

HEALTHCARE & LIFE SCIENCES

The Concept of “Need” in South Africa’s Healthcare Framework: From Certificates of Need to National Health Insurance Accreditation

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On 18 May 2026, the Constitutional Court (“CC”) in *Solidarity Trade Union and Others v Minister of Health and Others* [1] confirmed the invalidity of the Certificate of Need (“CoN”) provisions contained in sections 36 to 40 of the National Health Act [2] (“NHA”).

The CC found that the CoN provisions were irrational and unjustifiably limited the right to choose a trade, occupation or profession freely. The CC’s invalidity confirmation has prompted closer examination of the role that the concept of “need” plays within South Africa’s healthcare legislative framework.

Such examination is warranted because the CoN provisions incorporated considerations of need into the regulatory framework governing whether or not and where healthcare service providers could establish, construct, modify or acquire health establishments or provide prescribed health services. [3] The CC’s judgment therefore brought an end to a legislative scheme in which an assessment of need formed part of the criteria determining whether or not and where healthcare service providers could establish, construct, modify or acquire health establishments or even provide prescribed health services.

In terms of the CoN scheme, healthcare service providers were required to obtain approval from the Director General of the National Department of Health (“Director General”) before establishing, constructing, modifying or acquiring health establishments or providing prescribed health services. In determining whether or not to grant such an approval, the Director General was required to consider various factors, including, amongst others, the need to promote the equitable distribution and rationalisation of healthcare services and resources, address inequities based on racial, gender, economic and geographical considerations, and promote an appropriate mix of public and private healthcare services. [4] Accordingly, the concept of “need” formed an integral part of the considerations informing the Director General’s decision whether or not to grant or refuse a CoN application.

Following the CC’s judgment, questions naturally arose regarding whether or not, and to what extent, similar considerations of need continue to feature in other healthcare legislation.

In particular, the incorporation of the concept of “need” in the National Health Insurance Act [5] (“NHI Act”) raises important questions regarding how that concept ought to be interpreted and implemented so as to avoid the constitutional difficulties that resulted in the invalidation of the CoN provisions. Although the NHI Act does not establish a CoN regime and does not require healthcare service providers to obtain prior approval in order to operate, references to “need” feature prominently throughout the NHI Act’s currently proposed purchasing, contracting and accreditation framework. In particular –

- the Fund is required to actively and strategically purchase healthcare services on behalf of users in accordance with need [6];
- the Fund must enter into contracts with accredited healthcare service providers and health establishments based on the health needs of users [7];
- healthcare service providers and health establishments, seeking accreditation, must demonstrate that they meet the needs of users and comply with prescribed performance criteria [8]; and
- the Fund may conclude legally binding contracts only with health establishments and prescribed healthcare service providers that satisfy the applicable accreditation requirements. [9]

Accordingly, whilst healthcare service providers remain free to operate in the absence of accreditation, participation in the provision of Fund-funded healthcare services is dependent upon satisfying the requirements prescribed by section 39(2) of the NHI Act.

Given that the Fund is to be the single purchaser of healthcare services covered under the NHI framework, the inability to obtain accreditation may substantially affect a healthcare service provider’s ability to render Fund-funded services and, consequently, to participate effectively in that segment of the healthcare market. In this respect, the practical implications of accreditation under the NHI Act warrant consideration alongside the concerns identified by the CC regarding the use of regulatory mechanisms that may limit the extent to which healthcare service providers are able to exercise their right to choose a trade, occupation or profession freely.

It is therefore necessary to consider the role that “need” plays within the NHI Act and, concomitantly, whether the CC’s treatment of the concept of “need”, in the context of the CoN scheme, now provides any insight into how the concept of “need” should be interpreted and applied under the NHI accreditation framework.

Applying the principles of statutory interpretation, the phrase “needs of users” must be interpreted in accordance with its ordinary grammatical meaning, read in context and having regard to the purpose of the NHI Act. [10]

Ordinarily, the phrase “needs of users” may be understood as referring to the healthcare requirements of persons entitled to receive healthcare services funded by the Fund. In this regard, the NHI Act seeks to achieve universal access to quality healthcare services through the strategic purchasing of healthcare services by the Fund based on the health needs of users. Viewed in this context, the reference to need within the NHI Act appears directed towards ensuring that healthcare services purchased by the Fund correspond with the healthcare requirements of the population served by the Fund.

Nevertheless, the NHI Act does not define what constitutes the “needs of users” nor does it prescribe the criteria against which those needs are to be assessed. The absence of specific statutory guidance regarding the factors relevant to determining whether or not a particular healthcare service provider meets the needs of users may afford the Fund a measure of discretion in the accreditation process.

There are, however, important distinctions between the two regimes: the CoN scheme directly restricted the ability of healthcare service providers to establish, acquire or modify health establishments in the absence of administrative approval but, by contrast, the NHI Act does not prohibit healthcare service providers from operating without accreditation. Instead, the NHI Act regulates participation in the provision of healthcare services financed by the Fund.

The constitutional significance of the CoN judgment therefore lies not merely in the invalidation of the CoN scheme itself, but in the caution that judgment provides against the future interpretation and implementation of healthcare legislative provisions, which incorporate considerations of “need” in a manner capable of affecting the exercise or limitation of constitutional rights.

Notwithstanding these differences, both frameworks incorporate considerations of need into administrative decision-making processes that influence the extent to which healthcare service providers may participate in the delivery of publicly funded healthcare services. To this limited extent, the CC’s reasoning in the CoN judgment remains relevant to discussions concerning the implementation of the NHI Act. More specifically, the CC’s judgment illustrates that, notwithstanding the legitimacy and importance of the public health objectives pursued by the CoN scheme, legislative measures designed to achieve those objectives must bear a rational connection to their stated purpose. In the absence of such a rational connection, those legislative measures are susceptible to constitutional challenge and may be declared legally invalid. [11]

The invalidation confirmation of the CoN provisions by the CC should serve as a cautionary reminder when considering the role of “need” within the NHI framework.

Although the NHI accreditation framework differs from the CoN scheme in several respects, the incorporation of “need” into the Fund’s purchasing, contracting and accreditation functions warrants careful scrutiny as and when the framework is implemented in practice. Particular care should, therefore, be taken to ensure that the interpretation and application of the “needs of users” requirement do not produce outcomes that replicate the constitutional defects identified by the CC in the CoN scheme.

Accordingly, the implementation of the NHI Act must be accompanied by clear criteria, rational decision-making processes and appropriate procedural safeguards to ensure that the operation of the “need” requirement does not produce outcomes analogous to those that led to the invalidation of the CoN scheme.

[1] [2026] ZACC 19 (18 May 2026).

[2] No. 61 of 2003.

[3] Section 36(3) of the National Health Act.

[4] *Solidarity Trade Union and Others v Minister of Health and Others* [2026] ZACC 19 (18 May 2026) at paragraph 3.

[5] No. 20 of 2023.

[6] Section 35(1) of the National Health Insurance Act.

[7] Section 7(2)(e) of the National Health Insurance Act.

[8] Section 39(2)(c) of the National Health Insurance Act.

[9] Section 39(3) of the National Health Insurance Act.

[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 17.

[11] *Solidarity Trade Union and Others v Minister of Health and Others* [2026] ZACC 19 (18 May 2026) at paragraphs 57 and 78.



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