CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 240/24

In the matter between:

SOLIDARITY TRADE UNION	First Applicant
ALLIANCE OF SOUTH AFRICAN INDEPENDENT PRACTITIONERS ASSOCIATION	Second Applicant
SOUTH AFRICAN PRIVATE PRACTITIONERS FORUM	Third Applicant
BARBARA PRETORIUS	Fourth Applicant
CHRISTA ROLLIN	Fifth Applicant
BREAAN SPIES	Sixth Applicant
ANJA HEYNS	Seventh Applicant
HOSPITAL ASSOCIATION OF SOUTH AFRICA	Eighth Applicant
and	
MINISTER OF HEALTH	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
DIRECTOR-GENERAL, NATIONAL DEPARTMENT OF HEALTH	Third Respondent

Neutral citation: *Solidarity Trade Union and Others v Minister of Health and Others* [2026] ZACC 19

Coram:	Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Savage J, Theron J and Tshiqi J
Judgment:	Savage J (unanimous)
Heard on:	9 September 2025
Decided on:	18 May 2026
Summary:	National Health Act 61 of 2003 — constitutionality of sections 36 to 40 — confirmation application — order of constitutional invalidity confirmed Abstract challenge — matter is ripe for hearing — irrationality of provisions Section 22 of the Constitution — limitation of the right to choose trade, occupation or profession freely — section 36 of the Constitution — limitation not justifiable

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ORDER

On application for confirmation of the order of constitutional invalidity by the High Court of South Africa, Gauteng Division, Pretoria:

1. The cross-appeal is dismissed.
2. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
3. It is declared that sections 36 to 40 of the National Health Act 61 of 2003 are inconsistent with the Constitution and invalid in that they are irrational and unjustifiably limit the right to choose a trade, occupation or profession freely, and are consequently severed from the Act.
4. The first and third respondents are ordered to pay the applicants' costs in this Court, including the costs of two counsel where so employed.

JUDGMENT

SAVAGE J (Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Theron J and Tshiqi J concurring):

Introduction

[1] South Africa remains one of the most unequal countries in the world. Thirty years after the advent of democracy, the progressive realisation of the right to access to health services remains illusory for most of our people, deeply impacted by the destructive and discriminatory policies and practices of the past. This is so despite the constitutional duty on the state to take reasonable legislative and other measures to progressively realise this right.[1] This case involves sections 36 to 40 of the National Health Act[2] (Act), legislation that the respondents posit as necessary to address the urgent need to achieve equitable health services for the majority of South Africans.

[2] The application before this Court is one brought in terms of sections 167(5) and 172(2)(a) of the Constitution, read together with rule 16 of this Court's Rules, to confirm the order of the High Court of South Africa, Gauteng Division, Pretoria (High Court) declaring sections 36 to 40 of the Act (impugned provisions) constitutionally invalid and severing such provisions from the Act.

[3] The impugned provisions establish a scheme that vests the third respondent, the Director-General of the National Department of Health (Director-General), with the power in terms of section 36 of the Act to grant, refuse, withdraw or impose conditions on the issue of a certificate of need to health establishments, health agencies or health

[1] Section 27(2) of the Bill of Rights.

[2] 61 of 2003.

care providers who provide prescribed health services (scheme).[3] In considering an application to issue such a certificate, the Director-General is required to have regard to various factors, including the need to promote an equitable distribution and rationalisation of health services and health care resources; correct inequities based on racial, gender, economic and geographical factors; and promote an appropriate mix of public and private health services.

Parties

[4] The first to seventh applicants are Solidarity Trade Union, the Alliance of South African Independent Practitioners Association, the South African Private Practitioners Forum, and four independent health care practitioners (together referred to as Solidarity). The eighth applicant is the Hospital Association of South Africa (HASA), which intervened in Solidarity's High Court application and pursued the same relief.

[5] The first respondent is the Minister of Health (Minister). The second respondent is the President of the Republic of South Africa. The third respondent is the Director-General. The Minister and Director-General oppose the matter.[4] The President does not.

The legislative framework

[6] The objects of the Act, set out in section 2, are—

> "to regulate national health and to provide uniformity in respect of health services across the nation by—
>
> (a) establishing a national health system which—
>
> (i) encompasses public and private providers of health services; and
>
> (ii) provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford;

[3] Section 36 of the Act.

[4] I will therefore refer to the Minister and Director-General as the respondents.

(b) setting out the rights and duties of health care providers, health workers, health establishments and users; and

(c) protecting, respecting, promoting and fulfilling the rights of—

(i) the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care;

(ii) the people of South Africa to an environment that is not harmful to their health or well-being;

(iii) children to basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution; and

(iv) vulnerable groups such as women, children, older persons and persons with disabilities."

[7] Section 36(1) provides that:

"(1) A person may not—

(a) establish, construct, modify or acquire a health establishment or health agency;

(b) increase the number of beds in, or acquire prescribed health technology at, a health establishment or health agency;

(c) provide prescribed health services;

(d) or continue to operate a health establishment or health agency after the expiration of 24 months from the date this Act took effect,

without being in possession of a certificate of need."

[8] A person who wishes "to obtain or renew a certificate of need must apply to the Director-General in the prescribed manner and must pay the prescribed application fee" in terms of section 36(2). Before the Director-General issues or renews a certificate of need in terms of section 36(3), he or she must take into account—

"(a) the need to ensure consistency of health services development in terms of national, provincial and municipal planning;

(b) the need to promote an equitable distribution and rationalisation of health services and health care resources, and the need to correct inequities based on racial, gender, economic and geographical factors;

(c) the need to promote an appropriate mix of public and private health services;

(d) the demographics and epidemiological characteristics of the population to be served;

(e) the potential advantages and disadvantages for existing public and private health services and for any affected communities;

(f) the need to protect or advance persons or categories of persons designated in terms of the Employment Equity Act, 1998 (Act 55 of 1998), within the emerging small, medium and micro-enterprise sector;

(g) the potential benefits of research and development with respect to the improvement of health service delivery;

(h) the need to ensure that ownership of facilities does not create perverse incentives for health service providers and health workers;

(i) if applicable, the quality of health services rendered by the applicant in the past;

(j) the probability of the financial sustainability of the health establishment or health agency;

(k) the need to ensure the availability and appropriate utilisation of human resources and health technology;

(l) whether the private health establishment is for profit or not; and

(m) if applicable, compliance with the requirements of a certificate of non-compliance."

[9] The Director-General may, in terms of section 36(4)—

"investigate any issue relating to an application for the issue or renewal of a certificate of need and may call for such further information as may be necessary in order to make a decision upon a particular application."

[10] Section 36(5) provides that a certificate of need may be issued or renewed by the Director-General, subject to—

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

[11] The Director-General may, in terms of section 36(6), withdraw a certificate of need on various grounds, including—

> "(a) on the recommendation of the Office of Standards Compliance in terms of section 79(7)(b);
>
> (b) if the continued operation of the health establishment or the health agency, as the case may be, or the activities of a health care provider or health worker working within the health establishment, constitute a serious risk to public health;
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> (c) if the health establishment or the health agency, as the case may be, or a health care provider or health worker working within the health establishment, is unable or unwilling to comply with minimum operational norms and standards necessary for the health and safety of users; or
>
> (d) if the health establishment or the health agency, as the case may be, or a health care provider or health worker working within the health establishment, persistently violates the constitutional rights of users or obstructs the State in fulfilling its obligations to progressively realise the constitutional right of access to health services."

[12] If the Director-General refuses an application for a certificate of need or withdraws a certificate of need, the Director-General must, in terms of section 36(7), give the applicant or holder, as the case may be, written reasons for such refusal or withdrawal within a reasonable time.

[13] Section 37 provides that a certificate of need is valid for a prescribed period, which may not exceed 20 years. Section 38 allows for an appeal to the Minister against the decision of the Director-General in relation to a certificate of need within 60 days from the date on which written reasons for the decision were given by the Director-General, or such later date as the Minister permits. The Minister is required "as soon as practicable" to confirm, set aside, vary or substitute the decision of the Director-General, with written reasons provided "within a reasonable time".

[14] In terms of section 39(1):

> "The Minister may, after consultation with the National Health Council, make regulations relating to—
>
> (a) the requirements for the issuing or renewal of a certificate of need;
>
> (b) the requirements for a certificate of need for health establishments and health agencies existing at the time of commencement of this Act;
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> (c) the requirements for a certificate of need for health establishments and health agencies coming into being after the commencement of this Act; and
>
> (d) any other matter relating to the granting of a certificate of need and the inspection and administration of health establishments and health agencies."

[15] Such regulations, in terms of section 39(2)—

"(a) must ensure the equitable distribution and rationalisation of health, with special regard to vulnerable groups such as women, older persons, children and people with disabilities;

(b) may prescribe the fees payable in respect of applications for the issuing and renewal of certificates of need;

(c) must prescribe the formats and procedures to be used in applications for the issuing and renewal of certificates of need, and the information that must be submitted with such applications;

(d) must ensure and promote access to health services and the optimal utilisation of health care resources, with special regard to vulnerable groups such as women, older persons, children and people with disabilities;

(e) must ensure compliance with the provisions of this Act and national operational norms and standards for the delivery of health services;

(f) must seek to avoid or prohibit business practices or perverse incentives which adversely affect the costs or quality of health services or the access of users to health services;

(g) must avoid or prohibit practices, schemes or arrangements by health care providers or health establishments that directly or indirectly conflict with, violate or undermine good ethical and professional practice; and

(h) must ensure that the quality of health services provided by health establishments and health agencies conforms to the prescribed norms and standards."

[16] Section 40 provides that:

"(1) Any person who performs any act contemplated in section 36(1) without a certificate of need required in terms of that section is guilty of an offence.

(2) Any person convicted of an offence in terms of subsection (1) is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment."

Litigation history

Previously in this Court

[17] The Act was brought into operation on 2 May 2005, save for the impugned provisions, which were erroneously proclaimed on 31 March 2014 to be operative as from 1 April 2014. Thereafter, in *South African Dental Association*,[5] this Court set aside the erroneous proclamation of such provisions on the application of the President. This was on the basis that the Act authorises the Minister to prescribe regulations regarding applications for, and the granting of, certificates of need, but these regulations were not yet in place. Had such proclamation not been set aside, the provision of health services, as contemplated in section 36(1), would, in the absence of a certificate of need, have constituted an offence pursuant to section 40 of the Act. This, in circumstances in which it was not possible to obtain the required certificate given that no regulations were as yet in force.

[18] In *South African Dental Association*, it was recognised that the purpose of the President's power to bring the impugned provisions into operation was to achieve an orderly and expeditious implementation of a national regulatory scheme for health services.[6] In setting aside the proclamation that had brought the impugned provisions into operation, this Court relied on *Pharmaceutical Manufacturers*[7] to find that the President's decision to issue the proclamation, before there was a mechanism in place to address certificate of need applications, was not rationally connected to this purpose or any other government objective.[8] This proclamation was, on this basis, found to be invalid, and it was set aside.

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[5] *President of the Republic of South Africa v South African Dental Association* [2015] ZACC 2; 2015 (4) BCLR 388 (CC).

[6] Id at para 15.

[7] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[8] *South African Dental Association* above n 5 at paras 13-15.

High Court

[19] In their application to the High Court, the applicants sought that the impugned provisions be declared constitutionally invalid pursuant to section 172(1) of the Constitution.[9] The applicants' attack in the High Court was two-pronged. They contended that the requirement that a certificate of need be obtained under section 36(1) violates a number of constitutional rights, including the rights to human dignity; freedom of movement and residence; trade, occupation and profession; not to be arbitrarily deprived of property or have it be impermissibly expropriated; and access to health care. In addition, the applicants contended that the scheme created by the impugned provisions is not rationally connected to the purpose for which the power was conferred and that, without regulations, it is inchoate.

[20] The respondents opposed the application on the basis that no regulations to give effect to the scheme existed and that the matter thus amounted to an abstract challenge. The respondents submitted that the scheme has multiple objectives, with its purpose being to enhance the equitable geographic distribution of health services and the enforcement of norms and standards to ensure access to quality health care.

[21] The High Court found in July 2024 that there was "no nexus between the scheme and its implementation and the purpose for which it was enacted". In addition, the scheme was found to be unduly extensive in its reach and failed to have regard to the constitutional rights of owners of private health establishments, private health care providers and private health workers. The Court found that regard was not had to the social, professional and financial impact of the scheme on such providers. The scheme was also found to be procedurally irrational insofar as it vested far-reaching powers in the hands of two administrators, the Director-General and the Minister, without adequate statutory safeguards. The scheme's invalidity was bolstered by the absence of any requirement to consider the rights and interests of affected parties or to adhere to

[9] Solidarity launched its application in the High Court in December 2021. The application was unopposed and, in June 2022, the High Court declared the impugned provisions constitutionally invalid. In June 2023 the order of the High Court was rescinded, with the matter thereafter determined by Millar J in July 2024.

a fair process before imposing conditions on the issuance of a certificate of need, with no available mechanism to receive substantive representations from applicants.

[22] The Court further found that there was no cogent evidence to demonstrate that the refusal or non-renewal of a certificate of need would necessarily result in the geographic relocation of facilities. The scheme was found to grant the Director-General broad powers to decide where new health establishments and medical practices could be established. The power to withhold the issuance of a certificate of need was found to amount to a blunt instrument for the Director-General to reduce the number of private health establishments and private health care providers who could lawfully provide medical care in an area, in the hope that by depriving them of property and the ability to earn a living, they would relocate to areas in which health services were required. This was found to unjustifiably violate multiple constitutional rights, including the rights to dignity, freedom of movement, occupational choice, property and access to health care, with no rational connection between the scheme and its objects to justify the limitations of the rights of the owners of private health establishments and private health care providers in the manner that would arise.

[23] The High Court held that the two-year period within which to apply for the issue of a certificate of need on the scheme coming into operation and the imperative placed on existing establishments to obtain a certificate of need in order to continue operating were impermissibly retrospective. For these reasons, the impugned provisions were found to be constitutionally invalid. Since sections 37 to 40 of the Act remained purposeless without section 36, and because the impugned provisions were yet to be proclaimed and had no practical consequence for the operation of the Act, the Court ordered that "sections 36 to 40 of the National Health Act 61 of 2003 are invalid in their entirety and are consequently severed from the Act". The first and third respondents were ordered to pay the costs of the application of the first to eighth applicants, including those of two counsel.[10]

[10] The order of the High Court read as follows:

In this Court

Applicants' submissions

[24] Before this Court, Solidarity and HASA seek confirmation of the High Court's declaration of constitutional invalidity in respect of the impugned provisions and an order that such provisions be severed from the Act. Solidarity asks, in the alternative, that the declaration of invalidity be suspended and the matter be remitted to Parliament for revision of the impugned provisions within 24 months, with such revisions including adequate safeguards to protect the constitutional rights of health establishments, providers and users.

[25] The applicants persist in their challenge that the scheme is irrational, infringes on the separation of powers and unjustifiably limits fundamental constitutional rights. The applicants contend that no evidence has been advanced by the respondents to show that the scheme will achieve its intended purpose of expanding geographical access to health services and imposing norms and standards for medical establishments, agencies or health care providers, or that it will fulfil the state's obligations in terms of section 27(2) of the Constitution. This, when it has not been shown that seeking to require health care providers to allocate their investments and resources in particular geographical areas will progressively realise the right of access to health services. In addition, the applicants contend that the Minister's power to publish norms and standards is not reflected in the impugned provisions, when other provisions of the Act, together with allied legislative and regulatory instruments, in any event impose norms and standards for health establishments, agencies and providers.

"85.1 It is declared that sections 36 to 40 of the National Health Act 61 of 2003 are invalid in their entirety and are consequently severed from the Act.

85.2 In terms of section 167(5) of the Constitution read together with section 15 of the Superior Courts Act 10 of 2013 and Rule 16 of the Rules of the Constitutional Court, the Registrar of this Court is directed to lodge a copy of the order and this judgment, within 15 days of the order, with the Registrar of the Constitutional Court.

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

[26] The applicants argue further that the scheme is vague and risks having an arbitrary impact, it not having been shown that the means selected by the respondents will achieve the anticipated ends. Using a certificate of need scheme to expand geographic access to health services limits where health establishments, agencies and providers may operate and what services they offer. This risks causing harm in that it has the potential to restrict health care providers' scope of practice and employment opportunities, without appropriate regard to the financial impact of doing so, and to decrease access to high-quality care without assessing genuine community need for health services within an area. The applicants contend that by doing so, the scheme resembles a traditional licensing regime, with the mandatory considerations outlined in the Act being broad and vague and conferring wide discretionary powers on the respondents, devoid of constraints. The aim to progressively make health services available cannot be met by depriving those who currently have access to health care of their existing rights. Thus, the applicants contend that the scheme is contrary to the purpose of the Act.

[27] Further, the scheme is said to be procedurally irrational in that it vests far-reaching discretionary powers in the hands of the Minister and the Director-General to grant or renew the certificate of need, with or without conditions, and with no adequate statutory safeguards. Nor, the applicants submit, does the scheme require consideration of the rights or interests of those most directly affected by such decisions.

[28] The applicants also challenge the scheme on the basis that it infringes a number of constitutional rights, including the right to dignity, the right to equality, the right to engage in a profession of one's choice and the right not be arbitrarily deprived of property, and on the basis that it does not satisfy the section 36 limitations analysis.

[29] Finally, issue is taken with the fact that health services constitute a matter of concurrent national and provincial competence, with municipal health services constituting local government matters to the extent set out in section 155(6)(a) and (7)

of the Constitution. Accordingly, the impugned provisions grant the respondents powers that conflict with the Constitution. This, it is contended, will strip provincial legislatures and local authorities of the powers and competencies granted to them by the Constitution in respect of health services.

Respondents' submissions

[30] The respondents file a counter-application, seeking that the High Court's declaration of unconstitutionality be refused on the basis that the impugned provisions are not operational and that the necessary regulations and statutory infrastructure have not been finalised. Given as much, the respondents state that the challenge raised by the applicants is speculative and that the matter amounts to an abstract challenge that should not be considered by this Court.

[31] The respondents state that the scheme created by the impugned provisions is a central pillar in the implementation of the National Health Insurance Act[11] (NHI Act), which, among other objectives, seeks to achieve the progressive realisation of the right of access to quality personal health services; to realise universal health coverage; and to eliminate the fragmentation of health care funding in South Africa. They contend that the legitimate government purpose of the "self-evidently rational" scheme is to ensure broader access to health care through an equitable geographic distribution of health services, as well as the regulation of such services in South Africa in the public interest, given the urgent need to adopt transformative measures and redress the historical imbalances of the past. The scheme empowers the Minister to ensure a fair and equitable geographic distribution of health services across South Africa. This is to promote access to health care for disadvantaged communities or in areas with limited health care infrastructure and to prevent an overconcentration of health services in affluent areas, catering only to the few who can afford them. The scheme is, in substance, analogous to that challenged in *Affordable Medicines*,[12] which passed

[11] 20 of 2023.

[12] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC).

constitutional muster, and its provisions are rationally connected to the restitutionary and transformative objects of the Constitution, the Act and the NHI Act.

[32] The respondents contend that the establishment of the scheme, which is regulatory in nature and not a licensing regime, is necessary for transformation, given the fragmented and highly inequitable health care system and the racialised allocation of resources inextricably linked to geographical spatial apartheid. The scheme, they argue, is designed to ensure that health services are developed consistently with national planning and the state's constitutional obligation under section 27 of the Constitution to address imbalances in access to health care. Unlike a licensing regime, the respondents submit that the scheme does not apply to all medical personnel, but only to prescribed health services, which are yet to be identified by regulations still to be promulgated. However, even if it can be said to be comparable to a licensing scheme, the respondents submit that this does not render the scheme unconstitutional.

[33] The respondents contend that the High Court erred in finding that section 36 of the Act does not require the Director-General to take into account the social, professional and financial impact on health services and providers. Furthermore, they dispute that the fact that appeals against refusals or withdrawals of a certificate are limited to an internal review by the Minister, rather than an independent adjudicator, is inherently flawed. No procedural unfairness arises, say the respondents, since the Director-General is obliged under section 38(3) to give reasons for an adverse condition imposed, and regulations are still to be promulgated which may address the procedure to be followed by the Director-General in this regard.

[34] The respondents take issue with the High Court's failure to test the constitutionality of each of the impugned provisions independently, focusing rather on the scheme as a whole. They submit that the applicants cannot rely on *Grootboom*[13] to support the proposition that the impugned provisions impede access to health services,

[13] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

when such an effect has not been established on the facts and cannot be presumed to eventuate simply from the introduction of the scheme.

[35] The respondents argue that the impugned provisions do not violate the right to human dignity; nor is such right available to juristic persons or trading corporations.[14] They contend that the High Court did not draw this distinction. It also did not identify whose dignity would be violated or how this would occur when, according to the respondents, the impugned provisions promote the dignity of all South Africans.

[36] The respondents dispute that the impugned provisions unreasonably limit any constitutional rights. They state that no violation of the section 22 right to freedom of trade, occupation or profession arises when this provision confers rights only on citizens, and health establishments and health agencies are not citizens within the meaning of the provision. Section 36 of the Act does not affect the continuing choice of medical practitioners to remain in the profession and health workers will not be compelled to work in specific geographical areas. This, when the internal limitation in section 22 allows the practice of a trade, occupation or profession to be regulated by law.

[37] In relation to section 25, they contend that the scheme does not permit an unlawful expropriation of property and that the High Court conflated deprivation and expropriation. This is so in that the impugned provisions do not permit the state to expropriate private hospitals, medical practices or equipment, but rather regulate their operation. Regulatory limitations on property rights, such as zoning laws, business licensing or professional accreditation, do not constitute expropriation. Section 36 of the Act is an empowering provision which does not in itself result in any deprivation of property, let alone an arbitrary one. This is so, argue the respondents, in that it is only when the Director-General has made a decision on the issue or renewal of a certificate of need that an impact is felt. In addition, they contend that section 25(2) of the

[14] *Reddell v Mineral Sands Resources (Pty) Ltd* [2022] ZACC 38; 2023 (2) SA 404 (CC); 2023 (7) BCLR 830 (CC) at para 83.

Constitution is not infringed given the lack of a compensation mechanism, as there is no expropriation.

[38] The respondents dispute that the scheme falls foul of the limitations analysis in section 36 of the Constitution and contend that the High Court erred in finding as much. Finally, the respondents deny that the scheme strips provincial legislatures and local authorities of the powers and competencies granted to them in terms of the Constitution, since the Constitution does not specifically assign the regulation of health services to provinces. The respondents seek that their cross-appeal be upheld and that the order of constitutional invalidity made by the High Court not be confirmed by this Court.

Issues

[39] The issues before this Court are—

(a) whether condonation should be granted for the late filing of the respondents' opposition to the confirmation application and their cross-appeal;

(b) whether the challenge raised by the applicants to the impugned provisions is an abstract one that ought not to be determined by the Court at this time, given that to date the provisions have not been brought into operation and no regulations have been promulgated under the Act;

(c) whether the declaration of the High Court that the impugned provisions are constitutionally invalid must be confirmed; and

(d) the just and equitable relief that should be granted under section 172(1)(b) of the Constitution and the issue of costs.

Analysis

Condonation

[40] The respondents seek condonation for the late filing of both their opposition to the confirmation application and their cross-appeal. While Solidarity opposes the application, HASA abides by the decision of the Court. Although the delay is extensive,

with the notice of opposition filed 117 days late and the cross-appeal approximately five months late, the reasons given for the delay are adequate. These include the number of legal challenges raised against the NHI Act, which placed pressure on the Office of the State Attorney; the fact that the mandate of the legal team that had acted for the respondents in the High Court was terminated; the delay in appointing a new team; the delay in the appointment of the Minister following national elections held on 29 May 2024; and the need to appoint a private firm of attorneys to act for the respondents. What is clear is that no prejudice has been suffered by Solidarity as a result of the delay, and given the nature and complexity of the matter, together with its public importance, the interests of justice warrant the granting of condonation. For these reasons, condonation for the late filing of both the respondents' opposition to the confirmation application and their cross-appeal is granted.

Jurisdiction

[41] This Court is mandated by section 167(5) of the Constitution to confirm any order of invalidity made by the Supreme Court of Appeal or the High Court, or a court of similar status, before that order has any force. Given as much, it holds the requisite jurisdiction, pursuant to section 167(5), to determine this application for confirmation of the order of constitutional invalidity made by the High Court.

Abstract challenge

[42] The first issue that arises is whether this application amounts to an abstract challenge that ought not to be determined by this Court at this time. At the hearing of this matter, the respondents retreated from their contention that the matter is not ripe for hearing, but maintained their argument that the application constitutes an abstract challenge. In their written submissions the respondents state that the impugned provisions have not been made operative and no fundamental rights had been impacted. Therefore, on the basis of *Ferreira*,[15] the challenge raised should be treated as an

[15] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC).

abstract one, with it not shown that any constitutional shortcomings will eventuate on the impugned provisions being made operative.

[43] Abstract legal challenges are generally treated with disfavour by courts, which are reluctant to "peer into the future" to determine academic, hypothetical or speculative issues when doing so may necessitate predicting facts and legal problems that may not arise or that have not arisen.[16] Where legislative provisions remain inoperative, it has been recognised that a heavy burden rests on an applicant to show that such provisions are constitutionally unsound "merely on their face".[17] Possible unconstitutionality that may arise in due course is usually not enough to convert a challenge into a justiciable one,[18] unless rights are at stake, or it is shown that imminent or inevitable harm would arise.

[44] This is to be balanced against the fact that, once enacted, legislation assumes a constitutional character and is exposed to constitutional scrutiny, irrespective of its operational status.[19] That scrutiny permits a statute to be declared invalid to the extent of its inconsistency with the Constitution,[20] even in circumstances in which it has not as yet been brought into operation. This Court has thus entertained abstract challenges in appropriate circumstances. In *Ferreira*, in the context of an abstract challenge arising from public interest litigation, O'Regan J stated that relevant factors include—

> "whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and

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[16] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at para 13.

[17] Id.

[18] *Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) at para 47.

[19] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 91; *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at para 62; *South African Iron and Steel Institute v Speaker, National Assembly* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC); 2026 (2) SA 368 (CC) at para 50.

[20] *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (*New National Party*) at para 22.

> prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court."[21]

[45] In *Lawyers for Human Rights*, it was held that the factors set out in *Ferreira* in relation to public interest standing are of relevance even where there is no live controversy and where the challenge is an abstract one:

> "It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."[22]

[46] It follows that determining the appropriateness of hearing an abstract challenge requires regard to be had to a number of factors, none of which is individually decisive of the issue. These include—

(a) the nature of the right said to be infringed;

(b) whether a genuine dispute exists which is not premature, hypothetical in nature or based on speculation,[23] with the basis of the challenge apparent from a clear factual matrix;

(c) whether there is another reasonable and effective manner in which the challenge can be brought;

(d) the consequences of the infringement of the right and whether the manner in which the impugned provisions will operate in practice is capable of identification;[24]

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[21] *Ferreira* above n 15 at para 234. See also *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Corruption Watch*) at paras 37-8.

[22] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 18.

[23] *Ferreira* above n 15 at para 164.

[24] *Doctors for Life* above n 19 at paras 47-50.

(e) the range of persons or groups who may be directly or indirectly affected by any order made by the court, including the degree of vulnerability of the people affected, and the opportunity that those persons or groups have had to present evidence and argument to the court; and

(f) the nature of the relief sought, the extent to which any relief granted will have a direct, practical effect of general and prospective application and not amount to a symbolic or advisory opinion on the issues.

[47] In the challenge before this Court, the fact that the impugned provisions are not as yet operative, and that regulations, as contemplated in section 39 of the Act, have not as yet been promulgated to give effect to the operation of the scheme, does not in itself justify a conclusion that the matter ought not to be heard. A genuine dispute exists between the parties, one that is not premature, hypothetical in nature or based on abstract assertions. The basis of the challenge raised by the applicants is apparent from the facts set out in their application and an interpretation of the impugned legislative provisions as they stand, regardless of the fact that they remain inoperative at this time. The challenge does not concern a speculative future application of the impugned provisions, but rather raises concerns as to the inherent constitutional invalidity of the provisions as they appear facially.

[48] The challenge raised pertains to a genuine dispute as to the constitutionality of the impugned provisions, one that is neither premature nor hypothetical, with there being no other reasonable and effective manner in which the challenge can be brought. If a constitutional challenge were to be avoided in such circumstances, it would risk bringing into operation provisions that are constitutionally invalid, simply on the basis that the matter is not ripe for hearing, despite it being before the Court. Finally, any relief granted will not amount to a symbolic or advisory opinion on the issues, but will have a direct effect and settle the matter as it arises for both parties.

[49] For these reasons, the high threshold required to bring an abstract challenge has been met. Such a conclusion is a procedural determination by this Court. This does not

inherently lead us to the finding that the threshold for confirmation has been met; rather, it is merely a recognition that the matter is ripe, making it proper for the Court to determine this case on the merits. The application to confirm the declaration of unconstitutionality in respect of the impugned provisions does not amount to a speculative, uncrystallised or hypothetical attack on the future application of such provisions. As was the case in *Glenister II*[25] and *Helen Suzman Foundation*,[26] this is an appropriate case in which to entertain an abstract challenge[27] and the matter is therefore properly before this Court for determination.

The nature of the challenge raised

[50] Section 27 of the Constitution provides:

> "(1) Everyone has a right to have access to—
>
> (a) health care services, including reproductive health care;
>
> . . .
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.
>
> (3) No one may be refused emergency medical treatment."

[51] Despite the Constitution's commitment to social justice and the improvement of the quality of life for everyone,[28] the provision of health services in South Africa remains deeply inequitable, with access differing starkly by geographic location and between the public and private sectors. This, as was recognised nearly three decades ago in *Soobramoney*,[29] in the context of a society—

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[25] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

[26] *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC).

[27] *Corruption Watch* above n 21 at para 40.

[28] *Grootboom* above n 13 at para 1.

[29] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1997 (12) BCLR 1696 (CC); [1998] 1 All SA 268 (CC); 1998 (1) SA 765 (CC).

> "[i]n which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[30]

[52] The Act was passed more than two decades ago by Parliament, in the exercise of its legislative authority under section 44 of the Constitution, cognisant of the context within which health services are rendered in the country and the state's constitutional obligations under section 27(2).

[53] In asking this Court to confirm the High Court's order that the impugned provisions are constitutionality invalid, the applicants do not dispute the patent inequalities and significant challenges that persist in the progressive realisation of the right of access to health services in the country. The applicants' challenge is concerned rather with whether the impugned provisions meet the threshold of rationality required, or whether they unjustifiably limit fundamental constitutional rights.

The rationality threshold

[54] All public power must be sourced in law and is subject to at least two constitutional constraints.[31] The first is that it must be rationally connected to the purpose for which the power was conferred.[32] The second is that it must not infringe any of the fundamental rights enshrined in the Bill of Rights.[33]

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[30] Id at para 8.

[31] *Affordable Medicines* above n 12 at para 74 and *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society*) at para 32.

[32] *Pharmaceutical Manufacturers* above n 7 at para 85.

[33] *New National Party* above n 20 at para 20.

[55] The constitutional requirement of rationality is an incident of the rule of law. In *Pharmaceutical Manufacturers* it was stated:

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. . . . The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle. In the present case, the Act was not brought into force with the appropriate regulatory infrastructure in existence or ready to be put in place."[34]

[56] This compels that—

> "[s]tate actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant 'to promote the need for governmental action to relate to a defensible vision of the public good' and 'to enhance the coherence and integrity' of legislative measures."[35] (Footnotes omitted.)

[57] Legislation is constitutionally required to be rationally related to a legitimate government purpose; otherwise, it is invalid. It is not however for a court to determine whether a legislative or policy choice is the best or most effective, or to substitute its

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[34] *Pharmaceutical Manufacturers* above n 7 at paras 85-7. See also *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) (*Prinsloo*) at para 25; *New National Party* above n 20 at paras 19 and 24; *United Democratic Movement v President of the Republic of South Africa (No 2)* [2002] ZACC 21; 2002 (11) BCLR 1179 (CC); 2003 (1) SA 495 (CC) at para 55; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (2) SACR 101 (CC); 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 49; and *Democratic Alliance v Minister of Home Affairs* [2025] ZACC 8; 2025 (4) SA 323 (CC); 2025 (7) BCLR 779 (CC) (*Democratic Alliance*) at para 45.

[35] *Law Society* above n 31 at para 32.

own view for that of the Legislature or Executive.[36] A court is not to make an unconstrained value judgment or seek to take over the function of government to formulate and implement policy;[37] nor may it consider the political merits or demerits of policy choices made, or substitute its own opinions for those of the Legislature or Executive.[38] The fact that more ways than one may be available to achieve a legitimate purpose, and any preference that a court may have, is immaterial.[39] For this reason it was stressed in *Affordable Medicines* that—

> "[t]he rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the legislature. In the exercise of its legislative powers, the legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the legislature its rightful role in a democratic society."[40]

[58] This is so, as was emphasised in *New National Party* in the context of a challenge to the Electoral Act,[41] in that—

> "[i]t is for Parliament to determine the means by which voters must identify themselves. This is not the function of a Court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in

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[36] See *Pharmaceutical Manufacturers* above n 7 at para 90.

[37] *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) (*Merafong*) at para 63.

[38] *Jooste v Score Supermarket Trading (Pty) Limited* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC); (1999) 20 ILJ 525 (CC) at para 17; *New National Party* above n 20 at para 24; *Pharmaceutical Manufacturers* above n 7 at para 90; *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2; 2002 (3) SA 265; 2002 (9) BCLR 891 (CC) at para 45; and *Merafong* id.

[39] *Merafong* id.

[40] *Affordable Medicines* above n 12 at para 86.

[41] 73 of 1998.

> the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose."[42]

[59] Rationality, as was crisply stated by this Court in *Democratic Alliance*, "imposes a relatively minimal requirement: an identification of a legitimate government purpose and a link between the adopted means and that purpose".[43]

Does the scheme meet the rationality threshold?

[60] The impugned provisions, according to the respondents, are directed at the achievement of a legitimate government purpose. The first of these is the broadening of access to health care through an equitable geographic distribution of health services to transform access to health care and redress the historical imbalances of the past. The second is the regulation of such services to enforce norms and standards and ensure access to quality health services in the public interest.

[61] Law or conduct reflects a legitimate purpose where it is consistent with legal and constitutional constraints, including the Bill of Rights and the objective, normative value system of the Constitution. The expressed purpose of the impugned provisions is patently legitimate. It is consistent with the state's duty under section 27(2) to achieve the progressive realisation of the right of access to health services in the country. It accords with the objects of the Act, set out in section 2, to "regulate national health", "provide uniformity" and equitable access to health services by "establishing a national health system" that includes public and private providers of health services. In addition, it reflects a recognition of the undisputed challenges which exist in advancing access to health services in the country in the face of the persistent service delivery challenges and the inequitable geographic distribution and availability of such services.

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[42] *New National Party* above n 20 at para 19.

[43] *Democratic Alliance* above n 34 at para 45.

[62] In issue is whether a rational connection exists between this legitimate purpose and the means adopted to achieve it. This, when it has been recognised that the means adopted must be neither capricious nor arbitrary and must relate to a defensible vision of the public good, coherently and with integrity.[44] This is an objective test, since action that is objectively irrational cannot be considered rational simply because the decision-maker believed it to be so.[45]

[63] Legislation embodies public policy choices about how to regulate sectors of society. It is a legitimate form of state control authorised by the Constitution and a necessary tool for fulfilling constitutional obligations. Importantly, however, as with the exercise of all public power, it remains subject to constitutional control and constraint.[46] The threshold question in the rationality inquiry is whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise.[47]

Broadening access to health care through equitable geographic distribution

[64] The respondents submit that the scheme will achieve the purpose of broadening access to health care through advancing the equitable geographic distribution of health services. They contend that, in doing so, the scheme will "optimise resources" and "promote a spirit of co-operation and shared responsibility among public and private health professionals and providers", as well as with other relevant sectors within the context of national, provincial and district health plans as stated in the preamble to the Act. What is not clear is that the means adopted, namely the imposition of the scheme,

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[44] *Prinsloo* above n 34 at para 25.

[45] *Pharmaceutical Manufacturers* above n 7 at para 86.

[46] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) BCLR 1 (CC); 2000 (1) SA 732 (CC) at paras 51-3; *Affordable Medicines* above n 12 at paras 48-50; *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) at paras 616 and 621 (judgment of Sachs J); and *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at paras 59-60.

[47] *Scalabrini Centre of Cape Town v Minister of Home Affairs* [2023] ZACC 45; 2024 (3) SA 330 (CC); 2024 (4) BCLR 592 (CC) (*Scalabrini*) at para 45. See also *Law Society* above n 31 at paras 32 and 35.

which requires the issuance of a certificate of need in order to provide health services, is rationally connected to the purpose for which the power was conferred.

[65] This is so for a number of reasons. The first concerns to whom and what resources the scheme applies. The respondents dispute that a certificate of need will be required by *all* medical personnel or juristic persons, or in respect of *all* health technology. This is so on the basis that it is only once regulations are in place that the health technology[48] and health services[49] required to obtain a certificate of need will be prescribed. A number of difficulties arise with this contention.

[66] A "health agency" is defined in the Act as—

> "any person other than a health establishment—
>
> (a) whose business involves the supply of health care personnel to users or health establishments;
>
> (b) who employs health care personnel for the purpose of providing health services; or
>
> (c) who procures health care personnel or health services for the benefit of a user,[50]

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[48] The Act defines "health technology" as—

> "machinery or equipment that is used in the provision of health services, but does not include medicine as defined in section 1 of the Medicines and Related Substances Control Act, 1965 (Act 101 of 1965)."

[49] The Act defines "health services" as—

> "(a) health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution;
>
> (b) basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution;
>
> (c) medical treatment contemplated in section 35(2)(e) of the Constitution; and
>
> (d) municipal health services."

[50] Paragraph (c) has been substituted by section 58(1) of the NHI Act, a provision which will be put into operation by proclamation.

> and includes a temporary employment service as defined in the Basic Conditions of Employment Act, 1997 (Act 75 of 1997), involving health workers or health care providers."[51] (Footnote added.)

[67] The business of a health agency is defined as involving the supply of health care personnel to users or health establishments. Health care personnel are defined in the Act as "health care providers and health workers", while a health care provider means "a person providing health services in terms of any law".[52] A health worker is defined as "any person who is involved in the provision of health services to a user, but does not include a health care provider". In addition, a health agency is defined to include a temporary employment service "involving health workers or health care providers". It follows that a health agency supplies both health workers and health care providers, who by definition are engaged in the provision of health services. Since section 36(1) requires that a certificate be obtained to provide *prescribed* health services, where the health services provided by a health agency have not been prescribed, a health agency is unable to operate without the making of regulations that prescribe the health services it may provide.

[68] A similar difficulty arises in respect of a "health establishment", which is defined as—

> "the whole or part of a public or private institution, facility, building or place, whether for profit or not, that is operated or designed to provide inpatient or outpatient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescent, preventative or other health services."

[69] Since section 36(1) requires that a certificate of need be obtained to provide "prescribed health care services" and the definition of "health establishment" includes an establishment providing "other health services", it is only once the health services

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[51] Section 1 of the Act.

[52] Including in terms of the Allied Health Professions Act 63 of 1982; Health Professions Act 56 of 1974; Nursing Act 50 of 1978; Pharmacy Act 53 of 1974; and Dental Technicians Act 19 of 1979.

which health establishments provide have been prescribed that it can be determined whether a certificate of need is required to provide such services.

[70] The result is that, in the absence of such regulations, it is unclear to which health services the scheme applies, with this being left at the sole discretion of the Minister under section 39 of the Act. This, in circumstances in which the Minister exercises a discretionary and not a mandatory power. To permit the Minister to determine the intended scope of the legislative scheme through regulations is discordant with the principle that regulations cannot be used to interpret legislation.[53] For this reason, the power granted to the Minister to determine the services to which the scheme applies amounts to an impermissible delegation of power in that this permits for power to be exercised in a manner which is unconstrained, risks being unduly broad and is in contrast with what the Legislature intended.

[71] Furthermore, given such delegation of power, the impugned provisions do not establish a comprehensible, choate scheme against which it is possible to determine whether it reflects a coherent and defensible vision of the public good, or that there exists a rational connection between the purpose of broadening geographic access to health services and the means adopted to achieve it. In addition, without a choate scheme created by statute, it is impossible for health service providers to comport their behaviour in a manner compliant with the law.

[72] Similar concerns arise regarding the prescribed health technology in respect of which a certificate is required under section 36(1). Without regulations having been promulgated, it is not possible to determine to which health technology the scheme will apply, the ambit of the regulation intended or its impact on the provision of such health technology. The result is, as with the regulation of health services, that the sole

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[53] *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 62; *Head of Department, Department of Education, Free State Province v Welkom High School* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) at para 65; *National Lotteries Board v Bruss N.O.* [2008] ZASCA 167; 2009 (4) SA 362 (SCA) at para 37; and *Rossouw v FirstRand Bank Ltd* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) at para 24.

discretion to issue regulations is conferred upon the Minister in circumstances in which it is not possible to determine from the impugned provisions whether the scheme reflects a coherent and defensible vision of the public good, or that there exists a rational connection between the purpose of broadening geographic access to health services and the means adopted to do so. The scope of the scheme and the services it seeks to regulate are not inconsequential details in the provision of health services to the people of this country. Recklessly pursued, without appropriate regard to the impact of such regulation, the potential clearly exists to effect lasting damage to the provision of all health services across South Africa.

[73] The second issue which arises in considering whether there exists a rational connection between the purpose of the scheme and the means adopted to achieve it relates to the 13 factors set out in section 36(3) to be taken into account by the Director-General in determining whether to grant a certificate of need. These include "the need to promote an equitable distribution and rationalisation of health services and health care resources, and the need to correct inequities based on racial, gender, economic and geographical factors".[54] However, missing from the 13 factors is any requirement that the rights and interests of health establishments, agencies or providers be taken into account. The failure to consider such rights and interests in itself renders the process of granting a certificate of need irrational,[55] in that the Director-General is empowered by the statute to grant or refuse a certificate of need without taking account of the rights or interests of an applicant.

[74] In *Dawood*,[56] the difficulties were noted in conferring a broad discretion upon an official, who may be untrained in law and constitutional interpretation, while expecting that official, in the absence of direct guidance, to exercise the discretion

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[54] Section 36(3)(b) of the Act.

[55] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at paras 39-40; *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) BCLR 1 (CC); 2008 (1) SA 566 (CC) at para 187 (judgment of Ngcobo J).

[56] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

granted in a manner consistent with the Constitution.[57] Granting the power to the Director-General to issue or refuse a certificate, without requiring regard to be had to the rights and interests of health establishments, agencies or providers, is inconsistent with legal and constitutional constraints and falls short of the threshold requirement of rationality. The fact that section 36(7) provides that the Director-General must, within a reasonable time, give an applicant written reasons for such refusal or withdrawal, or that there exists a right to appeal the decision taken, does not cure this irrationality; nor does the fact that the decision taken may subsequently be challenged on review.

Enforcement of norms and standards to ensure access to quality health services

[75] The second expressed purpose of the scheme relied upon by the respondents is that it will achieve the enforcement of norms and standards to ensure access to quality health services through requiring health care facilities to undergo a process of evaluation, assessment and approval to determine their necessity and appropriateness in a specific area. Section 36(5)(a) provides that a certificate of need may be issued or renewed by the Director-General subject to—

> "compliance by the holder with national operational norms and standards for health establishments and health agencies, as the case may be."

[76] This, the respondents contend, will enable the enforcement of quality standards for health care facilities and the services they provide, which will contribute to improved health care outcomes for the population. It will, they say, allow resources to be allocated efficiently and effectively where they are most needed, having regard to health care needs and population demographics.

[77] However, no reason is advanced by the respondents why existing licensing and regulatory mechanisms in place, or other provisions of the Act which expressly regulate

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[57] Id at para 46.

norms and standards for the provision of health services, do not achieve this expressed purpose. In addition, the manner in which the scheme will be used to enforce norms and standards, apart from through issuing or refusing to issue a certificate, is unclear. No objective evidence had been produced by the respondents to show that the scheme will attain the purpose of achieving the enforcement of health care norms and standards, and the High Court's finding that the provisions regulate location, rather than quality, has not been assailed. The scheme has not been shown to this extent to be rationally related to a legitimate government purpose.

[78] It follows that no rational connection has been shown to exist between the impugned provisions and the expressed government purpose of enhancing access to health services, or creating uniformity in respect of the provision of such services. As such, the impugned provisions offend against the principle of legality as an incident of the rule of law under section 1(c) of the Constitution insofar as they fail to indicate the existence of a rational connection to a legitimate government purpose.

Does the scheme unjustifiably limit fundamental rights?

[79] Having concluded that the impugned provisions do not meet the required threshold of rationality, the enquiry could, in theory, end here. This approach is supported by the authorities of *Law Society*[58] and *Scalabrini*.[59] As this Court stated in *One Movement SA*,[60] however, the "conclusion reached arising out of the rationality enquiry is not dispositive of the infringement enquiry".[61] I therefore find it prudent to address the unjustifiable limitation of the fundamental right of citizens to choose their

[58] *Law Society* above n 31 at para 35.

[59] *Scalabrini* above n 47 at para 47.

[60] *One Movement SA NPC v President of the Republic of South Africa* [2023] ZACC 42; 2024 (2) SA 148 (CC); 2024 (3) BCLR 364 (CC).

[61] Id at para 233.

trade, occupation or profession freely, as outlined in section 22 of the Constitution,[62] especially given that the Court has had the benefit of full argument on this point.[63]

[80] *South African Diamond Producers*[64] summarised the test outlined in *Affordable Medicines*[65] for a violation of section 22 as follows:

> "If a legislative provision would, if analysed objectively, have a negative impact on choice of trade, occupation or profession, it must be tested in terms of the criterion of reasonableness in section 36(1). If, however, the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of Rights."[66]

The scheme created by the impugned provisions, once operational, will prohibit persons from entering or remaining in the profession where they lack a valid certificate of need. To this extent, the scheme strikes at the heart of the choice to provide or continue providing health services.

[81] A person's choice of trade, occupation or profession depends significantly on considerations of location, nature, specialty, profitability and financial sustainability. The scheme created by the impugned provisions, once operational, will empower the Director-General to consider these factors (amongst others) when deciding whether to grant or renew a certificate of need. Inevitably, a person's choice as to the location, nature, specialty, profitability and financial sustainability of the health establishment, agency or provider of health services will not in all cases accord with the decision of

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[62] Section 22 provides: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[63] See *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (1) BCLR 1 (CC); 2021 (2) SA 54 (CC) at para 75.

[64] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O.* [2017] ZACC 26; 2017 (6) SA 331 (CC); 2017 (10) BCLR 1303 (CC).

[65] *Affordable Medicines* above n 12 at paras 92-4.

[66] *South African Diamond Producers* above n 64 at para 65.

the Director-General in relation to the grant or renewal of a certificate of need. If it did, the scheme would not be necessary.

[82] Yet, under the impugned provisions, the Director-General's decision prevails over, and thus limits, the person's choice. As a consequence, some health service providers will face the burden of either practising in a place or specialty contrary to their choosing, or risking the threat of criminal sanction.[67] Such an eventuality necessarily renders the profession of health services provision so "undesirable, difficult or unprofitable" that a person may choose not to enter it in the first place.[68] Given the significant limitation this imposes on a person's choice of trade, occupation or profession, the impugned provisions must be "tested in terms of the criterion of reasonableness in section 36(1)".[69]

[83] Section 36(1)[70] of the Constitution requires a court to "engage in a balancing exercise".[71] It must "arrive at a global judgment on proportionality and not adhere mechanically to a sequential checklist".[72] Such an exercise must be conducted on a

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[67] *South African Dental Association* above n 5 at para 11.

[68] *South African Diamond Producers* above n 64 at para 68.

[69] Id at para 65.

[70] Section 36(1) provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[71] *S v Manamela* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32.

[72] Id.

"case-by-case" basis, as there is no absolute standard to be applied in determining reasonableness.[73] As stated in *Bhulwana*:[74]

> "[T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."[75]

Against this backdrop, I turn to the relevant factors.

[84] With regard to the nature of the right, this Court recognised in *Affordable Medicines* that "[f]reedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution".[76] It further affirmed that "[o]ne's work is part of one's identity and is constitutive of one's dignity", shaping and completing the individual over a lifetime of devoted activity.[77] Robust protection of this right enhances our country's capacity to fulfil other rights, including the right of access to health care. Consequently, limitations imposed by law on the right to freely choose a profession must not be lightly tolerated.[78]

[85] As previously described, the impugned provisions are aimed at the laudable purpose of broadening access to health care through an equitable geographic distribution of health services.[79] I have already shown, however, that the impugned provisions are not rationally related to this purpose. Moreover, the impugned provisions, on their face, permit the Director-General to ignore the rights and interests of health establishments, agencies or providers, including their right to choose their

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[73] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

[74] *S v Bhulwana*; *S v Gwadiso* [1995] ZACC 11; 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC).

[75] Id at para 18.

[76] *Affordable Medicines* above n 12 at para 59.

[77] Id.

[78] Id at para 60.

[79] See [61].

trade, occupation or profession freely. When considered in conjunction with the significant limitations they place on a health establishment, agency or service provider's choice of location, nature, specialty, profitability and financial sustainability, it is clear that the impugned provisions impose severe limitations on the right in section 22.

[86] On the face of it, the impugned provisions are unduly restrictive and not tailored towards balancing the different rights and interests at stake. This is so given that the rights and interests of health establishments, agencies or providers do not need to be accounted for in the granting of a certificate of need. This being an abstract challenge, however, it would not be appropriate to opine on the possible range of less restrictive means; suffice it to say that, on a facial interpretation of the impugned provisions, such means are available. The limitations they impose on the right to choose one's trade, occupation or profession are therefore not justifiable.

[87] As was made clear in *Freedom of Religion South Africa,*[80] once it has been determined that one fundamental right has been unjustifiably infringed, it is not necessary to traverse other fundamental rights potentially affected. Similarly, it is unnecessary to consider whether the scheme intrudes on the competence of provincial and local government in relation to the provision of health services or whether it infringes any of the other fundamental rights canvassed by the applicants.[81]

Remedy

[88] This Court is mandated under section 172(1)(a) of the Constitution to declare a statutory provision invalid to the extent of its inconsistency with the Constitution. Where it has done so, a just and equitable order under section 172(1)(b) must follow, which may include the severance of unconstitutional provisions from the Act, without the referral of the Act back to Parliament.

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[80] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC) at para 30.

[81] *Law Society* above n 31 at para 35 and *Scalabrini* above n 47 at para 45.

[89] Given that the impugned provisions are structurally interconnected,[82] with sections 37 to 40 dependent on the existence and operation of section 36, it is possible to sever only those provisions from the Act. Since the scheme established by section 36 is constitutionally invalid, and sections 37 to 40 cannot operate in the absence of section 36, excising the impugned provisions is not only just and equitable but does not affect the operation of the remainder of the Act. This is evident from the fact that the remaining provisions of the Act have been in operation, without the impugned provisions having been brought into effect, for over two decades. The severance of some or parts of the impugned provisions is not only unfeasible but would amount to unwarranted textual surgery when the finding of invalidity made is not confined to isolated words or subsections, but goes to the heart of the scheme's design.[83]

[90] Since the scheme reflected in the impugned provisions is unconstitutional in its entirety, no purpose would be served if the declaration of invalidity were to be suspended or if the matter were to be referred back to Parliament. The impugned provisions have yet to be brought into operation, and no administrative disruption will arise from their severance from the statute. Parliament remains free to legislate anew, provided that it does so within constitutional bounds.

[91] For these reasons, the High Court's declaration that the impugned provisions are invalid, given their inconsistency with the Constitution, must be confirmed and the cross-appeal dismissed. The applicants have sought to vindicate constitutional rights in this matter and, on the application of the *Biowatch* principle,[84] the respondents should pay their costs, including the costs of two counsel.

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[82] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16.

[83] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 73.

[84] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Order

[92] The following order is made:

1. The cross-appeal is dismissed.
2. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
3. It is declared that sections 36 to 40 of the National Health Act 61 of 2003 are inconsistent with the Constitution and invalid in that they are irrational and unjustifiably limit the right to choose a trade, occupation or profession freely, and are consequently severed from the Act.
4. The first and third respondents are ordered to pay the applicants' costs in this Court, including the costs of two counsel where so employed.

For the First to Seventh Applicants:	M J Engelbrecht SC and M Dafel instructed by Serfontein Viljoen and Swart
For the Eighth Applicant:	B E Leech SC and A Ngidi instructed by Werksmans Attorneys
For the First and Third Respondents:	N Maenetje SC, D Chabedi SC, A Dipa, L Mokgoroane and C Juries instructed by Kgosana Attorneys