IN 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

DATE: 24 JULY 2024

SIGNATURE:..............................

Case No. 61844/2021

In the matter between:

SOLIDARITY TRADE UNION	**FIRST APPLICANT**
ALLIANCE OF SOUTH AFRICAN INDEPENDENT PRACTITIONER ASSOCIATIONS	**SECOND APPLICANT**
SOUTH AFRICAN PRIVATE PRACTITIONER FORUM	**THIRD APPLICANT**
PRETORIUS, BARBARA	**FOURTH APPLICANT**
ROLLIN, CHRISTA	**FIFTH APPLICANT**

SPIES, BREAAN **SIXTH APPLICANT**

HEYNS, ANJA **SEVENTH APPLICANT**

HOSPITAL ASSOCIATION OF SOUTH AFRICA **EIGHTH APPLICANT**

And

MINISTER OF HEALTH **FIRST RESPONDENT**

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **SECOND RESPONDENT**

DIRECTOR-GENERAL, NATIONAL DEPARTMENT OF HEALTH **THIRD RESPONDENT**

Coram: Millar J

Heard on: 4 & 5 June 2024

Delivered: 24 July 2024 ~ This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 24 July 2024.

Summary: Constitutional law – challenge to constitutionality of the Certificate of Need (CON) scheme set out in sections 36 – 40 of the National Health Act 61 of 2003 – Constitutional Court previously found scheme

inchoate without regulations and proclamation of scheme set aside in 2015 ~ regulations still not promulgated and scheme not proclaimed – scheme in its terms violates sections 10 (dignity), 21 (freedom of movement and residence), 22 (to choose a trade, occupation and profession), 25(1) (no arbitrary depravation of property), 25(2) (impermissible expropriation) and 27(1) (right of access to healthcare) of the Constitution – CON scheme declared unconstitutional and sections 36 to 40 severed from the Act – matter referred to the Constitutional Court for confirmation.

ORDER

It is Ordered:

[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 read together with section 15 of the Superior Courts Act 10 of 2013 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 this judgment, within 15 days of the order, with the Registrar of the Constitutional Court.

[3] The first and third respondents are ordered to pay the costs of the application of the first to eighth applicants which costs are to include the costs consequent upon the engagement of two counsel.

JUDGMENT

MILLAR J

[1] The applicants challenge the constitutionality of the Certificate of Need (CON) scheme introduced in sections 36 to 40 of the National Health Act[1] (NHA). The applicants seek an order declaring that those sections are unconstitutional and invalid in their entirety and ought to be severed from the NHA.

[2] The first, second and third applicants are organizations that represent private medical practitioners. The fourth to eighth applicants are healthcare providers and the owners of healthcare establishments. Such healthcare establishments include private hospitals, pharmacies, clinics and private rooms set up by any healthcare provider, even if the rooms are private and within the home of the healthcare provider. The applicants are all directly affected by the CON scheme and make common cause with each other in the present matter. The applicants, besides all acting in their own respective interests as persons affected by the CON scheme also act in the wider interests of all persons who will be subjected to the scheme if implemented.[2]

[3] The first and third respondents are the parties under whose aegis the NHA and the implementation of the CON scheme fall. They too make common cause with each other in the present matter. The second respondent was cited by virtue of the fact that he has the power to proclaim the commencement of the relevant sections of the NHA, but he has taken no part in these proceedings.

BACKGROUND

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1 61 of 2003. The NHA was assented to on 18 July 2004 and most of its provisions became operable on 2 May 2005.

2 See section 38 of the Constitution.

[4] The NHA was enacted to "*provide a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments with regard to health services.*" Additionally, its preamble it also recognizes, *inter alia* "*the socio-economic injustices, imbalances, and inequities of health services of the past*" and "*the need to improve the quality of life of all citizens and to free the potential of each person.*" The preamble specifically provides for the NHA to "*unite the various elements of the national health system in a common goal to actively promote and improve the national health system in South Africa.*"

[5] The NHA commenced on 2 May 2005 with the exception of a number of sections which were yet to be proclaimed. Included in those sections that were yet to be proclaimed are sections 36 to 40 which form the subject matter of the present proceedings.

[6] Broadly speaking, the CON scheme requires both healthcare service providers and facilities which offer healthcare services (by healthcare service providers) to apply for a certificate of need for the place where they wish to render services.

[7] The provisions of the CON scheme are not concerned with the maintenance of professional standards of practitioners or with the standards to which health facilities are to be constructed or operated[3]. The CON scheme is not aimed at regulating how services are rendered but rather the place where they are to be rendered.

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[3] Insofar as individual health practitioners are concerned, there are separate pieces of legislation dealing with the regulation of the persons concerned and the standard at which they are required to conduct themselves. In regard to healthcare establishments, extant regulations in the form of regulation R158 of 1980 as amended in 1996 which remains in force in consequence of section 93(2) of the NHA provides for the minimum requirements for health facilities. Provincial legislation has in some instances also been enacted to operate in Regulation 158's stead.

[8] Chapter 3 of the NHA provides for the establishment of norms and standards applicable to health services. Although the provisions of this chapter are operable, there are at this stage, still no norms and standards that have been put in place.

[9] Besides applying to all new entrants to the market in a particular area, the CON scheme places a time limit on any certificate that may be granted a period for up to 20 years. After 20 years, an application for renewal must be submitted. Through the issueing of certificates of need, the number of both healthcare practitioners and facilities such as hospitals or private medical practices which are permitted by law to operate within a particular area can be limited. The scheme criminalizes the provision of healthcare services in a particular area or the operation of a facility if a certificate of need has not been issued.

[10] On 31 March 2014, sections 36 to 40 were proclaimed to be operative as from 1 April 2014.[4] This proclamation was subsequently set aside in *President of the Republic of South Africa and Others v South African Dental Association and Another.*[5] The Constitutional Court found that:

> *"The purpose of the President's power to bring portions of the National Health Act into operation is to achieve an orderly and expeditious implementation of a national regulatory scheme for health services. Clearly the decision to issue the Proclamation before there was any mechanism in place to address applications for certificates of need, thereby rendering the provision of health services a criminal offence, was not rationally connected to this purpose (or any other governmental objective)."*[6] (footnotes omitted).

[11] Accordingly, the CON scheme is, without the necessary regulations, inchoate. Until there are regulations, the CON scheme can never become operative.

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[4] Proclamation 21 in GG 37501 of 31 March 2014.
[5] 2015 (4) BCLR 388 (CC).
[6] *Ibid* para [15].

RIPENESS

[12] It is common cause between the parties that at present, the regulations required in order to give effect to the sections in question do not yet exist and that there has been no further proclamation of the operation of these sections. The fact that the CON scheme is presently inchoate and incapable of being put into operation without regulations, has the consequence, so it was argued by the respondents, of there being nothing to challenge and that for this reason the issue is not ripe for hearing.

[13] The respondents relied upon *Ferreira v Levine NO and Others; Vryenhoek and Others v Powell NO and Others*[7] in which it was held:

> *"Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystalized, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."*

[14] The respondents also referred to *Law Society of South Africa v President of the Republic of South Africa*[8] in which it was held:

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7 1996 (1) SA 984 (CC) at para [199].
8 2019 (3) SA 30 (CC) at paras [23] – [29].

"As a general proposition, legislative and comparable processes must be left to run their normal and full course before courts intervene. This is particularly so where appropriate checks and balances are in place to secure the rights of those who might otherwise have been disadvantaged by actual or perceived irregularities. One such example is our elaborate law-making process which has the added advantage of the President's constitutional power to send legislation back to the National Assembly for reconsideration or refer it to the Constitutional Court for the determination of its constitutionality before assenting to and signing it into law. All this is to be done to protect the rights and interests of the public.

Courts therefore ought to intervene in incomplete processes only when no other avenue is realistically available to adequately address whatever grievances the people might have. . . . This would explain why other arms must also be allowed to discharge their obligations in terms of set procedures before court may interfere, barring exceptional circumstances. . . Hasty intervention that borders on prematurity is ordinarily inappropriate. That said, the practice or rule is not inflexible. The interests of justice sometimes require court intervention, even if a particular process might still not be complete. A comparison between the principles that govern a law-making process and those applicable to the process prescribed for international agreements is thus necessary."

[15] The crux of the argument on the part of the respondents is that the case advanced by the applicants was not grounded in *"the operation of sections 36 to 40 of the NHA."* It was posited by them that *"[b]efore the Applicants rights could even possibly be limited further several steps would have to occur. . ."*. In other words, whatever the shortcomings of the sections that the applicants assert, these must actually eventuate, and it is only after the proclamation of the sections (together with their regulations) that any challenge should be mounted.[9] A central tenet of this

[9] See *Sapat and Others v Director: Directorate for Organized Crime and Public Safety and Others* 1999 (2) SACR 435 (C); *Korabie v Judicial Commission of Enquiry into Allegations of State Capture, Corruption, Fraud in the Public Sector, including Organs of State and Others* [2022] JDR 3033 (WCC) at para [54].

argument was that the regulations to be promulgated may cure such shortcomings, if there were indeed any.

[16] Insofar as the argument relating to the absence of regulations was concerned, the applicants argued that section 39(1) conferred a discretion upon the Minister of Health to make regulations. There was no requirement that such regulations in fact be made. Furthermore, the use of regulations in the interpreting of legislation is impermissible.

[17] The applicants also argued that the fact that the relevant sections were not yet operative did not prevent this court from enquiring into the validity of the provisions. On at least 3 previous occasions the Constitutional Court set aside an 'as yet' inoperative provision.

[18] The first of these was *Khosa v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* [10] where it was held:

> "*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 [impugned 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 court may make an order concerning the constitutional validity of an Act of Parliament. Thus, the fact that [the impugned section] has not yet been brought into force should not remove it from the jurisdiction of this Court to determine its constitutionality. This is similar to the position in Canada and the*

[10] 2004 (6) SA 505 (CC) at para [90].

United States where a provision can also be challenged if it has not yet been brought into force."

[19] This was followed in *Doctors for Life International v Speaker of the National Assembly.*[11] Recently in *South African Iron and Steel Institute v Speaker of the National Assembly*[12] an inoperative statutory provision was also set aside.

[20] It is clear that this court may enquire into the constitutionality of the impugned sections notwithstanding that they are not yet operative. But what of the argument that absent the regulations, any enquiry is fruitless and would be *in vacuo*?

[21] The NHA definition of *'health services'* is expansive[13] and accordingly, so too is the reach of any regulations made in terms of section 39 read together with section 90.

[22] The respondents argued that "*[t]he Act does not contemplate that all existing healthcare services and providers will be required to obtain a certificate of need scheme; rather the requirement for a certificate applies to those intending to provide "prescribed healthcare services"; what is to constitute prescribed services can only be done by way of regulations in terms of section 90."*

[23] In *National Lotteries Board v Bruss NO,*[14] it was held that:

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[11] 2006 (6) SA 416 (CC) at para [62].

[12] 2023 (10) BCLR 1232 (CC) at para [20].

[13] *'Health service's mean- (a) health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution; (b) basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution; (c) medical treatment contemplated in section 35(2)(e) of the Constitution; and (d) municipal health services." The definition of 'municipal health services' in the NHA expands the scope even further by including under its definition "(a) water quality monitoring; (b) food control; (c) waste management; (d) health surveillance of premises; (e) surveillance and prevention of communicable diseases, excluding immunisations; (f) vector control; (g) environmental pollution control; (h) disposal of the dead; and (i) chemical safety, but excludes port health, malaria control and control of hazardous substances."*

[14] 2009 (4) SA 362 (SCA) at para [37]. *Moodley v Minister of Education and Culture, House of Delegates* 1989 (3) SA 221 (A) at 233E-F.

> *"It is not permissible to use a definition created by a Minister in regulations to interpret the intention of the legislature in an Act of Parliament, notwithstanding that the Act may include regulations."*

[25] Reliance upon the yet to be made regulations does not avail the respondents in this matter. It certainly offers no answer to what the intention and the scope of the CON scheme is to be if its reach is to be determined in the regulations.

[26] Since the making of regulations is not peremptory, the CON scheme must be evaluated and considered in the terms upon which it was birthed by Parliament. If sections 36 to 40 of the NHA do not withstand constitutional scrutiny, then the complaint of the applicants is neither uncrystallized nor hypothetical. For the reasons I have set out, I find no merit to the argument proffered by the respondents the matter is not ripe for hearing.

DOES THE CON SCHEME PASS CONSTITUTIONAL MUSTER?

[27] The CON scheme stands upon 5 legs. The first is section 36 which stipulates who requires a certificate and the procedure to be followed. The second, section 37, provides for the duration of validity. The third, section 38, for an appeal against the refusal to issue or renew a certificate. The fourth, section 39, empowers the making of regulations in terms of section 90 for the determination of what is to be considered when issuing or renewing (or the refusal to do so) of a certificate and the fifth, in section 40, which provides for the criminalization of persons who provide health services without being in possession of a certificate.

[28] The CON scheme encompasses both individual private medical practitioners, individual persons employed by them[15] to provide healthcare but also to juristic persons[16] who establish and operate facilities at which healthcare services are provided. The reach of the CON scheme is extensive and goes so far, when regard is had to the definition of "health agency" in the NHA, to even include medical schemes in terms of the Medical Schemes Act.[17]

[29] The 5 sections operate in an integrated manner to give effect to the scheme. Accordingly, it must be considered both individually and collectively to determine whether or not one or more of the sections or the scheme as a whole, give effect to the purpose for which the NHA was enacted[18] and whether or not it infringes upon the constitutional rights that the applicants assert are infringed by the scheme.

[30] The applicants argue that at least 6 constitutional rights are infringed. These are:

[30.1] the right to human dignity;[19]

[30.2] the right to freedom of movement and residence;[20]

[30.3] the right to choose a trade, occupation and profession;[21]

[30.4] the right not to be arbitrarily deprived of property;[22]

[30.5] the impermissible expropriation of property;[23] and

[30.6] the right of access to healthcare.[24]

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15 This is apparent from the definition of 'healthcare personnel' and 'healthcare provider' in the NHA.

16 This appears from the definition of 'health establishment' read together with the definition of 'private health establishment' in the NHA.

17 131 of 1998.

18 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributers: in re Hyundai Motor Distributers (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at para [22].

19 Section 10.

20 Section 21.

21 Section 22.

22 Section 25(1).

23 Section 25(2).

24 Section 27(1).

[31] In order to determine whether or not the scheme infringes on constitutional rights, the test to be applied is that set out by the Constitutional Court in *Ex Parte Minister of Safety and Security and Others : In Re S v Walters and Another*[25] where it was held:

> *"[26] ....This is essentially a two-stage exercise. First there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) or (b). Subsections 39(1) and (2) of the Constitution give guidance as the interpretation of both the rights and enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then.*
>
> *[27] If there is indeed a limitation, however, the second stage ensues. This is ordinarily called the limitations exercise. In essence it requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved."*

THE RIGHT TO DIGNITY, THE RIGHT TO FREEDOM OF MOVEMENT AND RESIDENCE AND THE RIGHT TO CHOOSE A TRADE, OCCUPATION AND PROFESSION

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[25] 2002 (4) SA 613 (CC).

[32] It was argued by the applicants that the scheme impermissibly impairs the human dignity of individual healthcare providers and healthcare workers and their right to be treated with inherent and infinite worth.[26] This is a foundational right[27] which also safeguards an individual's reputation built on their achievements[28], right to work[29] as well as the ability to support themselves and their families.[30]

[33] It was argued that the scheme *"tramples on the choices that healthcare providers 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."*

[34] It was also argued that the scheme, in limiting the choices an individual may make with regards to where they are to reside and to "make their lives" is inextricably linked to their right to pursue the life endeavour of their choice.[31] While the constitution provides that the practice of any trade, occupation or profession may be regulated by law, neither the NHA nor the CON scheme have this as their purpose. There is bespoke legislation[32] which regulates the practice of healthcare providers and healthcare workers and this is recognised in the NHA.

[35] In *Affordable Medicines Trust v Minister of Health*[33] that:

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26 *S v Makwanyane* 1995 (3) SA 391 (CC) at para [144].

27 *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* 2021 (3) SA 246 (CC) at para [28].

28 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para [27].

29 *Rayment v Minister of Home Affairs* 2024 (2) SA 591 (CC) at para [59].

30 *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) at para [304].

31 The Pharmacy Case 7 BVerfGE 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. 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."

32 See for example, the Health Professions Act 56 of 1974; the Nursing Act 50 of 1978, the Pharmacy Act 53 of 1974, the Allied Health Professions Act 63 of 1982 and the Dental Technicians Act 19 of 1979.

33 2006 (3) SA 247 (CC) paras [59] – [60].

"What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up an activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity, it is the foundation of a person's existence.

Though economic necessity or cultural barriers may unfortunately limit the capacity of individuals to exercise such choice, legal impediments are not to be countenanced unless clearly justified in terms of the broad public interest. Limitations on the right to freely choose a profession are not to be lightly tolerated." (footnote omitted).

[36] The Constitutional Court set out the scope and test of section 22 of the Constitution in the matter of *South African Diamond Producers Organisation v Minister of Minerals and Energy*,[34] it held:

"Section 22 comprises two elements: the right to choose a trade, occupation or profession freely, and the proviso that the practice of a trade, occupation or profession may be regulated by law. Though both the "choice" of trade and its "practice" are protected by section 22, the level of constitutional scrutiny that attaches to limitations on each of these aspects differs. If a legislative provision would, if analysed objectively, have a negative impact on choice of trade, occupation or profession, it must be tested in terms of criterion of reasonableness in section 36(1). If however, the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of Rights. In that case, there is no

[34] 2017 (6) SA 331 (CC).

limitation of section 22 and no section 36 analysis is required. As this Court held in Affordable Medicines, "restrictions on the right to practise a profession are subject to a less stringent test than restrictions on the choice of a profession."

The first question, then, is whether [the impugned provision] imposes restrictions on the choice of a trade, occupation or profession, or only on its practice. This court has not yet laid down specific guidance for determining when a legislative provision "is likely to impact negatively on the choice" of profession, trade or occupation, as opposed to simply regulating the practice of that trade, occupation or profession. However, some guidance may be sought from Affordable Medicines, the leading judgment on the interpretation of section 22.

In Affordable Medicines, this 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 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 practice that trade, would limit the choice element of section 22; in these cases, there is a legal barrier to choice. <u>This would be the case where, for instance, a licence is necessary to conduct a particular trade, and that licence is withdrawn. However, one may also conceive of legislative provisions that, while not explicitly ruling out a group of persons from choosing a particular trade, does so in effect, by making the practice</u>

of that trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited.

These provisions must also fall within the ambit of provisions that limit choice, as they create an effective limit on choice. Indeed, this court in Affordable Medicines seems to have taken into account both the fact that the legislation in issue did not present a legal barrier to entry into the profession, and that it did not impose an effective limit on that choice in that it would not "deter" persons from entering into the profession." [35]*(my underlining)*

[37] The CON scheme does not purport to regulate the healthcare workers and healthcare practitioners insofar as the rendering of their services are concerned. It rather, in its terms, represents both a barrier to entry as well as being able to continue with the provision of those services.

[38] Section 36(1) provides:

"36. (1) 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 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 of this Act took effect, without being in possession of a certificate of need.

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[35] *Ibid* paras [65]–[69].

[39] Section 36(1) must be read together with Section 40.[36] Besides criminalizing the provision of "prescribed health services" in the absence of a certificate, the owner of a private healthcare establishment, healthcare provider or worker who does so, may be liable on conviction to a fine or to imprisonment for a period of up to five years or both. It bears mentioning that there is no definition of "prescribed health services" and so the CON scheme may operate as widely or as narrowly as regulations (which have not yet been conceived) may determine.[37]

[40] Any person wishing to engage in any of the activities referred to in section 36(1), must obtain a certificate of need. In the absence of the regulations contemplated in section 39, all that one can have regard to is both the factors which the Director General of Health (DG) is required to take into account in terms of section 36(3)[38] and (5)[39] for either the issue or renewal of a certificate and the factors to be

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[36] *"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."

[37] See *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at para [79].

[38] *"(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;
(b) the need to promote an equitable distribution and rationalization 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 provides 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;
(l) whether the private health establishment is for profit or not; and
(m) if applicable, compliance with the requirements of a certificate of non-compliance.

[39] *"(5)The Director-General may issue or renew a certificate of need subject to-*

considered in the regulations provided for in section 39(2). None of the factors set out are particularly contentious. It is what is not set out as a requirement for the DG to take account of, which is problematic. This is exacerbated by the provisions of section 37 which provide that any certificate that is issued or renewal is only valid for a period of 20 years.

[41] The object of the NHA and the CON scheme is to establish a "*national health system*" which "*encompasses public and health providers of health services*" and "*provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford.*"

[42] The scheme is silent on the extant rights of both the owners of private health establishments, private healthcare service providers and private healthcare workers. Such extant rights include their integration and professional reputations in the communities which they presently serve together with the significant financial investments and commitments made by them to be able to render the services that they do.

[43] It was argued by the applicants that the entire purpose of the CON scheme is to compel private health establishments, healthcare providers and workers to relocate to new locations or establish new facilities or practice their profession where the DG deems that it is necessary for them to do so.

(a) Compliance by the holder with national operational norms and standards for health establishments and health agencies; as the case may be; and
(b) any condition regarding –
(i) the nature, type or quantum of services to be provided by the health establishment or health agency;
(ii) human resources and diagnostic and therapeutic equipment and the deployment of human resources or the use of such equipment;
(iii) public private partnerships;
(iv) types of training to be provided by the health establishment or health agency; and
(v) any criterion contemplated in subsection 3

[44] The DG holds the power, in terms of the scheme, to decide where new health establishments will be established and where new medical practices can be opened. The power goes further, although it is well accepted in our law that legislation unless it is specifically provided for, cannot operate retrospectively.[40] Through the provision of section 36(1)(d), the NHA has this effect.

[45] The provision provides that all existing healthcare establishments and service providers have a 2-year grace period after the scheme becomes operative within which to make application for a certificate. Thus, although the NHA does not specifically provide for retrospective operation, the effect of requiring all existing private healthcare establishments and service providers to obtain a certificate after 2 years makes, for all intents and purposes, the imposition of the scheme impermissibly retrospective.[41]

[46] Notwithstanding the effect on existing establishments and providers, there is nothing to be found in either sections 36(3), (5) or section 39(2) which recognises the need to take account of its social, professional and financial impact upon those in respect of whom it is imposed.

[47] It was argued that the failure to take account of the extant rights of those to whom the scheme would apply may result in the arbitrary deprivation of property. This is specifically prohibited by section 25(1) of the Constitution. In this regard, it is necessary to have consideration of the extent to which the rights of a person to their property have been affected.[42] It is not necessary that the property is taken from them. It is sufficient that the rights that they enjoy in the property are

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40 *Curtis v Johannesburg Municipality* 1906 TS 308.

41 *Veldman v Director of Public Prosecutions, Witwatersrand Local* Division 2007 (3) SA 210 (CC) fn. 51.

42 *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) at para [59] where it was stated that "*. . . Meaning that the extent of the intrusion must be extensive to have a legally significant impact on the rights of the affected party.*"

impacted or that a previously enjoyed right is taken away.[43] The test for determining whether this has occurred is an objective one.[44]

[48] In *Agri SA v Minister for Minerals and Energy*,[45] a situation similar to the present was considered. In that matter, which related to the conversion of existing mineral rights to prospecting and mining rights under the Mineral and Petroleum Resources Development Act,[46] the existing mineral rights remained in force for a period of one year after the coming into operation of the Act pending the right of the holder of those mineral rights to apply for conversion. In that case, unlike the present, if the holder of the mineral right met the requirements, the rights would be converted.

[49] There is no such concomitant right in the present instance. Existing private health establishments and healthcare providers are not entitled as of right, to either the issue of a certificate or to the subsequent renewal of that certificate. Thus, while the refusal of a certificate would not deprive the owner of a health establishment of the physical property, it would deprive him of the right to use the property for that purpose – a *de facto* deprivation when one considers that health establishments, particularly hospital facilities, are purpose - built at great cost and cannot readily be converted for other use. It is the substance of what the refusal to issue a certificate in the first instance or a renewal in the second instance, would mean to the person applying for the certificate.

[50] In this regard, in *Agri SA*[47], the Court held:

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[43] *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty)* Ltd 2011 (1) SA 293 (CC) at para [41]. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para [114].

[44] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) at para [73].

[45] 2013 (4) SA 1 (CC).

[46] 28 of 2002.

[47] *Ibid* paras [63]-[64].

"Additionally, a proper meaning to give to the notion of acquisition should pose no threat to the possibility of maintaining a sensitive balance between existing private property rights and the pursuit of transformation that s 25 was designed to facilitate.

A one-size-fits-all determination of what acquisition entails is not only illusive but inappropriate particularly when an alleged expropriation of incorporeal rights like mineral rights, is considered. A case by case determination of whether acquisition [deprivation] *has in fact taken place presents itself as the more appropriate way of dealing with these matters."* [my addition]

[51] It was argued that in respect of existing health establishments, imposing the obligation to obtain a certificate in order to continue operating is tantamount to the retrospective imposition of the obligation upon the persons concerned and that any failure or refusal to issue a certificate to such persons would amount to a deprivation of property as contemplated in section 25 of the Constitution.

[52] Existing healthcare establishments have where apposite, been constructed in compliance with regulations which govern this. The construction of such establishments requires significant capital outlay both in respect of the acquisition of land where the establishment is to be constructed and then for its construction. It was argued on behalf of the eighth applicant, and not disputed, that it can cost in excess of R500 million to construct such a facility.

[53] The construction of such facilities is not a matter of sentiment but is grounded in commercial viability. So too is the position with regards to every single person who operates a health establishment whether as private rooms in a modest facility or even from home.

[54] There is in every instance, besides the intangible goodwill[48] and public confidence that resides in such establishments, a significant financial investment. The refusal to issue a certificate for any existing facility or for that matter, even if a certificate is issued, to renew such certificate in 20 years may have a deleterious effect on the willingness of any person to invest in a healthcare establishment.

[55] It seems to me a matter of common sense that if the time period over which a R500 million investment can be recovered is limited to 20 years, this will necessarily create a situation where no investor would invest unless their investment (and more) could be recouped over the 20-year period. This would have the effect of driving up the cost of healthcare in respect of not only new facilities to be constructed but also existing facilities, the value of which absent a certificate would be a fraction of their true worth.

[56] While it must be accepted that little has changed over the last 30 years from when the Constitutional Court held in *Soobramoney v Minister of Health, KwaZulu-Natal* [49] that:

> "*We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health care services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*"

It does not behove government in pursuing transformation, to trample upon the rights of some ostensibly for the benefit of the many. Our law provides a clear framework within which this is to be done.

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48 *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at paras [58] and [63].

49 1998 (1) SA 765 (CC) at para [8].

[57] For the deprivation to be lawful, it must be neither arbitrary nor procedurally unfair and interpreted broadly[50]. In *First National Bank of SA Ltd t/a Wesbank v Commissioner of South African Revenue Service and Another*[51] it was held that:

> *"It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question."*
>
> and
>
> *"In evaluating the deprivation in question regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected."*
>
> and
>
> *"Depending on such inter-play between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution."*

[58] The CON scheme is procedurally unfair. Although the provisions of the scheme require a private healthcare establishment or healthcare service provider to apply to the DG for a certificate and furthermore requires the DG in terms of section

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50 *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) at para [36].

51 2002 (4) SA 768 (CC) para [100] generally, but specifically sub-paras (a), (c) and (g).

36(7) to provide reasons if a certificate is refused or withdrawn, the CON scheme fails to:

[58.1] Require the DG to consider the rights and interests of private healthcare establishments and healthcare providers before issuing a certificate in terms of section 36(3) of the NHA.

[58.2] Require the DG to follow a fair process which would include the right to be heard, when deciding what conditions would be imposed for the issue or renewal of a certificate. Furthermore, the CON scheme does not require the DG to provide reasons for any condition imposed that would be adverse to the property rights of private healthcare establishments and healthcare providers.

[58.3] The CON scheme in its entirety makes no provision for those affected by it to make any substantive representations before a decision is taken by the DG that could lead to the deprivation of their property rights.

[59] In *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd*[52] the Constitutional Court endorsed a higher threshold for extensive restrictions on property rights and in this regard held:

> *"Since the nature of the deprivation we are concerned with here is extensive and affects ownership of land, for it to escape arbitrariness it is not sufficient to merely establish a rational connection between what s 22 authorises and the goal of achieving rapid roll out of electronic communications networks or facilities. Compelling reasons must be advanced for the deprivation on the scale that s 22 and the related provisions allow."*

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[52] 2015 (6) SA 440 (CC) at para [61].

[60] Any deprivation of property rights or limitation of the rights of any private healthcare provider, which occurs in consequence of the CON scheme, is irrational inasmuch as there is no connection between the objects of the NHA, the provisions of the scheme and the consequence of its implementation.

[61] Since the Constitutional Court has already found that absent regulations, the CON scheme is inchoate, what is left is section 36(3) of the NHA.

[62] The CON scheme specifically recognises that extant rights will be affected upon its implementation. It, at the same time, empowers the DG to refuse to issue or renew a certificate in terms of section 36(1) and, in so doing, vests in him the power to take away those extant rights. Of course nowhere in the CON scheme is there any provision that compels the owners of private healthcare establishments or for that matter private healthcare practitioners and private healthcare workers to either invest in, establish or relocate themselves, their means and their skills to an area that the DG has determined requires them and in respect of which he would issue a certificate.

[63] The power to withhold the issue of a certificate or the renewal of a certificate is nothing more than a blunt instrument which would be used by the DG to reduce the number of private healthcare establishments and private healthcare providers who could lawfully provide medical care within a particular area in the hope that having been deprived of their property and ability to earn a living they would without more accept the losses foisted upon them and relocate to an area in respect of which the DG had determined that a certificate would be issued. Even if this did occur, there would be no certainty. The sword of Damocles hangs over every private healthcare establishment and private healthcare provider in perpetuity for so long as they are required to renew a certificate of need.

[64] Section 25(2) of the Constitution expressly provides that property may not be expropriated without compensation and furthermore that in respect of such

compensation, it must be just and equitable, and either agreed upon or determined by a court.

[65] Expropriation is generally the compulsory deprivation of ownership rights, usually by a public authority for a public purpose.[53] In *Agri SA*, it was held that –

> *"Although expropriation is a species of deprivation, there are additional requirements that set expropriation apart from mere deprivation. They are (i) compulsory acquisition or rights in property by the state; (ii) for the public purpose or in the public interest, and (iii) subject to compensation."*[54]

[66] The CON scheme permits the DG to compel existing private healthcare establishments and private healthcare providers who administer prescribed healthcare services to enter into public-private partnerships and in so doing, to share all their resources as a condition of their right to operate and practice. Section 36(6)(d) specifically provides that the DG may withdraw a certificate of need *"if the health establishment or the health agency, as the case may be, or a healthcare 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."*

[67] The respondents argued that: *"the Applicants in this matter represent the interests of the private healthcare sector. That sector, due to its relatively high prices and its geographic concentration of infrastructure in predominantly wealthy areas, caters to that small group of South Africans who can afford medical aid or pay for services out of pocket. In contrast, the public health system, administered and overseen by the National Department of Health and government, is an overburdened and under-resourced system that provides fundamental healthcare services, at no or minimal cost to more than 80% of the South African population."*

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[53] *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) at para [40].

[54] *Agri SA*, para [67].

[68] This is the reason for which the sword of Damocles is wielded by the DG. All persons who require a certificate of need, especially those who presently own or operate private healthcare establishments, or private healthcare service providers, will find themselves compelled to accept the imposition of conditions and their compliance with those conditions against the threat of the withdrawal of the certificate. This is by all accounts is an expropriation of both property and services and to my mind, is akin to an attempt to indenture the private medical sector in the service of the state.

[69] The scheme violates section 25(2) of the Constitution for two main reasons.

[69.1] Firstly, the NHA does not provide a mechanism for providing affected parties with just and equitable compensation for the use of their resources. Instead, the DG has the power to impose a condition requiring the sharing of resources, failing which the establishment will not be issued a certificate and cannot operate lawfully.

[69.2] Secondly, the CON scheme does not provide for a process in terms of which an agreement could be reached between the DG and affected parties. The process that is provided for is an internal one in terms of which an appeal against a decision of the DG is lodged with the Minister of Health. It is self-evident that even this process would be fraught with difficulty inasmuch as from the time that the DG refused or withdrew a certificate, the affected parties would be unable to render any services (and earn income), as doing so renders them liable in terms of section 40 to a criminal conviction and fine and/or imprisonment.

[70] The applicants argue that the CON scheme in its present form would be destructive of existing healthcare services. In an already under resourced society, existing healthcare establishments and healthcare service providers may

be prevented by the refusal or withdrawal of a certificate from providing healthcare to those persons within the area in which they are presently located.

[71] The obligation of the State with regards to the provision of access to healthcare services is both a positive, one inasmuch as, subject to available resources, services are maintained or new services made available, and also a negative one inasmuch as it has an obligation to act in a manner that does not impede access to existing healthcare.[55]

[72] The CON scheme will, in consequence of the conditions imposed by the DG in terms of section 36(3), in the event that those conditions are accepted, have an impact on access to those private health establishments and private service providers who presently utilize their services. If the conditions are not accepted and no certificate is issued, the private healthcare establishment and private healthcare providers services are no longer able to operate where they have been.

[73] They will be become unavailable to the persons who relied upon them. The right to access private healthcare establishments and private healthcare providers is accepted in our law. This is particularly important in circumstances where the private healthcare establishments and providers are able to offer services not yet available in the public sector.[56]

[74] Besides impacting upon the rights of the owners and operators of private healthcare establishments, the CON scheme will have a direct impact upon the general public who use their services.

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[55] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para [34].

[56] *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at paras [87] and [100]. See also *Chaouli v Quebec* [2005] 1 SCR 791 where the Canadian Supreme Court found that a law that prohibits a person from acquiring private medical services (in circumstances where public resources could not respond timeously to all the public health demands) is an unjustifiable infringement of the right to life and security

[75] Does the CON scheme meet the proportionality test set out in section 36(1) of the Constitution? The section 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 the extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose."*

[76] The enquiry is a global judgment on proportionality[57] described by the Constitutional Court as follows:

> *"The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effects of the infringement provision, taking into account the availability of less restrictive means available to achieve that purpose. The limitation analysis that follows will therefore first consider the extent of the limitation of the right caused by [the impugned provisions], and will then turn to the purpose, importance and effect of [the impugned provision]. These are the two issues whose relative weight determines the outcome of the limitation analysis. That analysis therefore concludes by comparing the relative weight."*

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[57] *S v Manamela* 2000 (3) SA 1 (CC) at para [34] read together with para [66].

[77] More recently in *Economic Freedom Fighters v Minister of Justice and Correctional Services*[58] it was held that:

> *"That exercise entails a reflection on the historical origins of the concept or right entrenched and the cardinal values it embodies. The analysis must be premised on the ever-abiding consciousness that the impugned limitation violates rights and freedoms which are guaranteed by the supreme law of the Republic. And courts must approach this exercise alive to the constitutional obligation to uphold the rights in the Bill of Rights. The contextualisation of the interpretive exercise with reference to a free and democratic society as part of the standard for justifying the limitation of rights speaks to the "very purpose for which the [Bill of Rights] was originally entrenched in the Constitution.*
>
> *An approach to the justification analysis that seems to move from the premise that a legitimate governmental objective for the limitation automatically renders the limitation reasonable and justifiable or somehow shifts the burden to citizens to explain what is wrong with the limitation or why their constitutional rights deserve protection, would be misplaced. The purpose of the limitation, however legitimate and laudable, must still earn its juxtaposition to the right it inhibits. The burden to prove that it passes constitutional muster rests primarily upon the State. And that is so because the obligation to give these rights the space to flourish rests on the same State that may limit them, in a constitutionally permissible manner."*[59]

[78] The fact that the scheme infringes upon the various rights discussed above and is in its terms unable to achieve the purpose for which it was enacted, so it was argued by the applicants, evidences a failure on the part of the respondents to discharge the onus upon them.

[79] This failure, it was argued, is apparent from the fact that there is no rational connection between the scheme and its objects which would justify the limitations

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[58] 2021 (2) SA 1 (CC).
[59] *Ibid* paras [39] – [40].

of the rights of the owners of private healthcare establishments and private healthcare providers.

[80] The mere fact that a certificate would not be issued or renewed does not mean that those concerned would necessarily wish to, or for that matter be in a position to relocate their facilities or themselves and their families to where the DG decided a certificate could be issued. Added to this is the fact that the closure of facilities or relocation of healthcare service providers may have serious consequences for those who are reliant upon that them in the area where they operated.

[81] The respondents for their part argued –

[81.1] that since the main purpose of the CON scheme was that it was "*intended to [i] regulate the geographical distribution of health establishments and health agencies as well as [ii] their compliance with norms and standards,"* the limitation was reasonable. For the reasons set out above, it is readily apparent that there is no rational connection between the CON scheme and the purpose for which it was enacted. It is misguided to hold the view that the CON scheme, in implementation, by the withholding of certificates or refusal to renew certificates will have the consequence of a redistribution or the establishment of new facilities. Furthermore, absent the CON scheme, section 90 provides for the issue of regulations in regard to norms and standards and so the CON scheme is, insofar as it is claimed that this is one of its purposes, superfluous. To demonstrate this, regard need only be had to the fact that on 2 February 2018, "Norms and Standards Regulations Applicable to Different Categories of Health Establishments" were published and are in force.

[81.2] that insofar as existing health establishments are concerned, in implementing the CON scheme, the DG would not act in a manner that would result in a reduction of facilities or infringement of the right of access to healthcare. The limitation of a constitutional right cannot be justified on the basis that the functionary tasked with the implementation of the CON scheme would do so in a well-meaning or benign manner. The CON scheme as it stands, and in particular, the provisions of sections 36(3) and 37 read together with section 40, amount to nothing more than the arbitrary deprivation of property and impairment of the right to freely practice a trade, occupation or profession.

[81.3] that there are no less restrictive means available to achieve the objectives of the CON scheme. The respondents however, did not set out what other means are available or could be adopted so as to enable this court to consider whether the CON scheme is in fact the least restrictive means that could have been adopted. Of the factors to be considered by the DG before issuing or renewing a certificate, none have regard to the rights of the health establishments or agents or healthcare service providers. In particular, there is no regard to the impact of the CON scheme on existing property rights or on the right of individual healthcare service providers to freedom of movement and the practice of their chosen trade or profession.

[82] Objectively, the CON scheme is not rational. There is no nexus between the scheme and its implementation and the purpose for which it was enacted. The onus to demonstrate that the scheme is rational[60] and that any limitation of rights in consequence of it passes constitutional muster rests on the respondents.[61] For

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[60] *NL and Others v Estate Late Frankel and Others* 2018 (2) SACR 283 at para [48].

[61] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para [86].

the reasons set out above, I find that it does not and hence the application for the relief sought must succeed.

[83] It was argued by the applicants that the appropriate remedy is to severe sections 36 to 40 of the NHA from the Act. It was argued that since section 36 serves as the lynchpin of the scheme without it, sections 37 to 40 are purposeless.[62] I agree. Furthermore, as set out above, no other provisions of the NHA would be impacted. Lastly, and perhaps most significantly, given that the relevant sections have yet to be proclaimed, there is no practical consequence to the operation of the NHA generally by the severing of these inoperative sections.

[84] The applicants all argued that the constitutional issues raised in this matter are of great importance and that in the circumstances the cost ought to follow the result. Since the applicants have been successful and given the importance of the matter to not only the applicants but the general public at large, I intend to make the order for costs that I do.

[85] In the circumstances, I make the following order:

[85.1] 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.

[85.2] In terms of section 167(5) of the Constitution read together with section 15 of the Superior Courts Act 10 of 2013 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 this judgment, within 15 days of the order, with the Registrar of the Constitutional Court.

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[62] *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at para [16].

[85.3] The first and third respondents are ordered to pay the costs of the application of the first to eighth applicants which costs are to include the costs consequent upon the engagement of two counsel.

A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	4 & 5 JUNE 2024
JUDGMENT DELIVERED ON:	24 JULY 2024
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NO APPEARANCE FOR THE SECOND RESPONDENT.