

SADA's statement on the High Court ruling against the certificate of needs scheme as proposed by the NHI

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The South African Dental Association (SADA) welcomes the recent ruling by the Gauteng High Court which declared the certificate of need (CoN) provisions in the National Health Act unconstitutional. This landmark decision, delivered by Judge Anthony Millar on July 24 2024, is a significant victory for healthcare professionals and institutions across South Africa, safeguarding their fundamental rights and freedoms.

The certificate of need scheme

The CoN scheme, detailed in sections 36 to 40 of the National Health Act, aimed to regulate the geographic distribution of private healthcare services. It required all new private health establishments, including hospitals, clinics and private healthcare providers, to obtain a certificate from the Director-General of Health to operate in specific areas. Existing facilities were given a two-year compliance window, with penalties for noncompliance, including fines or imprisonment.

Key findings of unconstitutionality

Expropriation of property and services: The court ruled that the CoN provisions would effectively result in the expropriation of property and services from healthcare providers. By mandating professionals to relocate or limit their practice to certain areas, the government would infringe on the constitutional rights to property and livelihood.

Arbitrary and unfair process: Judge Millar pointed out the lack of procedural fairness in the CoN scheme. The provisions failed to consider the social, professional and financial impacts on healthcare providers, granting the Director-General excessive power to deny or revoke certificates without due consideration of affected parties' rights.

Infringement on personal freedoms: The court observed that the CoN scheme infringed on personal freedoms, including the right to choose where to live and work. Compelling healthcare professionals to work in designated areas was seen as an undue restriction on personal liberty and professional autonomy.

Economic impact and healthcare costs: The judgment highlighted the economic ramifications of the CoN scheme,

noting its potential to deter investment in the healthcare sector. The requirement for a CoN could dissuade investors from establishing new facilities, thereby increasing healthcare costs. The court found no rational connection between the CoN scheme and its intended goal of improving healthcare access.

Public-private partnership coercion: The CoN provisions also included mechanisms that could coerce private healthcare providers into public-private partnerships, sharing resources as a condition for the right to practice. This aspect was deemed an expropriation of services, commandeering private resources for state use without due compensation or voluntary agreement.

A call for constructive engagement and reform

SADA has consistently voiced concerns over the CoN scheme and the broader implementation strategy of the National Health Insurance (NHI) system. In 2015, SADA, alongside the Hospital Association, successfully petitioned the Constitutional Court to set aside the proclamation enacting sections of the National Health Act related to CoN.

The court's recent ruling presents a crucial opportunity for the government to address these concerns. 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.

Our ultimate goal is to develop 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 South Africa's legal and constitutional framework.

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