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HEALTHCARE & LIFE SCIENCES

Gerrymandering Healthcare? Certificate of need

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The term "gerrymander" is used primarily in the context of shifting the boundaries or borders of voting constituencies in order to achieve a political advantage that would not be available with shifting those boundaries or borders.

The Oxford Advanced Learner's Dictionary 9th edition (2015) defines the term "gerrymander" as "to change the size and borders of an area for voting in order to give an unfair advantage to one party in an election".

Certificate of need

A similar concept to that of gerrymander is contained in section 36 of the National Health Act No. 61 of 2003 or NHA. Section 36 provides for the concept of a so-called "**certificate of need**". Whilst the term "certificate of need" is defined in section 1 of the NHA, the definition is unhelpful in so far as it merely states that a certificate of need "means a certificate contemplated in section 36".

The upshot of section 36 of the NHA is one that fundamentally restricts the practising of healthcare without being in possession of a certificate of need.

Therefore, section 36(1) provides that "[a] person may not –

> *(a) establish, construct, modify or acquire a health establishment or health agency;*
>
> *(b) increase the number of beds in, or acquire a prescribed health technology at, a health establishment or health agency;*
>
> *(c) provide prescribed health services; or*
>
> *(d) continue to operate a health establishment or health agency after the expiration of 24 months from the date [the NHA] took effect".*

Section 36 was inserted on 1 April 2014 into the NHA but has not been brought into force by the publication of a proclamation by the President. However, no steps have been taken by the Minister of Health, in terms of the NHA, to bring into effect the regulations that are required to support the implementation and application of section 36. Without the requisite regulations, it is legally impossible to comply with section 36 in so far as various prescribed aspects and elements contemplated in section 36 are legally absent.

Section 36(1) of the NHA

Section 36(1), on its face, means that a healthcare provider may not simply set up shop in order to provide healthcare services to the public in general. Such a healthcare provider would require a certificate of need before opening the doors of such a practice to the public.

In addition, where a healthcare practitioner has an established practice, whether a general practitioner in the suburbs or a private hospital in the central business district, that health practice is required to obtain a certificate of need within a prescribed period in order to continue providing such a service.

Such a system presupposes that the Director-General of Health, who is tasked with issuing or renewing certificates of need, in terms of section 36(3) of the NHA, is at liberty to decline to issue a certificate of need for an existing practice where, in the view of the Director-General, that practice does not meet the criteria that are stipulated in section 36(3) of the NHA for the renewal or granting of a certificate of need.

Ultimately, therefore the provisions of section 36 allow the Director-General and, ostensibly, the Department of Health, to rejig or gerrymander the existing network of healthcare providers so as to provide for only certain providers being able to perform healthcare services in a particular area – bearing in mind that one of the criteria, referred to in section 36(3) is "the need to ensure consistency of health services development in terms of national, provincial and municipal planning".

Read more about the National Health Act update.

Section 36(3) of the NHA – qualify for a certificate of need

There are various other criteria that are imposed by section 36(3). All-in-all there are 13 expressed criteria that a practitioner or healthcare provider would have to meet in order to qualify for a certificate of need. The criteria are stated, at times, in very broad and thus vague terms, and, on other occasions, in explicit terms.

The current criteria, contained in section 36(3), are the following:

> *(a) the need to ensure consistency of health services developed in terms of national, provincial, and municipal planning;*
>
> *(b) the need to promote an equitable distribution and rationalisation of health services and healthcare resources, the need to correct inequities, racial, agenda, 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 calibers of persons designated in terms of the Employment Equity Act,... within the merging, small, 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;*
>
> *(h) if applicable, the quality of health services rendered by the applicant in the past;*
>
> *(i) the probability of the financial sustainability of the health establishment or the health agency;*
>
> *(j) the need to ensure the availability and appropriate utilisation of human resources and health technology;*
>
> *(k) whether the private health establishment is for profit or not; and*
>
> *(m) if applicable, compliance with the requirements of a certificate of non-compliance."*

Legal ramifications of section 36 of the NHA

The possible legal ramifications of section 36 of the NHA were challenged by the Solidarity Trade Union in a review process lodged before the Pretoria High Court. The proceedings culminated in final arguments in March 2022 and a judgment being handed down on 15 June 2022. In the judgment by the Pretoria High Court, the provisions of sections 36 to 40 of the NHA, more particularly section 36(3), have been found to be unconstitutional and deleted from the NHA.

It is by no means coincidental that section 36 attracts attention from healthcare providers in the prevailing context of a proposed National Health Insurance Scheme or NHI.

In so far as one accepts the overall precept of the NHI that such a scheme is designed to achieve universal access to healthcare services, in circumstances where it appears to be accepted that there is a disparity in the availability of healthcare services in certain areas of the country, the Department of Health, through its Director-General, will certainly want to reserve to itself a right and power to force healthcare practitioners to practice in what may be considered to be under-serviced areas from a healthcare perspective. Such a situation is simply, however, constitutionally untenable:

> *"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 respected.' It is indicative that these challenged provisions rest in the state the power to override the choices that healthcare 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." (paragraph 113)*

The Pretoria High Court further found that **sections 36 to 40 of the NHA were unconstitutional on the basis of section 10** (the right to dignity), section 21 (freedom of movement), section 22 (freedom of trade and profession), section 25 (property) and section 27 (access to healthcare).

Whether or not an appeal of the judgment is to be sought by the Department of Health, remains to be seen. However, the Pretoria High Court has vindicated the rights of a healthcare practitioner to choose where he/she/it wishes to practice, the population that is to be served, and the particular disciplines that are to be provided to that population in the context of healthcare service delivery.

The judgment will no doubt have an impact on the design of NHI. As it currently stands in the National Health Insurance Bill [B11-2019] and which is currently before Parliament for a clause-by-clause debate in so far as –

- clause 32(1)(d) of the Bill refers expressly to section 36 of the NHA; and
- clause 39(2) refers to various criteria to be used by the Fund to accredit healthcare service providers or health establishments as participants in the Fund, which criteria form an open-ended list but currently include the following:

> *"(i) provision of the minimum required range of personal healthcare services specified by the Minister in consultation with the Fund and published in the Gazette from time to time, as required;*
>
> *(ii) allocation of the appropriate number and mix of healthcare professionals, in accordance with guidelines, to deliver healthcare services specified by the Minister in consultation with the National Health Council and the Fund, and published in the Gazette from time to time, as required;*
>
> *(iii) adherence to treatment protocols and guidelines, including prescribing medicines and procuring health products from the Formulary;*
>
> *(iv) adherence to healthcare referral pathways;*
>
> *(v) submission of information to the National Health Information system to ensure portability and continuity of healthcare services in the Republic and performance monitoring of any valuation; and*
>
> *(vi) adherence to the national pricing regiment for services developed."*

Therefore, based on the contents of the judgment, greater consideration will now have to be given to the imposition of criteria for the accreditation of healthcare providers in order to ensure that the criteria imposed, meet the constitutional prerogatives that otherwise caused the demise of Sections 36 to 40 of the NHA.

The judgment is certainly a shot across the bow of NHI.



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