throughout the country to enable equitable access to health services for everyone. Section 36(1)(b) of the National Health Act stipulates that "a person may not increase the number of beds in, or acquire prescribed health technology at, a health establishment or health agency without being in possession of a certificate of need". However, Regulations to bring this section into effect have not been published. One reason for this is the lack of capacity to administer a Certificate of needs at this point in time. The Director-General must, in compliance with section 78 of the National Health Act,

establish an Office of Standards Compliance, which inter alia must advise the Minister of Health on norms and standards for such processes.

104. Another possible reason for lack of visible implementation in this area may also relate to the fact that this type of policy may conflict with the principles of a free market economy. Such type of restrictions enlisted by a certificate of need could thus constitute an illegal barrier to market entry.

105. I do find and support submissions made by the Applicant`s in that *The right to choose a trade, occupation and profession (section 22) is of paramount importance.* Section 22 of the Constitution guarantees the right of every citizen to "choose their trade, occupation or profession freely." While the state is permitted to regulate the practice of an occupation or a profession, the constitutional right is impaired when the state takes measures that restrict (i) access to an occupation, profession and trade and (ii) the choices that persons can make in the fulfilment of their occupation, profession and trade.[68]

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[68] In *JR 2013 Investments CC and Others V Minister of Safety and Security and Others* 1997 (7) BCLR 925 (E) at 930, the High Court, per Jones J held that section 22 must be interpreted within its historical context:

> "In the pre-Constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions upon where and for how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens of the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs. Any lawful pursuit which qualifies as a trade, occupation or profession is now open to all in the sense that all are free to choose it."

CONCLUSION

106. However, and more significantly, I am convinced that it is permissible for the Applicant to contest the said section of the Act, in that section 36 to 40 is inconsistent with the purposes of the National Health Act, which is intended to realise healthcare services progressively to larger portions of South African society. Therefore, the Respondents must provide sufficient response to cure the operation of a legislative scheme.

107. It must, accordingly, follow that the On 15 July 2021 as submitted that the Minister published draft Regulations Relating to Certificate of Need for Health Establishments and Health Agencies in GN 528 of Government Gazette 44714 of 15 July 2021. The draft is attached and marked "STU4". The draft regulations only cover health establishments and health agencies. It does not cover health care personnel. It also does not cover entities providing municipal health services. It is unclear why the draft only speaks to health establishments and agencies and not health care personnel and entities that provide municipal health services. Although respondents are of the view that the scheme covers health care providers, such lack of clarity creates uncertainties. Distinguishing health establishments and agencies, on the other hand, and health care personnel, on the other is of importance.

108. Section 36(2) of the Act empowers the Director-General of the National Department of Health to issue or renew a certificate of need. A person or entity wishing to obtain or renew a certificate of need must pay the prescribed application fee. Before the Director-General issues or renews

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a certificate of need, section 36(3) provides that the Director-General 'must take into account' mandatory considerations as stipulated in the Act.

109. It is clear that the 'certificate of need' scheme is an inaccuracy, the mandatory considerations do not expressly require the Director-General to consider whether a preferred area of practice is oversubscribed. It does suggest that the purpose of the scheme is to ensure that private entities do not create or expand a healthcare facility unless it can be shown that there is a 'need' in the community for the additional healthcare service. As contended by the Applicant there is nothing in the express wording of the text to so suggest that the purpose of the 'certificate of need' scheme is to prevent the oversupply of health care services within a community.

110. That being the case, I do find that the mandatory considerations are imprecise and it is unclear how the Director-General and Minister will exercise their powers to impose conditions when issuing or renewing a certificate.

111. It has been suggested by the Applicants that the certificate of need must be viewed and treated as a licence. The scheme controls and restricts the rights and abilities of health care establishments, agencies and personnel to operate health care facilities and provide health care services. I must, accordingly, conclude on this aspect, that the legislative scheme introduced by the Health Act, has given unlimited discretionary powers to the Director General. For the reasons set out

above and submissions made by Applicants, it is indeed impossible to gain from the statutory provisions what the scope and limitations of the power to issue regulations and certificates of need are. The mandatory considerations set out in section 36(3) and permissible conditions set out in section 36(5) effectively permit the Director-General and the Minister to pursue virtually any objective. The Act did so without affording the applicant and potentially others an opportunity to be heard and present their submissions.

112. It must therefore follow that section 36-40 of Health Act is unconstitutional, to the extent that it provides for the automatic unlimited powers to an extent that it makes no provision for the Director-General to consider the constitutional rights of existing health care users. Also section 36 to 40 is inconsistent with the purposes of the National Health Act.

113. I do find that the scheme violates several constitutional rights, i.e. Section 10 of the Constitution declares that "*every person has human dignity and has the right to have their human dignity respect*". It's indicative that these challenged provisions vest in the state the power to override the choices that health care personnel have made for themselves and their families. Section 10 of the Constitution of the Republic of South Africa provides for the right to human dignity: "Everyone has inherent dignity and the right to have their dignity respected and protected". Human dignity is a central value of the objective, normative value system established by the Constitution. The right to human dignity is perhaps the pre-eminent value in our Constitution. The right to human dignity cannot be realised if all the other

socio-economic rights are not realised. The sources of human dignity in modern constitutionalism, the *Universal Declaration of Human Rights* (1948) (*Universal Declaration*) and the *International Charter of Human Rights* (1948) (*Charter*), accede to a preconception of dignity as a basis for human rights.

114. In the South African context, Davis J warned that the Court has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer[69]. This court further subscribes to a theory or a view in that recognition and respect for inherent dignity relates to types of treatment that are inconsistent with inherent dignity, as proscribed by international and national law texts[70]. McCrudden[71] refers to the second element as the "relational claim". In other words, it emphasises the relationship and expectations of the individual *vis-à-vis* the perceptions of his community – the so-called dignity of recognition, being the social dimension of dignity. As contended by the Applicants, this court supports the principle in that the right to human dignity is the right to be treated with inherent and infinite worth, this right also safeguards a person's reputation built upon his or her own individual achievements. The obligation of the state is to respect the decisions that each person has made for themselves. The state must treat each person as ends in themselves and not merely as a means to an end.

115. As a matter of interest for the court in making a determination, this following extract is persuasive in supporting this court`s decision

[69] As quoted by Botha 2009 *Stan L Rev* 172 fn 5
[70] Beyleveld and Brownsword *Human Dignity* 11.
[71] McCrudden 2008 *EJIL* 679.

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"***Human dignity's fusion of moral law with legal theory***

The theoretical basis for the three elements of dignity can be linked to Kant's moral and legal theories, which provide a legal framework to constitute human dignity as an *a priori* constitutional value and as the basis for human rights. Kant's claim of equal inherent dignity is regarded as the basis of human rights[72]. His notion of moral ethics was first published in *Grundlegung zur Metaphysik der Sitten*[73] in 1785, in which he argued that human reason, as the distinctive feature of humanity, induces people to act out of respect for universalised law-like conduct of themselves and others[74]. To act because of reason is to act exclusively out of a moral duty. This notion of duty is connected to respect for the human dignity of ourselves and others – dignity is ultimately the supreme value to be respected as an end in itself, so that humanity should never be treated as a means only (the categorical imperative)[75]. Kant's moral system requires internal compliance, whereas a legal system demands external compliance. In addition, the moral system exclusively accentuates the fulfilment of duties, whereas the legal system expands on the notions of objective rights and enforceable personal rights. Article 1(1) of the *Grundgesetz* of Germany *Basic Law*[76] is rooted in the Kantian notion of a reciprocal duty to rights

116. I also find that The scheme impairs section 21 of the Constitution. The questioned scheme empowers the Director-General to compel health care personnel to work in places against their choice. This is fundamental to note and appreciate that our Bill of Rights is a cornerstone of democracy in South

[72] Beyleveld and Brownsword *Human Dignity* 53.
[73] Translated in English as *Groundwork of the Metaphysics of Morals*.
[74] Englard 1999-2000 *Cardozo L Rev* 1918.
[75] Englard 1999-2000 *Cardozo L Rev* 1918.
[76] *Grundgesetz für die Bundesrepublik Deutschland,* 1949.

Africa. It enshrines Section ... **21**. (1) Everyone has the right to freedom of movement.

117. Universal access is provided for in section 27(1)(a) which states that "Everyone has the right to have access to health care services, including reproductive health care..." Section 27(1)(b) provides for the State to " take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right." According to section 7(2) of the Constitution[77] the State is obliged to respect, protect, promote and fulfil all the rights in the Bill of Rights). In the case of the right to

118. This court further finds that the right to choose a trade, occupation and profession according to section 22 of the constitution is compromised, this right is infringed to the extent that people may only practice their chosen trade, occupation or profession to the extent permitted by law. Section 22, which seeks to protect the economic activities of South Africans and implies the right to access to work, states that *"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".*

119. In Affordable Medicines[78], the Constitutional court held that a law requiring medical practitioners who wished to dispense medicines to obtain a licence, did not have the effect of influencing negatively a person's decision whether to become a medical practitioner. This was because the provision did not purport to regulate entry into the medical profession, nor did it affect the continuing

[77] Section 27 (2) of the Constitution of the Republic of South Africa, Act 108 of 1996.
[78] Affordable Medicines Trust V Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (Affordable Medicines) at para 63.

choice of practitioners as to whether to remain medical practitioners or not. It merely regulated the specific circumstances in which medical practitioners may, if they choose, dispense medicines. The Court further held that it was "difficult to fathom" how a person who has chosen to pursue a medical profession could be "deterred from that ambition by the requirement that, if, upon qualification, he or she wishes to dispense medicine as part of his or her practice, he or she would be required, among other things, to dispense medicines from premises that comply with good dispensing practice." Clearly, then, a law prohibiting certain persons from entering into a specific trade, or providing that certain persons may no longer continue to practise that trade, would limit the choice element of section 22; in these cases, there is a legal barrier to choice. This would be the case where, for instance, a licence is necessary to conduct a particular trade, and that licence is withdrawn. Such cannot be disassociated with the contemplated Scheme.

120. Further concluded in this aspect that The rationality test was also accepted in relation to section 22 of the Final Constitution in Affordable Medicines, where the Court rejected the suggestion that a reasonableness test applied[79]. The Court held that the standard for determining whether the regulation of the practice of a profession falls within the purview of section 22 is whether the regulation of the practice of a profession is rationally related to a legitimate government purpose and does not infringe any of the rights in the Bill of Rights.

[79] The Court in Van Rensburg v South African Post Office Ltd 1998 (10) BCLR 1307 (E) applied a reasonableness test. This Court in Affordable Medicines above n 53 discusses this finding at para 81: "If the Court intended to adopt reasonableness as a standard for reviewing legislation that regulates the practice of a profession, I am, with respect, unable to agree."

121. What is paramount in this case is to also look at the test laid down in FNB matter[80] , this test requires us to ask, first, whether the things at issue here constitute property; second, whether there has been a deprivation; and third, whether the deprivation is contrary to section 25(1) . in this case it is clear that the scheme impairs section 25(1). A distinct feature of the scheme is that it does not protect vested rights (i.e. rights that existed at the time the scheme commenced). The scheme permits that these vested rights may be taken away.

122. Section 25(1) provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". In order for there to be an infringement of section 25(1), (1) the thing in question must be property; (2) there must be a deprivation; and (3) the deprivation must be arbitrary. Without elaborating much on this aspect. Section 25(1) of the Constitution provides that no person may be deprived of property except in terms of a law of general application, and no law may permit the arbitrary deprivation of property. The Applicants correctly argued that issuing and withholding of licences is that, it does not protect vested rights (i.e. rights that existed at the time the scheme commenced). The scheme permits the Director-General to take away vested rights. It is arbitrary and irrational to insist that health care establishments, agencies and health care personnel comply with after-the-fact requirements, failing which these establishments, agencies and personnel will have to stop practising. It is important to emphasise that the status quo hasn't change in that the protection of the right of private ownership of

[80] First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (FNB) at para 46.

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property has always been entrenched in Section 25 of the Constitution. In its current form, Section 25 of the Constitution provides that: -

"*25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*"

123. Further finds that The Director-General will impair the constitutional right if it decides not to renew a certificate of a health care practitioner or establishment. Section 27(1) of the Constitution guarantees everyone the right to access healthcare services, which includes safeguarding existing access to health care services.

124. It is important to further emphasise the primary objectives of the Health Act are to realise the state's obligations in terms of section 27(2) of the Constitution. Section 27(1) provides that everyone has the right to health care services, and section 27(2) requires the state to achieve the progressive realisation of the right. The duty of the state is therefore to take (I) reasonable measures and (ii) measures that can progressively realise the right. I'm not convinced that the said disputed sections of the Act are coherent and consistent with the primary objectives of the Act. Universal access is provided for in section 27(1)(a) which states that "Everyone has the right to have access to health care services, including reproductive health care..." Section 27(1)(b) provides for the State to " take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right."

Further there is an obligation to respect the right, our constitution does oblige the State to refrain from denying or limiting access to health care services to

anyone. These should be available to all on a non-discriminatory basis. The obligation to protect include, inter alia, adopting legislation and other measures to ensure equal access to health care facilities provided by third parties; to ensure that privatisation does not constitute a threat to the availability, acceptability and quality of services provided; and to control the marketing of medicines by third parties.

125. Therefore, this court does find the scheme to be unconstitutional because it unjustifiably infringes constitutional rights as stipulated above.

The goal of equity and implementation of quality and efficient service delivery in the public sector remains to be realised. Justice Yakoob stated that in his judgement in the Grootboom case, Policies and programmes must be reasonable both in their conception and their implementation. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations[81].

126. With reference to pronunciation of MARIUS PIETERSE Professor of Law, University of the Witwatersrand Legislative and executive translation of the right to have access to health care services "For reasons of institutional legitimacy, resources, expertise, capacity and clout, the legislative and executive branches of government are typically regarded as being best placed to articulate specific

[81] Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC), para 42.

socioeconomic entitlements and to establish the administrative and other processes through which these may effectively be claimed. Indeed, they are constitutionally mandated to do this, as reflected by the State's obligation under sections 26(2) and 27(2) of the Constitution to progressively realise socio-economic rights within its available resources by taking reasonable legislative and other measures".

127. He further contends that "Of course, the fact that the socio-economic rights in the Constitution are justiciable in itself presents an important avenue for this translation. This is because beneficiaries can insist on the satisfaction of their constitutional rights through the judicial process".

128. The contentious element is that the Certificate of need is intended to ensure that such establishments are distributed equitably. Not only will all new or enlarged facilities have to obtain a certificate, but all established facilities would need to obtain such. Such certificates will be valid for a prescribed period, not exceeding 20 years. Section 36(3) prescribes the factors that the Director-General must take into account when deciding whether or not to issue or renew a certificate. A recent Constitutional Court challenge has resulted in similar 'need' provisions being declared ultra vires[82].

129. Having found a violation of the rights in sections10,21,22,25 and 27 of the Constitution, it is now necessary to determine the scope of the declaration of invalidity necessary to remedy the violations. The scope may need to be restricted in terms of the timeframe of application and the categories of

[82] The Affordable Medicines Trust v the Minister of Health and Others 2004(6) SA 387 (T) (the High Court judgment) and 2005 JOL 13932 (CC) (The Constitutional Court judgment). URL: http://www.constitutionalcourt.org.za/uhtbin/hyperionimage/J-CCT27-04

individuals to which it applies. This Court must be cognisant of the scope necessary to provide an adequate remedy to the applicant. This court also finds that the scheme is unconstitutional in that the scheme violates the separation of powers, the scheme is irrational, the scheme prescribes impermissibly vague criteria, the scheme unjustifiably limits several constitutional rights as alluded above.

130 Section 172 of the Constitution provides that:

"*When deciding a constitutional matter within its power, a court*

a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

b. may make any order that is just and equitable, including

I. an order limiting the retrospective effect of the declaration of invalidity; and

ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

131. in terms of section 167(5) of the Constitution, a declaration of invalidity has no effect until confirmed by the Constitutional Court.[83] To facilitate this process, Rule 16(1) of the Rules of the Constitutional Court require the Registrar of the court which has made an order of constitutional invalidity to lodge a copy of the order with the Registrar of the Constitutional Court within 15 days.[84] Therefore,

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83 Section 167(5) of the Constitution provides:

"The Constitutional Court makes the final decision on whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force".

84 Rule 16(1) of the Constitutional Court Rules provides:

while not strictly necessary, it is convenient that such direction be made as part of the order, Since the President has not yet proclaimed the commencement of the impugned provisions, this court does not need to be concerned with the practical effect of declaring invalid the provisions.

132. For the reasons outlined above, sections 36 to 40 of the Health Act are invalid in their entirety. The Applicants have made out a case for constitutional invalidity

COSTS

133. I turn now to the issue of costs. As regards, the costs should follow the successful party. The Applicants are successful parties and are entitled to the costs of suit. This Court has a discretion regarding its costs award, as the applicants were successful in establishing a form of constitutional violation caused by the Respondents.

ORDER

134. The following order is thus made: -

134.1. That Sections 36 to 40 of the Health Act 61 of 2003 are unconstitutional.

134.2. It is declared that sections 36 to 40 of the National Health Act 61 of 2003 are invalid in their entirety and are consequently severed from the Act.

134.3. In terms of section 167(5) of the Constitution and Rule 16 of the Rules of the Constitutional Court, the Registrar of this Court is directed to lodge a copy of

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"The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such an order."

the order and judgment, within 15 days of the order, with the Registrar of the Constitutional Court.

134.4. The respondents are ordered to pay the applicants' costs, including the costs of two counsel.

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BOKAKO AJ

Counsels for the Applicants

Margaretha Engelbrecht SC and

Michael Dafel

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