

Certificate of need in the healthcare sector: not needed

25 May 2023 7 min read

The National Health Act or NHA[1] makes provision for a system of licensing referred to as a certificate of need or CoN. A certificate need is formally dealt with in terms of sections 36 to 40 of the NHA. Fundamentally, CoN provisions provides that no person may operate an existing health establishment, increase the number of beds in such an establishment or construct or open a new health establishment without being in possession of a CoN.

For purposes of the NHA, a health establishment is described as "the whole or part of a public or private institution, facility, building or place, whether for profit or not, that is operated or designed to provide inpatient or outpatient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescent, preventative or other health services".[2]

Therefore, the definition of a health establishment is incredibly wide and would easily include almost any place where a health service is available including pharmacies, a general practitioner's consulting rooms and hospitals. Accordingly, the CoN provisions of the NHA have universal application to all places where health-related services may be obtained in the country.

In order to obtain a CoN, a particular set of criteria are set out in section 36(2) of the NHA. These criteria must be taken into account by the Director-General of the Department of Health when issuing or renewing a CoN. These criteria include –

- the need to ensure consistency in the development of health services in terms of government planning; nationally, provincially and at local government levels;
- the promotion of equitable distribution and rationalisation of health services;
- promoting a proper "mix of public and private health services";
- the demographics of a particular population to be served;
- potential advantages and disadvantages for existing public and private facilities and for any affected communities;
- the need to protect or advance persons or categories of persons designated in terms of the Employment Equity Act No. 55 of 1998 within emerging small, medium and micro-enterprise sector;
- potential for research and development with respect to the improvement of health service delivery;
- to ensure that the ownership of health facilities does not create perverse incentives for health services and health workers;
- the quality of the health services rendered by an applicant in the past;
- the probability of the financial sustainability of the establishment;
- the need to ensure availability and appropriate utilisation of human resources and health technology;
- whether the private health establishment is for profit or not; and
- compliance with the requirements of a certificate of non-compliance, if applicable.

Section 39 contemplates a set of supporting regulations for the CoN provisions in the NHA. Such regulations are yet to be published.

Any person performing any act where a CoN is required commits an offence and may be subject to a fine or to imprisonment not exceeding five years or to both a fine and imprisonment.[3]

A CoN, if granted, is valid for a period of 20 years.[4]

The CoN provisions of the NHA became the subject matter of a constitutional challenge in *Solidarity Trade Union & Others v Minister of Health & Others* (case number: 61844/2021) and heard before the High Court, Gauteng Division, Pretoria. A judgement was subsequently delivered on 15 June 2022. In the High Court's judgement, the CoN provisions of the NHA were analysed in a comprehensive judgement by Acting Judge Bokako. At paragraph 33 of the judgement the CoN provisions are described as follows –

"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 Department of Health. This includes controlling the private health care industry. In addition, the centralisation of the power permits the Minister and the Director-General to reallocate and redistribute health care facilities, personnel and equipment."

At paragraph 94 of the judgement, the court held that "it is clear that the certificate of need covers the entire health care industry". Therefore, in a nutshell, the CoN provisions afford enormous amounts of power in government to rejig the entire healthcare system to suit government policy/ies, which would include the proposed national health insurance scheme.

The court then addresses the application of the provisions of the Constitution of the Republic of South Africa, 1996 and comes to the conclusion that "[a]t the very least the scheme is unconstitutional because the [NHA] does not require the Director-General to consider whether the issuing or renewal of a [CoN] impacts the constitutional rights mentioned above".[5] Those constitutional rights include the right to human dignity, the right to freedom of movement, the right to choose a trade, occupation or profession, the right not be deprived arbitrarily of property, impermissible expropriation of property and the right to access healthcare.

In fact, so devoid of legality are the provisions of the CoN, the court comes to the ineluctable conclusion that "[t]he scheme also makes no provision for the Director-General to consider the constitutional rights of existing healthcare users. The scheme provides no appropriate protection for the rights of existing patients".[6]

In respect of accessing healthcare services, a fundamental tenet in the Bill of Rights, the court held that –

"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 appropriate. 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."[7]

In relation to the factors listed in section 36(3) of the NHA, which are to be considered by the Director-General for the purposes of issuing or renewing a CoN, the court held that the "mandatory considerations are imprecise and it is unclear how the Director-General and the Minister will exercise their powers to impose conditions when issuing or renewing a certificate".[8]

The court ultimately comes to the conclusion, correctly with respect, that the CoN violates various provisions of the Bill of Rights.[9] The court then declares the CoN provisions of the NHA as being unconstitutional and "are consequently severed from the [NHA]".[10] That decision is now ultimately within the purview of the Constitutional Court to confirm.

The provisions of the CoN remain within the court system and time will tell what the ultimate fate of the CoN will be. However, with the provisions of the CoN currently framed, the constitutionality of those provisions remains highly questionable. By abrogating the power to dictate who does what where from a healthcare point of view does not within and of itself progressively advance greater or better access to healthcare – there is no evidence to that effect. What such a scheme does do is frustrate investment opportunities in the healthcare sector, dissuade individuals from entering into healthcare service professions or simply from continuing to practise, guarantee little to those that need access to healthcare services and ignores the need for quality healthcare to create better outcomes for patients and the country in general.

Footnotes

[1] No 61 of 2003

[2] Section 1 of the NHA.

[3] Sections 40(1) and (2) of the NHA.

[4] Section 37 of the NHA.

[5] Paragraph 72 of the judgement.

[6] Paragraph 73 of the judgement.

[7] At paragraph 102 of the judgement.

[8] At paragraph 110 of the judgement.

[9] At paragraph 113 of the judgement.

[10] At paragraph 134 of the judgment.



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