

Dear GUAnn Bayman

The South African Dental Association (SADA) welcomes the Gauteng High Court's recent ruling, which declared the Certificate of Need (CoN) provisions in the National Health Act unconstitutional. This decision, handed down by Judge Anthony Millar, is a significant victory for healthcare professionals and institutions across the country, reaffirming their fundamental rights and freedoms.

The CoN scheme, as outlined in sections 36 to 40 of the National Health Act, sought to mandate the geographic distribution of private healthcare services. This would have required all new private health establishments, including hospitals and clinics, and private healthcare providers, to obtain a certificate from the Director-General of Health to operate in specific areas. Existing facilities would have had two years to comply, facing penalties of fines or imprisonment for non-compliance.

Unconstitutionality of the CON Scheme

1. **Expropriation of Property and Services:** The court found that the CoN provisions would effectively result in the expropriation of property and services from healthcare providers. By compelling professionals to relocate or restrict their practice to certain areas, the government would undermine the right to property and the ability to earn a living, both of which are protected under the South African Constitution.
2. **Arbitrary and Unfair Process:** Judge Millar highlighted the lack of procedural fairness in the CoN scheme. The provisions did not require the Director-General to consider the social, professional, and financial impacts on healthcare providers. The power to deny or revoke certificates without adequate consideration of affected parties' rights was deemed arbitrary and unjust, violating the constitutional guarantee of fair administrative action.
3. **Infringement on Personal Freedoms:** The court noted that the CoN scheme infringed upon personal freedoms, including the right to choose where to live and work. Forcing healthcare professionals to operate in specific regions, potentially against their will, was seen as an undue restriction on personal liberty and professional autonomy.
4. **Economic Impact and Healthcare Costs:** The judgment emphasized the economic consequences of the CoN scheme, particularly its potential to deter investment in the healthcare sector. The requirement for a CoN could dissuade investors from establishing new facilities, knowing that their operations could be restricted or discontinued, thereby increasing the overall cost of healthcare. The court found no rational connection between the CoN scheme and its purported goal of improving healthcare access, further undermining its justification.
5. **Public-Private Partnership Coercion:** The CoN provisions also included mechanisms that could force private healthcare providers into public-private partnerships, sharing resources as a condition for the right to practice. This aspect of the scheme was likened to an expropriation of services, effectively commandeering private resources for state use without due compensation or voluntary agreement.

A Call for Constructive Engagement and Reform

SADA in 2015 together with the Hospital Association successfully applied to the Constitutional Court to set aside the proclamation bringing sections of the National Health

Act relating to CoN into effect.

SADA has consistently voiced concerns over the CoN scheme and the broader implementation strategy of the National Health Insurance (NHI) system.

The court's ruling provides a critical opportunity for the government to address these issues. SADA urges the government to engage in transparent and inclusive dialogue with all stakeholders, including professional associations, healthcare providers, and the public, to reformulate the NHI Act in a manner that respects constitutional rights and promotes equitable healthcare access.

The ultimate goal should be to create a healthcare system that balances public health needs with the rights and freedoms of healthcare providers. This includes ensuring that any regulatory measures are fair, rational, and justifiable within the context of South Africa's legal and constitutional framework.

SADA remains committed to working with the government and other stakeholders to achieve these objectives. We believe that constructive engagement and a collaborative approach are essential to developing a healthcare system that serves the best interests of all South Africans.

We look forward to a future where healthcare policies are developed with respect for the rule of law and the fundamental rights of all citizens.

KC Makhubele
CEO



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