REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024/058172

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

06 May 2025

Date **ML TWALA**

In the matter between:

BOARD OF HEALTHCARE FUNDERS OF SOUTHERN AFRICA NPC **APPLICANT**

and

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

MINISTER OF HEALTH **SECOND RESPONDENT**

CASE NO: 24/111209

In the matter between:

SOUTH AFRICAN PRIVATE PRACTITIONERS FORUM **APPLICANT**

and

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

MINISTER OF HEALTH **SECOND RESPONDENT**

MINISTER OF FINANCE **THIRD RESPONDENT**

NATIONAL TREASURY **FOURTH RESPONDENT**

SUMMARY

Constitution -- Section 167(4)(e) —Jurisdiction – Matter does not fall within the exclusive jurisdiction of the Constitutional Court – High court has jurisdiction to adjudicate matter. Constitution – Section 79 – Section 84 -- President's power to assent to and sign the National Health Insurance Bill – Public power – Procedural step in lawmaking process — Not policy-laden or political act or engages separation of powers - Reviewable – Rule 53 of the Uniform Rules of Court applicable.

Rule 6(5) of the Uniform Rules of Court – Point of law raised – Court has jurisdiction to adjudicate matter – President's decision is reviewable – President obliged to furnish a record.

ORDER

1. The Gauteng High Court has jurisdiction to entertain the matter;
2. The President's decision to assent to and sign the National Health Insurance Act is reviewable;

3. The first respondent is ordered to furnish the record of the impugned decision within ten (10) calendar days of this court order; and
4. The first and second respondents are ordered to pay the costs related to the rule 6(5)(d)(iii) application, jointly and severally, the one paying the other to be absolved, including the costs for the employment of three counsel on scale C.

JUDGMENT

TWALA J

Introduction

[1] On 27 May 2024, the Board of Healthcare Funders NPC ("*BHF*") instituted proceedings to review and set aside the decision of the President to assent to and sign the National Health Insurance Bill[1] ("*NHI BILL*") under case number 058172/2024. On 1 October 2024, the South African Private Practitioners Form ("*SAPPF*"), under case number 24/111209, also instituted proceedings to review and set aside the decision of the President to assent to and sign the NHI Bill and to declare the National Health Insurance Act[2] ("*NHI ACT*") invalid and direct the President to reconsider the NHI Bill. The impugned decision of the President to assent to and sign the NHI Bill into law was taken on 15 May 2024.

[2] In response to both the applications of BHF and SAPPF, the President and the Minister of Health filed a notice in terms of rule 6(5) of the Uniform Rules of Court and respectively raised similar points of law; that this Court lacks jurisdiction to adjudicate these proceedings; that the decision sought to be reviewed is incapable of review; that if it is capable of review, that no record in terms of rule 53 of the Uniform Rules of Court needs to be produced and if it is reviewable and a record needs to be produced, the President has no obligation to do so.

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[1] B11-2019.
[2] 20 of 2023.

[3] It is noteworthy that the third and fourth respondents did not participate in these proceedings. Since the President and the Minister of Health have raised the question of law against both cases of the BHF and SAPPF, it was directed by the Deputy Judge President of this division that both cases be heard together – hence this judgment will cover both cases. Furthermore, in this judgment, I propose to refer to BHF and SAPPF as the applicants and to the first respondent as the President and the second respondent as the Minister. Where necessary, I will refer to the applicants by their acronyms as indicated above and to the President and the Minister as the respondents.

Description of the Parties

[4] The one applicant is the Board of Healthcare Funders of Southern Africa NPC ("*BHF*"), previously called the Representative Association of Medical Schemes ("*RAMS*") under the Medical Schemes Act.[3] BHF is a non-profit company registered and incorporated as such in South Africa with its principal place of business at Lower Ground Floor South Tower, 160 Jan Smuts Avenue, Rosebank, Johannesburg.

[5] The other applicant is the South African Private Practitioners Forum ("*SAPPF*"), a voluntary association of private practitioners who work in the private health care sector in South Africa, with its head offices at Unit 16, Northcliff Office Park, 203 Beyers Naude Drive, Northcliff, Johannesburg.

[6] The first respondent is the President of the Republic of South Africa *("the President"*), the Head of the Executive of Government whose office is at the Union Buildings, Government Avenue, Pretoria. I will also use the pronoun "he" when referring to the President since the sitting President is a male.

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[3] Act No. 72 of 1967.

[7] The second respondent is the Minister of Health ("*the Minister*"), the Cabinet and Executive member in charge of the National Department of Health whose office is at Dr AB Xuma Building, 1112 Voortrekker Road, Pretoria.

[8] The third respondent is the Minister of Finance, the Cabinet and Executive member in charge of the department of National Treasury, with offices at 40 Church Street, Old Reserve Bank Building, 2nd Floor, Pretoria.

[9] The fourth respondent is the National Treasury, a department that is under the control and supervision of the Minister of Finance, which advises on fiscal policy and public finances, financial relations and expenditure planning and priorities. It further manages the annual budget process and provides public finance management support and manages government's assets and liabilities. It has its office at 40 Church Street, Old Reserve Bank Building, 2nd Floor, Pretoria. Both the third and fourth respondents are not participating in these proceedings.

Factual Background

[10] On 15 May 2024, in the execution of his constitutional obligations in terms of section 84(2)(a) read with section 79 of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*"), the President assented to and signed into law the NHI Bill and a proclamation was published in the Government Gazette[4] on 16 May 2024. The decision of the President to sign the Bill was preceded by a protracted history since at the various stages of the Bill there has been grave concerns raised by members of the public and other stakeholders regarding its constitutionality.

[11] On 12 August 2011 the Green Paper titled '*National Health Insurance in South Africa*'[5] announced the introduction of a system of health care financing in South Africa. This was followed by the publication of a White Paper titled *'National*

[4] Proc R4826 *GG* 50664, 16 May 2024.
[5] National Health Act (61/2003): Policy on National Health Insurance, GN 657 *GG* 34523, 12 August 2011.

Health Insurance for South Africa: Towards Universal Health Coverage'[6] on 11 December 2015. The White Paper recorded that 150 written submissions were received from members of the public in response to the Green Paper and that the national and provincial road shows had solicited feedback from over 60 000 people over a period of four years.

[12] In 2015 SAPPF made submissions on the 2015 White Paper noting that several crucial aspects of the National Health Insurance ("*NHI*") were unclear such as its funding and affordability; the benefits to be covered; the role of medical schemes; the determination of service provider reimbursement; and the means of addressing the woeful state of government health facilities. SAPPF also pointed out that the costing models by Treasury relied upon had not been updated since the 2011 Green Paper.

[13] On 7 March 2017, the Davis Tax Committee ("*DTC*"), which was established by the Minister of Finance in 2013, published a report.[7] As part of its mandate, the committee was requested to evaluate the proposal to fund the NHI. The DTC report raised concerns, among others; that there is a revenue shortfall of about R71.9 billion which is contingent on a real growth of 3.5% of GDP and if the growth rate is at 2%, the shortfall would be R108 billion or more. There was uncertainty and a lack of common understanding of how the NHI will be implemented and operate given the magnitude of the proposed reform.

[14] Further, the lack of implementation detail made it difficult to estimate the potential economic benefits and costs. The DTC report stated that the magnitudes of the proposed NHI fiscal requirement are so large that they might require trade-offs with other laudable NDP programmes such as an expansion of access to post school education or social security reform. Given the current costing parameters outlined

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[6] White Paper on National Health Insurance, GN1230 *GG* 39506, 11 December 2015.
[7] The Davis Tax Committee *Financing a National Health Insurance for South Africa*, 7 March 2017.

in the White Paper, the proposed NHI in its current format is unlikely to be sustainable unless there is sustained economic growth.

[15] On 30 June 2017, the revised and finalised White Paper titled *'National Health Insurance for South Africa: Towards Universal Health Coverage'*[8] was published. Although there were submissions on the 2015 White Paper and the DTC report, the 2017 White Paper substantially relied on the cost projections of the 2011 Green Paper. On 21 June 2018 the National Department of Health published the draft NHI Bill which deferred the critical aspect of the costing and funding of the NHI to a later stage or date.

[16] SAPPF noted in its submissions on 20 September 2018 that certain issues that were raised during the Green and White papers have not been addressed in the NHI Bill and these included: the impact of the establishment of the NHI Fund on existing administrative structures and personnel in the health care sector; the relationship between the NHI Fund and medical schemes or private health insurance; the scope of health services covered by the NHI Fund; and the wide discretionary powers afforded to the Minister of Health.

[17] On 9 November 2018, the Acting Director-General of the Treasury raised concerns with the Advisor to the Presidency on NHI regarding the constitutionality of the draft NHI Bill. Amongst the concerns raised was that several discussions were held between the Minister of Finance and the Minister of Health with the State Law Advisor and several amendments were made to the draft NHI Bill which allowed the Minister of Finance to support the publication of the draft Bill for public comment.

[18] However, lamented the Acting Director-General, without any consultation with the Treasury or Minister of Finance, the Bill has now been substantively amended and the previous amendments effected to satisfy the Treasury's concerns around the

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[8] National Health Insurance for South Africa: Towards Universal Health Coverage G N 627 *GG* 40955, 30 June 2017.

intergovernmental financing system have been unilaterally removed. He also cautioned of constitutional challenges relating to the functions and funding of provincial health departments as well as other interest groups.

[19] The major problems listed by the Acting Director-General for Treasury were the inadequacy of detail on financial implications including the cost of NHI itself and the NHI Fund, the shifting of the health function from provincial to national level of government and the restricted complementary role envisaged for medical schemes. Further, that the NHI Bill infringes on the powers of the Minister of Finance and appears to override legislation dealing with the financial management of public funds. It warned that there was insufficient information on costs of the NHI itself and the cost of the Fund.

[20] The Minister of Health introduced the NHI Bill in the National Assembly on 7 August 2019 and a call for public comments was issued on 30 August 2019 which closed on 29 November 2019. Between 26 October 2019 and 24 February 2020, and 18 May 2021 and February 2022, nine hundred and sixty-one, and four hundred and forty-one oral submissions were heard, respectively. There were over three hundred and thirty-eight thousand written submissions indicated as having been received by the National Assembly.

[21] SAPPF was amongst those entities who made submissions and raised its concerns of the paucity of detail regarding the costing and funding of NHI and how the required funding will be determined. Further, it noted that the process for drawing up the budget of the NHI Fund, and aspects of the implementation of the NHI were relegated to regulations. The NHI Bill centralised power in the executive and gave the Minister of Health extensive regulation-making powers whilst some key terms in the NHI Bill were either undefined or defined overly broadly or unclearly.

[22] The Parliamentary Legal Advisor and the State Law Advisors, respectively, presented two opinions regarding the issues raised during the deliberations on the

NHI Bill to the Portfolio Committee on Health on the 15 March 2023. The Parliamentary Legal Advisor noted his concern about the constitutionality of the NHI Bill if medical scheme users suffer a reduction in access to health care as a result of the full implementation of the NHI and that it could raise a constitutional challenge based on section 27 of the Constitution.

[23] The State Law Advisors accepted that in order to pass constitutional muster the NHI Bill is required to be reasonably capable of achieving the purpose of achieving sustainable and affordable access to health care. However, the State Law Advisors opined that the combined constitutional obligation of section 27 of the Constitution and binding international obligations, which must be given effect to, are key to motivating the rationality of the Bill. On 13 June 2023 the NHI Bill was passed with minor amendments, by the National Assembly and transmitted to the National Council of Provinces for concurrence.

[24] On 9 November 2023, the National Department of Health presented a report[9] in response to the concerns raised by stakeholders. It noted that the Bill is based on section 27 of the Constitution as foundation – therefore, it cannot be unconstitutional. On 6 December 2023 the NHI Bill was passed by the National Council of Provinces notwithstanding that the Department of Health had accepted that changes needed to be made and was sent to the President.

[25] On 5 December 2023 BHF made formal submissions to the President expressing its reservations about the constitutionality of the NHI Bill. The letter to the President raised concerns about the lack of accountability since the NHI Bill defers critical issues and the lack of detail undermines the NHI Bill's effectiveness and hinders oversight from Parliament and the public. The NHI Bill fails to explain how the NHI will be funded which raises a serious concern since the economic growth of the country has been slow – thus making it financially impractical.

[9] Stakeholders Response to the National Health Insurance Bill (B11B-2019).

[26] BHF noted that there was a lack of detailed coverage and pricing guidance since the NHI Bill fails to identify the benefits covered by the NHI Fund and provides no precise mechanisms to determine the price of a benefit and the quantum of compensation payable to the healthcare providers. The legislative process did not allow for meaningful public consultation. Although numerous public submissions were made, significant concerns raised were not addressed. Presenters were not afforded sufficient time to express their concerns and there was minimal meaningful engagement with the private sector.

[27] Further, the NHI Bill includes undefined terms and lacks clarity whilst delegating significant powers to the Minister of Health to create regulations without the legislature's scrutiny or oversight. It will fail to fulfil constitutional obligations of the government under section 27(2) of the Constitution which mandates reasonable measures for the progressive realisation of healthcare rights. There is the potential risk of regression in healthcare services and could worsen healthcare access and quality.

[28] BHF noted further that the NHI Bill impedes access to established healthcare services, particularly for those opting to join medical schemes to avoid unreliable public healthcare. Moreover, its mandatory nature infringes on individual autonomy, freedom of association, self-determination, and security. It further threatens employment in the private healthcare sector.

[29] Realising that the National Council of Provinces has passed the NHI Bill without making any amendments, on 11 December 2023 BHF, through its legal representatives submitted an analysis of the main reason why the NHI Bill was unconstitutional. Some of the concerns raised by BHF was the failure of the NHI Bill to address the concerns raised in the submissions. It noted that the NHI Bill suffers from critical deficiencies that render it susceptible to constitutional challenges. The failure of the NHI Bill to specify covered benefits and determine

product prices leaves crucial aspects in the hands of unelected officials without a clear decision-making framework.

[30] On 12 December 2023, Momentum Health Solutions petitioned the President not to assent to and sign the NHI Bill and to refer the proposed law back to the National Assembly. The petition alerted the President to several provisions in the NHI Bill which violated constitutional provisions and that there was a lack of effective public consultation during the legislative process in the National Assembly and the National Council of Provinces.

[31] Concerned that the NHI Bill has now been sent to the President for his consideration and assent, on 18 December 2023 the South African Health Professionals Collaboration ("*SAHPC*") to whom SAPPF is a member, addressed correspondence to the President petitioning him to refer the NHI Bill back to the National Assembly for reconsideration of its constitutionality. It noted that the President performs an important checking role in the legislative process to ensure that the laws that he assents to, and signs conform to the Constitution.

[32] Further, it noted that the legislative process followed in respect of the NHI Bill was procedurally unfair, in that valid constitutional concerns repeatedly raised by stakeholders to the National Assembly and National Council of Provinces have been ignored and disregarded. That the limitation of medical schemes' permissible offering to only coverage complementary to NHI-funded offerings created a risk for the viability of the NHI Fund in that it shifted the responsibility of providing care for a large number of critically ill or high-risk patients from private medical aid to the state.

[33] It noted further that the NHI Bill undermined section 25 of the Constitution in that health care practitioners would effectively be deprived of all or part of the value of their practices as the transition is made from an environment of private sector medical scheme reimbursement for services to a national pricing system. It

undermines section 27 of the Constitution and constituted a retrogressive measure in that it unjustifiably impaired existing rights to health care – thus it contravenes the state's obligation not to impair the existing enjoyment of constitutional rights.

[34] On 4 January 2024 Discovery Medical Scheme ("*Discovery*") requested the President to refer the NHI Bill back to the National Assembly for reconsideration because the current form of the NHI Bill was unconstitutional and incapable of achieving universal healthcare coverage or important objectives of the NHI Bill itself. Like the other stakeholders, Discovery raised serious concerns about the affordability of NHI, shortcomings of a single funder model which poses significant fiscal and systemic risks, the uncertain role of medical schemes, the infringement of constitutional rights and the right to access healthcare services under section 27 of the Constitution.

[35] The Solidarity Trade Union ("*Solidarity*") petitioned the President on 23 January 2024 to refrain from assenting to and signing the NHI Bill because it was unconstitutional as it contravenes specific constitutional provisions regarding the preparation and introduction of money Bills. The preparation and introduction of money bills is reserved specifically for the Cabinet member responsible for the national financial matters, according to the Constitution. It noted further that the NHI Bill was irrational and fails to meet the constitutional mandate of reasonable legislative measures within available resources.

[36] Discontented with the announcement that the President would assent to and sign the NHI Bill, on 14 May 2024 the SAHPC published a statement expressing its profound disappointment that the unworkable NHI Bill would be signed into law. The Second Presidential Health Compact which followed the First Presidential Health Compact which was launched in 2019, which was supposed to be signed on 15 August 2024, was not signed by the stakeholders, including Business Unity of South Africa ("*BUSA*"), South African Medical Association ("*SAMA*") and SAPPF on the bases that it explicitly endorses the NHI Act in its current form. However, the Second

Compact was eventually signed on 22 October 2024 by mostly entities linked to the Department of Health and labour union.

[37] On the eve of signing the NHI Bill on 14 May 2024 the Western Cape Government urged the President not to sign the NHI Bill into law. It noted that it was deeply concerned with the Bill in its current form as it requires substantial amendments. It stated that the Bill as it stands was unconstitutional and will prove to be unaffordable and impractical. It will not achieve its purpose of Universal Health Coverage which the citizens deserve. It was further noted that correspondence has been sent to the President on 8 December 2023 and 24 January 2024 but there was no courtesy of a reply.

[38] Dissatisfied with the treatment received from the President, on 27 May 2024 BHF launched this application to review the decision of the President to assent to and sign the NHI Bill into law. Similarly, SAPPF launched its own application to review the decision of the President on 1 October 2024

[39] In response to both applications, the President and the Minister filed their notices to oppose the applications and the notice in terms of rule 6(5)(d)(iii), thereby raising a question of law in the following terms:

39.1 that this Court is not clothed with the necessary jurisdiction to adjudicate this matter since section 167(4)(e) provides that only the Constitutional Court may decide that the President has failed to fulfil a constitutional obligation.

39.2 if the Court finds that it has the necessary jurisdiction to hear the matter, and since the review relief sought by the applicants before this Court is in terms of rule 53 of the Uniform Rules of Court, the questions of law are:

39.2.1 whether assent and signature by the President of a Bill is capable of review;

39.2.2 if assent and signature by the President of a Bill is capable of review, whether rule 53 of the Uniform Rules of Court finds application to such a decision; and or

39.2.3 if rule 53 of the Uniform Rules of Court is applicable, then whether the President is obliged to produce a record of his decision.

Submissions of the Parties

[40] The respondents submitted that this court does not have the necessary jurisdiction to hear this matter since the challenge is about the failure of the President in fulfilling his constitutional obligation. It is trite, so it was contended, that a challenge where the President is alleged to have failed to comply with his constitutional obligations, only the Constitutional Court has the necessary jurisdiction to determine whether that is so in terms of section 167(4)(e) of the Constitution.

[41] The respondents say that the President derives his powers to assent to and sign a Bill from the Constitution. The assent to and signature to a Bill is the President's constitutional obligation and can only be executed by the President or Acting President. It is agent-specific and therefore it is one of the obligations of the President which, when it is alleged that it has been breached, the determination of that breach falls within the exclusive jurisdiction of the Constitutional Court. Since it is asserted by the applicants that the President has failed to fulfil its obligation in terms of section 79 and 84 of the Constitution, then it engages the provisions of section 167(4) of the Constitution, and it triggers the exclusive jurisdiction of the Constitutional Court.

[42] The obligation imposed on the President in terms of section 79 to assent to and sign a Bill, so the argument went, is at the tail-end of the legislative process and is agent specific since it is expressly imposed on the President alone and not Parliament or any other organ of state. As the assertion of the applicants is that the President failed to properly exercise his constitutional power under section 79(1) read with sections 83(b) and 84(2)(b) of the Constitution before assenting to and signing the NHI Bill, it is only the Constitutional Court that has the requisite jurisdiction to hear the matter

for all the constitutional obligations of the President under these sections implicate section 167(4) of the Constitution.

[43] The respondents contended further that the fulfilment of the President's obligations in terms of section 79 involves the exercise of a subjective discretion and an attempt to review that decision in the high court has very significant separation of powers implications. It is up to the President alone as to how he goes about ascertaining whether he has reservations about the constitutionality of the Bill and whether to refer it back to the National Assembly or to the Constitutional Court. A challenge on all these considerations falls within the remit of the Constitutional Court alone.

[44] Although jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case, in determining whether the Constitutional Court's exclusive jurisdiction is engaged in terms of section 167(4)(e) is not a superficial function of pleadings merely alleging the President's breach of a constitutional obligation. But more is required, though the starting point is the pleadings. By using 'must' in the provisions of section 79 of the Constitution, constitutional obligations are created for the President and a challenge to the fulfilment of these constitutional obligations by the President engages the provisions of section 167 of the Constitution and can only be determined by the Constitutional Court.

[45] It is immaterial, so the argument went, whether the review of the President's decision is based on its legality or rationality, whether he took the steps in terms of section 79 and whether he failed to take into account the submissions of stakeholders. All these contentions demonstrate that the President failed to fulfil his constitutional obligations as required and to comply with his constitutional obligation to act rationally when fulfilling his obligations in terms of section 79 of the Constitution.

[46] If this Court is persuaded to assume jurisdiction, so it was contended, it will set a precedent for every person, juristic or individuals, who are well-resourced and disgruntled with legislation to bring a review in the High Court. Such an application

may be entirely without merit and the applicant may go on a fishing expedition relying upon rule 53 in an attempt to make out an arguable case. The applicants have failed to demonstrate a reviewable flaw in the President's decision making yet they seek to bring a legislative process to address the healthcare needs of the entire population to a halt.

[47] Should the Court find that it has the requisite jurisdiction to determine this case, so it was contended, the conduct of the President in assenting to and signing the NHI Bill is not reviewable. This is so because the assent to and signature of the NHI Bill is explicitly excluded from the definition of administrative action and the President is not one of the listed entities and or organs of state whose administrative actions are reviewable. Administrative action does not include the executive powers or functions of the National Executive including the powers or function referred to in sections 79 and 84 of the Constitution.

[48] Although the President considers information and makes assessment of it before he reaches a conclusion, so it was contended, his doing so is not in the context of an administrative decision that could be the subject of a review. It is the exercise of his original constitutional powers that is subject to no constraint but that is listed in the Constitution itself. The powers of the President to assent to and sign a Bill may be subject to constitutional constraint and discipline, but not through the modality of a review process.

[49] If the Court finds that the decision of the President is reviewable, so the argument went, the decision of the President is not subject to the provisions of rule 53. If the Court finds that rule 53 is applicable, then the respondents contend that the President is not obliged to produce the record of the decision. This is so because this case does not concern an executive function in the traditional sense but rather the exercise of an original power conferred upon the President as the Head of State.

[50] Section 173 of the Constitution does not empower Courts to do whatever they want at the instance of the litigant. For section 173 to avail a litigant, so it was argued, the litigant must properly formulate or plead its case. There is no pleaded case by the applicants which sought the production of the record of decision from the President in terms of section 173. The development of the common law has not been sought by the applicants to oblige the President to produce the record of decision in light of section 173 or to declare that the record of decision is due in terms of section 173.

[51] The applicants say that the constitutional obligations complained of which were not fulfilled by the President when assenting to and signing the NHI Bill into law are not borne by the President alone but rather shared with the other branches of government. The President is part of and plays a complementary role in the law-making process. The President is the third level and the final stage of making the Bill into law, after the National Assembly ("*NA*") and the National Council of Provinces ("*NCOP*") has passed the Bill – hence the President's power to assent to and sign a Bill is part of the legislative process and it is not agent-specific since he performs this obligation collaboratively with the NA and the NCOP.

[52] The applicants contended further that the President's assent to and signing the NHI Bill does not raise a sensitive political matter or impinge upon aspects of the separation of powers as it involves the court considering whether the President duly performed a legal assessment rather than a political or policy-laden one. When assenting to and signing a Bill, the President exercises a public power which is subject to constraints imposed by the Constitution and the rule of law.

[53] According to the applicants, section 172 of the Constitution confers jurisdiction on the High Court to decide constitutional matters including determining the constitutional validity of any conduct of the President. The review, so it is contended, is directed at the decision of the President before assenting to and signing the NHI Bill which is whether he had any reservations before he assented to and

signed the NHI Bill. It is the manner in which the President exercised the public power when he assented to and signed the NHI Bill which is in issue.

[54] The President's powers and duties under section 84(2) read with section 79 of the Constitution do not involve a discretionary or political act. It is a procedural step in a much larger law-making process involving the other government branches. The President's decision to assent to and sign the NHI Bill is therefore, so it is contended, solely based on a legal determination and does not present sensitive political questions over which the Constitutional Court should exercise exclusive jurisdiction to preserve comity with the elected branches of government.

[55] The applicants say that the President violated his constitutional duty by failing to scrutinise the constitutionality of the NHI Bill and to refer it back to Parliament when he assented to and signed it into law. The President's power is coupled with a duty which does not arise from a single constitutional provision but from the interlinking constitutional duties imposed by section 84(2) as read with section 79, section 83(b) and section 7(2) of the Constitution.

[56] Further, so say the applicants, the President's conduct in assenting to and signing the NHI Bill into law was for an ulterior purpose or on the basis of irrelevant considerations that tainted the decision with irrationality. The president followed an irrational procedure in deciding to assent to and sign the NHI Bill because he ignored information that was materially relevant to the decision and the NHI Bill was therefore irrational because the legislation has patent constitutional defects.

[57] The President's power is not untrammelled and therefore he may not conduct himself in way that is free of particular constitutional constraints, or which ignores them when brought to his attention. Section 79 of the Constitution requires the President to scrutinise the Bill and to decline to assent to and sign it if he has reservation about its constitutionality which reservations may arise from submissions that are placed before him. If the President does not exercise the power

in accordance with the limits imposed upon it by the Constitution or law, then such conduct is reviewable under the principle of legality.

[58] The applicants say this case does not concern the failure of the President to fulfil a constitutional duty that only the Constitutional Court has jurisdiction to adjudicate, but it is whether the President exercised his power in compliance with the duties imposed upon him by the Constitution. Even if the grounds of review implicate a constitutional obligation, so it was contended, it is not an obligation of the kind envisage in section 167(4)(e). What is for determination by this Court is whether the President's conduct complied with the rule of law.

[59] The rule of law requires that the exercise of public power by the executive and other functionaries should not be arbitrary. Further, so the argument went, the decision must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. This include the procedure followed in reaching a decision which should be capable of leading to the attainment of the purpose for which the power was conferred. The exercise of the President's power under section 79, so it was contended, does not raise politically sensitive issues or impinge upon the separation of powers.

[60] The applicants say that, in terms of section 79 of the Constitution, the President performs his duties to assent to and sign a Bill not as a specific agent, which would then engage the exclusive jurisdiction of the Constitutional Court, but as part of the legislative process. Thus, the challenge is whether the President is said to have exercised some or other power in a manner that conflicts with constitutional principles, such as the rule of law, binding on all persons vested with public power. The President has a duty not to assent to and sign a Bill which is inconsistent with the Constitution.

[61] Further, the applicants contend that section 84 of the Constitution confers the power upon the President to assent to and sign a Bill or, if he has reservations about its

constitutionality, he must refer it back to Parliament for reconsideration or to the Constitutional Court. The powers are coupled with duties upon the President to use them in the requisite circumstances to fulfil the constitutional purpose which is to ensure laws that are constitutional. The duty imposed on the President is to make an assessment as to the constitutionality of the Bill in accordance with legal criteria and not a political or policy-laden assessment.

[62] The President's power to assent to and sign a Bill constitutes, so the argument went, a public power that provides scope for the Court to intervene through a review. The power is strictly controlled by the Constitution and is subject to minimum requirements that the President must meet in the exercise of this power which create the scope for the Court to scrutinise whether the requirements were met, and the power was properly lawfully and rationally exercised. Clearly, so it was contended, the powers of the President under section 84 warrants judicial scrutiny through review as it is well established that any exercise of public power is subject to the Constitution and the rule of law.

[63] The applicants say that whatever the President does, must be in accordance with the Constitution and the law. All exercises of public power are justiciable, and at a minimum must be lawfully and rationally exercised. Since the President's powers to assent to and sign the Bill are strictly controlled by the Constitution, so it was contended, the exercise of the President's power outside the limits imposed by the Constitution is therefore reviewable. The President has to satisfy himself that he has no reservations about the constitutionality of the Bill before signing it into law.

[64] The general applicable procedure for reviews is, so the argument went, once an applicant has elected to bring their review in terms of rule 53, it is entitled to the record of decision. This entitlement is automatic and does not depend on the merits of the review. The President is obliged to make the record available as it is not only for the benefit of the applicants but also essential to enable the Court to fulfil its

function to conduct a thorough and informed review of the impugned decision. The President has offered no compelling reasons for withholding the record in this case.

[65] The applicants say the record is for the benefit of both the applicants and the Court since it is the best available documentary evidence of the decision-making process and the lawfulness thereof, and its production thus ensures that the review application can be adjudicated in a proper, fair and constitutional manner. The record of decision also serves the constitutional imperatives of accountable and transparent public decision-making. The provision of the record of decision, so it was contended, will shed light on the reasoning behind the decision and refute after the fact justifications.

Legal Framework

[66] It is necessary at this stage to restate the provisions of the Constitution which are relevant for the discussion that will follow which state the following:

> "Section 7 Rights
>
> (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
>
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
>
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.
>
> Section 79 Assent to Bills
>
> (1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
>
> (2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.
>
> (3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if--

(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or

(b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either--

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

Section 83 The President

The President-

(a) is the Head of State and head of the national executive;

(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and

(c) promotes the unity of the nation and that which will advance the Republic.

Section 84 Powers and functions of President

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for-

(a) assenting to and signing Bills;

(b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;

(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;

(d) ...

Section 167 Constitutional Court

(1) ...

(4) Only the Constitutional Court may-

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) ...

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

(6) ...

Discussion

[67] It is trite that when the jurisdiction of the Court is challenged by one of the parties, it has to be determined first since it forms the basis for the Court's power to determine the issues between the parties. In determining whether the Court has the requisite jurisdiction to adjudicate the matter, the Court must consider the pleadings as a starting point. In constitutional matters, jurisdiction is shared between the Constitutional Court, Supreme Court of Appeal and the High Court, however the Constitutional Court has repeatedly made it clear that it is undesirable for it to sit as a court of first and last instance.

[68] In *Bruce and Another v Fleecytex Johannesburg CC and Others*[10], which was quoted with approval in *Satchwell v President of the Republic of South Africa*[11], the Constitutional Court stated the following:

[10] [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415.
[11] [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6.

> "It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.[12]"

[69] Furthermore, it has long been established that motion proceedings are designed for the resolution of legal issues based on common cause facts. Put differently, motion proceedings are to be decided on the papers and only in case where there is a factual dispute between the parties which could be foreseen, then it is appropriate that action proceeding should be instituted unless the factual dispute is not real or genuine or bona fide.

[70] The principle was laid down in *Plascon-Evans Paints (TVL) v Van Riebeck Paints (Pty) Ltd*[13] where the Court, quoting from *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[14] stated the following:

> "Where there is a dispute as to the facts a final interdict should only be "granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order … where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.
> This rule has been referred to several times by this court (see Burnkloof Caterers Ltd v Horseshoe Caterers Ltd 1976 (2) SA 930 (A), at 938; Tamarillo (Pty) Ltd v BN Aiteken (Pty) Ltd 1982 (1) SA 398 (A) at 430-1; Associate South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere 1982 (3) SA 893 (A) at 923. It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on affidavit, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred

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[12] *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415 at para 8.
[13] [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.
[14] 1957 (4) SA (C); [1957] 1 All SA 123 (C).

in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard- Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA at 1163 (T); Da Mata v Otto NO 1972 (3) SA 585 (A) at 882).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see Rikhoto v East Rand Administration Board 1983 (4) SA 278 (W) at 283 E -H). Moreover, there may be exceptions to this general rule, B as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the Associated South African Bakeries case, supra, at p 924 A)."

[71] The principle was expanded upon in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[15] where the court stated the following:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when

[15] [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).

> arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settled an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."[16]

[72] It is noteworthy that the respondents did not file any answering affidavits in opposition to these cases. Therefore, since the starting point in determining the issue whether this Court has the necessary jurisdiction to adjudicate this matter is from the pleadings, the Court is obliged to consider the only pleadings filed of record which are the founding affidavits of the applicants. Following the Plascon Evans rule as enunciated above, the facts as stated in the founding affidavits of the applicants are uncontroverted and are to be admitted as such.

[73] The case for the applicants is that the President has, in the face of enormous opposition that the NHI Bill was unconstitutional, nevertheless assented to and signed the NHI Bill into law in breach of his duties as imposed upon him by the Constitution. The Constitution requires the President to first consider and scrutinise the constitutionality of a Bill before assenting to and signing it into law, and the challenge in this instance is that the President failed to do so.

[74] It is undisputed that section 167(4)(e) specifically provides that where the President or Parliament is alleged to have failed to fulfil a constitutional obligation, the exclusive jurisdiction of the Constitutional Court is engaged. What this Court must consider is whether the conduct of the President complained of and the constitutional obligations which are conferred upon the President in terms of section 84(2)(a) read

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[16] Id at para 13.

with section 79 are those enlisted in section 167(4)(e) which fall within the exclusive remit of the Constitutional Court.

[75] In *Economic Freedom Fighters v Speaker, National Assembly and Others*[17] the Constitutional Court, dealing with the issue of determining whether a Court enjoys exclusive jurisdiction in a matter, stated as follows:

> "Whether this Court has exclusive jurisdiction in a matter involving the President or Parliament is not a superficial function of pleadings merely alleging a failure to fulfil a constitutional obligation. The starting point is the pleadings. But much more is required. First, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled. Second, that obligation must be closely examined to determine whether it is of the kind envisaged by section 167(4)(e)."[18]

[76] The Constitutional Court continued and stated that additional and allied considerations are that section 167(4)(e) must be given a narrow meaning and added the following:

> "An alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. An obligation shared with other organs of State will always fail the section 167(4)(e) test. Even if it is an office-bearer- or institution-specific constitutional obligation, that would not necessarily be enough. Doctors for Life provides useful guidance in this connection. There, Ngcobo J said, "obligations that are readily ascertainable and are unlikely to give rise to disputes", do not require a court to deal with "a sensitive aspect of the separation of powers" and may thus be heard by the High Court. This relates, as he said by way of example, to obligations expressly imposed on Parliament where the Constitution provides that a particular legislation would require a two-thirds majority to be passed. But where the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. When this is the case, then the demands for this Court to exercise its exclusive jurisdiction would have been met."[19]

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[17] [2016] ZACC 11, 2016 (3) SA 580, 2016 (5) BCLR 618 (CC).
[18] Id at para 16.
[19] Id at para 18.

[77] Although the concept of constitutional obligation has not been defined by the Constitutional Court, the Court has explained that whether conduct falls within its exclusive jurisdiction depends on the facts and the precise nature of the challenges to the conduct of the President. Put differently, the issue is always dealt with on a case-by-case basis and surely cannot mean the general duty to act in conformity with the Constitution as this would be at odds with section 172(2)(a) of the Constitution which confers jurisdiction on the Supreme Court of Appeal and High Court to determine such matters or conduct.

[78] In *Doctors for Life International v Speaker of the National Assembly and Others*,[20] which quoted with approval the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[21] the Constitutional Court stated the following:

> "What all of this points to is that the phrase 'a constitutional obligation' in section 167(4)(e) should be given a narrow meaning. If the phrase is construed as applying to all questions concerning the constitutional validity of Acts of Parliament, it would be in conflict with the powers of the Supreme Court of Appeal and the High Courts to make orders concerning the validity of Acts of Parliament."[22]
>
> In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU 1)*, this Court, in the context of the conduct of the President, expressed the view that the words 'fulfil a constitutional obligation' in section 167(4)*(e)* should be given a narrow meaning because a broader meaning would result in a conflict with section 172(1)(a) which empowers the Supreme Court of Appeal and the High Courts to make orders concerning the constitutional validity of the conduct of the President. While finding it unnecessary to define the expression 'fulfil a constitutional obligation', the Court expressed the view that '[i]t may depend on the facts and the precise nature of the challenges to the conduct of the President'. In my view, there is no reason why this should not apply to the phrase as it relates to Parliament.[23]"

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[20] [2006] ZACC 11;2006 (6) SA 416 (CC);2006 (12) BCLR 1399 (CC).
[21] [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059.
[22] [2006] ZACC 11;2006 (6) SA 416 (CC);2006 (12) BCLR 1399 (CC). at para 19.
[23] Id at para 20.

[79] The provisions of section 83 of the Constitution which imposes obligations on the President to uphold, defend and respect the Constitution are not enough to invoke the provisions of section 167(4)(e) for it is not an obligation solely imposed on the President but also to other organs of state. To implicate the exclusive jurisdiction of the Constitutional Court, the obligation must be conferred on the President or Parliament specifically and no other organ of state. If it is a shared obligation, as is the case in the legislative process which is shared by the National Assembly, the National Council of Provinces and the President, then the High Court and the Supreme Court of Appeal has the necessary jurisdiction to determine the matter.

[80] It is noteworthy that section 79, which empowers the President to assent to and sign a Bill into law if he does not have reservations about its constitutionality, falls under the heading 'National Legislative Process' in the Constitution. That would imply that the President has a certain role to fulfil in the legislative process and as the head of the executive together with other members of the executive implement national legislation. Put in another way, the President is a role player in the legislative process with other players although his role is activated only after Parliament has completed its functions and has presented the Bill to the President.

[81] In *Minister for Environmental Affairs v Aquarius Platinum (SA) (Pty) Limited*[24] the Constitutional Court stated as follows when it was dealing with the provisions of section 79:

> "For a proper understanding of the constitutional challenge and the order granted by the High Court, it is necessary to set out the legal framework before narrating the facts. The Constitution confers the legislative power at the national sphere upon Parliament. In the exercise of this power, Parliament passes legislation which is introduced to it in the form of Bills. In the National Assembly, Bills may be introduced by a Cabinet member, a Deputy Minister or a member of the Assembly only. The Bill does not assume the status of a law until it has been assented to and signed by the President.[25]

[24] [2016] ZACC 4; 2016 (5) BCLR 673 (CC).
[25] Id at para 5.

> Section 79 introduces the President as a role player in the process of making legislation. But the President's role is activated only after Parliament has completed its functions and has presented the Bill to the President. Upon receipt of a Bill, there are two options open to him. He may assent to and sign the Bill, in which case a further step would follow. This is the prompt publication of a Bill which has been converted into an Act of Parliament following the assent to and signing by the President."[26]

[82] To preserve the comity between the judicial, legislative and executive branches of government, only the highest court in constitutional matters may intrude into the domain of the principal legislative and executive organs of state. In terms of section 167(4)(e) only the Constitutional Court has the exclusive jurisdiction in crucial political areas, and it bears the duty to adjudicate finally in respect of issues which would inevitably have important political consequences.

[83] The Constitutional Court has recognised, in *Women's Legal Trust v President of the Republic of South Africa*,[27] that the High Court's constitutional jurisdiction must be broadly interpreted. Interpretation of the constitutional jurisdiction of the High Court entails recognising a broad category of presidential and parliamentary acts or omissions that are subject to the Courts' review, but not on the ground that they constitute a failure to fulfil a constitutional obligation.

[84] It is my respectful view therefore that the President is responsible, as part of his powers and functions, to assent to and sign a Bill as he did in this case with the NHI Bill as a role player in the national legislative process. The President's obligations in this instance are not agent specific and does not engage the exclusive jurisdiction of the Constitutional Court. Further, the conduct of the President that is complained of is his failure to scrutinise and assess the constitutionality of the NHI Bill since it is his duty to do so in terms of section 79 of the Constitution.

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[26] Id at para 6.
[27] [2009] ZACC 20; 2009 (6) SA 94 (CC) at para 12.

[85] There is no merit in the contention that the conduct of the President complained of has the potential to implicate the separation of powers. The issue is whether the President has properly applied his mind as required by section 79 of the Constitution when he assented to and signed the NHI Bill after receiving all the objections to the constitutionality of Bill from the stakeholders including his own legal advisors. This cannot be said to be intruding into the domain of the principal legislative and executive organs of state which would bring the matter into the remit of the exclusive jurisdiction of the Constitutional Court.

[86] Although there are no clear prescripts as to what degree of reservation the President should have before referring the Bill back to Parliament for reconsideration, when assenting to and signing a Bill, the President must subjectively apply his mind to assess and scrutinise if the Bill is not constitutionally invalid. It is this conduct which is challenged by the applicants in this case and does not fall in the category of the President's failures in fulfilling his constitutional obligations that excludes the jurisdiction of this Court but engages the exclusive jurisdiction of the Constitutional Court. The unavoidable conclusion is therefore that this Court has the necessary jurisdiction to adjudicate and determine the issues in this case.

[87] I now turn to deal with the question whether the President's decision is reviewable. It is trite that the exercise of all public power must comply with the Constitution, which is the supreme law and the doctrine of legality which is part of the rule of law. Section 2 of the Constitution provides that law or conduct which is inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. The President receives his powers from section 84 of the Constitution which powers are clearly not insulated from judicial review.

[88] In *Albutt v Centre for the Study of Violence and Reconciliation*[28] the Constitutional Court stated the following:

> "It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of section 84(2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application "considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality". It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.[29]
>
> All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution."[30]

[89] The President's power to assent to and sign a Bill into law is public power which is part of the President's constitutional duties and responsibilities which he exercises in the public interest. The power to assent to and sign a Bill into law is a key aspect of the legislative process as the President is a role player in the legislative process. Since all public power is bound to the principle of legality and the specific constraints imposed by section 79(1) clearly demonstrate that this power is subject to constitutional controls, it is therefore capable of judicial review.

[90] There is no merit in the argument by the respondents that to review the decision of the President made under section 79 will invite people who have deep pockets, to challenge every decision of the President to assent to and sign a Bill into law and thereby delay the passing of legislation whilst the matter is litigated upon. The President must act in accordance with the Constitution and the law. He has the

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[28] [2010] ZACC 4; [2010] (3) SA 293 (CC); SACR 101.
[29] Id at para 49.
[30] Id at para 50.

constitutional obligation and responsibility to uphold, defend and respect the Constitution as the supreme law of the Republic. As the first citizen of the Republic, the President must lead by example in observing and respecting the laws of the country. The ineluctable conclusion is therefore that the decision of the President to assent to and sign the NHI Bill is reviewable.

[91] In emphasising the role of the President in the democratic South Africa, the Constitutional Court stated the following in the *Economic Freedom Fighters* referred to above:

> "That this Court enjoys the exclusive jurisdiction to decide a failure by the President to fulfil his constitutional obligations ought not to be surprising, considering the magnitude and vital importance of his responsibilities. The President is the Head of State and Head of the national Executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project."[31]

[92] It is indisputable that the President exercises his discretion in terms of section 79 when he scrutinises and assess the constitutional validity of a Bill before assenting

[31] [2016] ZACC 11, 2016 (3) SA 580, 2016 (5) BCLR 618 (CC) at para 20.

to and signing it into law. However, as indicated previously, the exercise of discretion must be proper, lawful and rational and not arbitrary or capricious or to achieve an ulterior purpose. The President's exercise of the discretion in terms of section 79 whether to refer the NHI Bill back to Parliament or not, having regard to the opposition on the basis of its constitutionality by a number of stakeholders, is reviewable.

[93] It is well established that the primary purpose of rule 53 of the Uniform Rules of Court is to facilitate and regulate the applications for review. The rule requires the production of the record of the impugned decision since it is of cardinal importance as it provides the necessary insights into the decision–making process which is essential to determine the lawfulness and rationality of the decision.

[94] The approach to interpreting legislative provisions, whether acts or regulations made pursuant to an Act, is well settled. It was recently summarised in *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*[32] where the Constitutional Court stated the following:

> "One must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome."[33]

[95] Rule 53 provides as follows:

> "53. Reviews
>
> (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or

[32] [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC).
[33] Id at para 36

officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so."

(2) ...

[96] Relying on *President of the Republic of South Africa v Democratic Alliance and Others,*[34] the thrust of the respondents' contention is that the matter is politically sensitive or policy-laden and engages the separation of powers. Therefore, the applicant is certainly not automatically entitled to the record because this is a matter interwoven with the merits. Put in another way, since the political nature of this case engages separation of powers issues, rule 53 does not automatically apply, moreover, the President is not one of the entities mentioned in the rule and is therefore not obliged and bound to produce the record of decision as provided for in the rule.

[97] I do not understand the decision of the Court in the *Democratic Alliance* case to be saying that the President is immune from producing the record of decision in terms of rule 53. It cautions the Court to be careful when dealing with matters that are politically sensitive, policy-laden and engage the separation of powers. This case is

[34] [2019] ZACC 35; 2019 (11) BCLR 1403 (CC) 2020 (1) SA 428 (CC).

distinguishable from the *Democratic Alliance* case referred to above in that this Court has already found that it does not involve sensitive political issues which implicate the separation of powers. Further, it has been accepted by the Constitutional Court in the *Democratic Alliance* case that it is generally accepted that executive decisions are reviewable under the principle of legality or rule 53.

[98] It can be accepted that rule 53 does not list the President as one of the entities to which it shall be applicable. However, the rule is applicable, as was stated in the *Democratic Alliance* case, to review executive decisions. That implies to include decisions of the President. It would be an absurdity to interpret the rule narrowly to exclude the President on the basis that he is not mentioned as one of the entities who are subject to the rule. All organs of the state decisions are subject to review in terms of rule 53. To suggest that the President, as head of the State, is not obliged to produce the record of decision in terms of the rule would be tantamount to putting the President above the law.

[99] I can find no reason to disagree with the purposive interpretation of rule 53 as applied by this Division in *Democratic Alliance v President of the Republic of South African.* This is so because the record of decision is not only necessary for the benefit of the applicants but also to enable the Court to properly perform its constitutionally entrenched review function. The judicial authority of the Republic is vested in the Courts and no person or organ of state, including the President, may interfere with the functioning of the courts. It is my view therefore that the President is not above the law or the authority of the Court and is therefore obliged to produce the record of decision in terms of rule 53.

[100] In *Eke v Parsons*[35] the Constitutional Court defining the purpose of the Rules of Court stated the following:

[35] [2015] ZACC 30; 2016 (3) SA 37 (CC), 2015 (11) BCLR 1319 (CC).

"Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said "[i]t is trite that the rules exist for the courts, and not the courts for the rules."[36]

Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice". I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts' judicial functions."[37] (Footnotes excluded).

[101] When embarking on a purposive interpretation of rule 53 in *Democratic Alliance v President of the Republic of South Africa*[38] the Court stated the following:

"Relying on the purposive interpretation there is no logical reason not to utilise it in an application to review and set aside an executive decision. The judicial exercise undertaken by the court in such a review is no different from the one undertaken in review applications of an *"inferior court, a tribunal, a board or an officer performing judicial, quasi-judicial or administrative functions."* The tests to be applied may be different but the process

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[36] Id para 39.
[37] Id para 40.
[38] *Democratic Alliance v President of the Republic of South Africa*: In re: *Democratic Alliance v President of the Republic of South Africa* [2017] ZAGPPHC 148; [2017] 3 All SA 124 (GP); 2017 (4) SA 253 (GP).

utilised can be the same. Its provisions, in my judgment, should be applied unless it can be shown that its application in a particular case would result in a failure of justice."[39]

[102] The President has not filed an answering affidavit to state the reasons why it is undesirable for him to produce the record of decision or what portions of the record of decision he should not produce and under what circumstances. No compelling reasons have been placed before Court to justify the withholding of the record or any parts thereof. The purpose of the rule is to facilitate and regulate applications for review which proceedings were said by the Supreme Court of Appeal in *Van Zyl and Others v Government of the Republic of South Africa and Other*[40] must in the ordinary course be brought under rule 53 unless they otherwise fall within the purview of the Promotion of Administrative Justice Act.[41]

[103] In *Murray and Others NNO v Ntombela and Others*[42] the majority decision of the Supreme Court of Appeal held that the general legal position was that in respect of review proceedings contemplated in rule 53, the applicant was entitled as of right, derived from rule 53(3) itself to a record of the decision sought to be reviewed. The unavoidable conclusion is therefore that the applicants are entitled, as of right derived from rule 53, to the record of decision to assent to and signing the NHI Bill into law. The President is obliged, since the executive decisions are subject to be reviewed in terms of rule 53, to produce the record of his decision to assent to and sign the NHI Bill into law.

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[39] Id at para 29.
[40] [2007] ZASCA 109; 2008 (3) SA 294 (SCA) [2008] 1 All SA 102 at para 36.
[41] 3 of 2000 (PAJA).
[42] [2024] ZASCA 24; [2024] 2 All SA 342 (SCA); 2024 (4) SA 95 (SCA).

[104] The Constitutional Court had an opportunity to deal with the issue of producing the record of the impugned decision in terms of rule 53 in *Competition Commission of South Africa v Standard Bank of South Africa Ltd*[43] and stated the following:

> "This finding is entirely consistent with what the Supreme Court of Appeal and this Court have said about the importance of the rule 53 record and its availability to litigants. This is because a distinction must be made between the jurisdiction of the forum to hear the review application and the merits of the review application. If a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless. As the Supreme Court of Appeal put it, "the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be". This is because, as recognised by the majority decision in Helen Suzman, rule 53 envisages the grounds of review changing after the record has been furnished. The record is essential to a party's ability to make out a case for review. It is for this reason that a prima facie case on the merits need not be made out prior to the filing of record.[44]
>
> I accept that there are good reasons for the obligation to produce the record following automatically upon the launching of a review application. Delaying the production of the record is inimical to the exercise of the courts' constitutionally mandated review function. A lengthy delay may impede the courts' ability to assess the lawfulness, reasonableness and procedural fairness of the decision in question and undermine the purpose of judicial review. One reason for this is that documents and evidence, which should be included within the rule 53 record, may be lost if there is a considerable delay in the production of the review record. This does not, however, imply that a court should order production of a rule 53 record without first determining its competence to hear the review application."[45](Footnotes excluded)

[105] Although the President is, as stated in the *Economic Freedom Fighters* case, a constitutional being by design, the quintessential national pathfinder, he is not above the Constitution and laws of the Republic. It is my considered view therefore that

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[43] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* [2020] ZACC 2; 2020 (4) BCLR 429 (CC).
[44] Id at para 120
[45] Id at para 122.

the purpose of the rule and the rule of law itself would be defeated if the President is immunised from filing the record of decision solely because he is the President of the Republic.

[106] Even if it were to be accepted that the President is not obliged to file the record of decision in terms of rule 53, this Court has the inherent power in terms of section 173 of the Constitution to order the President to file the record in the interest of justice. This is so even if the litigants have not pleaded and sought that the Court engage the provisions of section 173. In this case, the interest of justice would be better served if the President produces and files the record of decision since it will enable not only the applicants to amend their notices of motion but also the Court to fulfil its review functions.

[107] Section 173 of the Constitution provides the following:

> "Inherent power
>
> The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[108] In *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others,*[46] quoted with approval in *Social Justice Coalition and Others v Minister of Police and Others,*[47] the Constitutional Court stated the following when it was dealing with the inherent powers of the Superior Courts in terms of section 173 of the Constitution:

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[46] [2006] ZACC 15; 2007 (1) SA 523 (CC).
[47] [2022] ZACC 27; 2022 (10) BCLR 1267 (CC) at para 72.

"Courts, therefore, must be independent and impartial. The power recognised in section 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power *must take into account* the interests of justice.[48]

In my view it must be added that the power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfill the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution.[49]"

[109] There is no merit in the respondents' contention that this Court should not come to the rescue of the applicants and engage the provisions of section 173. The power in section 173 vests in the Court, and not in the litigants, the authority to uphold, protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. It is the authority for the Court to regulate its processes, even where the rules of procedure fall short, if the interests of justice would be better served.

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[48] [2006] ZACC 15; 2007 (1) SA 523 (CC) at para 36.
[49] Id para 90.

Conclusion

[110] It is my respectful view that this Court has the necessary jurisdiction to adjudicate this case for the conduct of the President complaint of does not involve sensitive political issues or political-laden nor does it implicate the separation of powers. Further, the conduct of the President complained of is performed by him as part of the legislative process – thus it is not performed by the President alone but is performed collaboratively at the third level and final stage of the legislative process. Put differently, to assent to and sign a Bill into law, the President performs his function as a role player in the legislative process.

[111] The President's decision to assent to and sign the NHI Bill is reviewable because all executive decisions are reviewable under principle of legality or under rule 53. Therefore, I hold the view that the President's decision is reviewable in terms of rule 53 and the President is obliged to produce and file the record of decision as provided for in the rule.

Costs

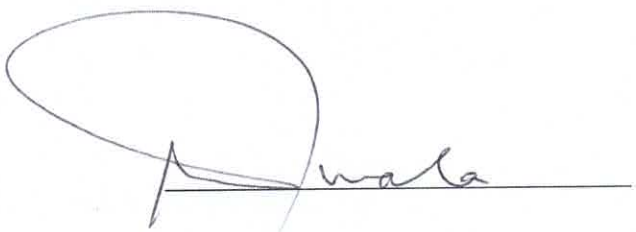
[112] The applicants seek costs on scale C in terms of rule 67A of the Uniform Rules of Court, including the costs for the employment of three counsels. The higher scale and number of counsels is sought due to the complexity of the issues in this matter and the nature of the legal questions involved. The President also sought the same scale of costs against the applicants if he were successful.

[113] It is trite that the awarding of costs is strictly in the discretion of the Court and as a rule, generally the successful party is entitled to his or her costs. I have no reason to

deviate from the general rule in this case and the applicants are therefore entitled to their costs as successful parties on scale C in terms of rule 67 of the Uniform Rules of Court including costs of senior counsel.

[114] In the premises, the following order is made:

1. The Gauteng High Court has jurisdiction to entertain the matter;
2. The President's decision to assent to and sign the National Health Insurance Act is reviewable;
3. The first respondent is ordered to furnish the record of the impugned decision within ten (10) calendar days of this court order; and
4. The first and second respondents are ordered to pay the costs related to the rule 6(5)(d)(iii) application, jointly and severally, the one paying the other to be absolved, including the costs for the employment of three counsel on scale C.



TWALA M L
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GAUTENG LOCAL DIVISION

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Date of Hearing: **4 and 5 March 2025**

Date of Judgment: **6 May 2025**

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be 6 May 2025.