

EXPLAINER | The lay of the law on National Health Insurance

Court challenges to both the procedure by which the National Health Insurance (NHI) Act was passed into law and the substance of the act could take 10 to 15 years to resolve, a lawyer involved in two of the cases told a recent medical scheme conference.

However, the key to future litigation currently lies in a Constitutional Court judgment that is expected to determine the constitutionality of the legislative process which resulted in the NHI Act being passed, the Board of Healthcare Funders (BHF) conference heard in Cape Town. The cases were heard in May, and there is no indication of when the judgment/s will be handed down, as the court will deliver them when it is ready, Neil Kirby, Werksmans is acting for the BHF in its NHI challenges, two of which are before the Constitutional Court. BHF members include several medical schemes whose existence is threatened by provisions of the NHI Act.

Cases challenging how NHI Act was passed

Cases challenging the process by which an act was passed into law must be heard by the Constitutional Court, while challenges to the act itself and its clauses are heard by the high court, even if the challenge is based on constitutional grounds, Kirby explained.

The two cases challenging the way the NHI Act was passed include:

The BHF case

The BHF applied to the Constitutional Court to declare the NHI Act unconstitutional on the basis that it was passed into law after a deficient public participation process, Kirby said. The BHF spent 18 months analysing the lengthy public participation process and the issues raised, and how this process failed to result in any material change to what was finally passed as law, Kirby said. It gave the court 2 000 pages of its findings

The Western Cape premier's case

The BHF challenge was heard at the same time as the one from Western Cape Premier Alan Winde. The premier's application argues that the National Council of Provinces

The application also argues that the NCOP did not consider the Gauteng government's report and rushed its hearings on the NHI Bill, and ignored the Western Cape government's requests for reasonable extensions.

What could happen next?

Kirby said when the Constitutional Court delivers its judgments, it may:

Agree with the BHF that public participation was deficient, strike down the NHI Act as unconstitutional, and send it back to Parliament;

Disagree with the BHF's arguments but agree with the premier's argument that the NCOP process was deficient. In this case, the act could be referred back to the NCOP;

or Disagree with both the BHF and the premier that the process followed was unconstitutional, and any pending cases being held in abeyance while these two cases are heard will resume in the Gauteng High Court in Pretoria.

The high court cases

Several cases in the high court also challenge the NHI Act on the grounds that its provisions contravene the Constitution. In February 2026, the health minister, the Department of Health, and seven organisations challenging the NHI Act reached an agreement that the minister would not implement any provisions of the NHI Act, and the parties would not continue their litigation until judgment is handed down in the Constitutional Court. This agreement was made an order of the court.

Depending on how the Constitutional Court rules on the cases before it, the high court cases could be abandoned, adapted, or continued. They include:

In a legal first, the BHF brought a high court application in 2024, challenging President Cyril

Ramaphosa's decision to sign the NHI Act into law and questioning whether he had applied his mind to the serious constitutional issues raised with him.

The BHF asked for a record of the president's considerations to see if he disagreed with the submissions made to him or ignored them, as, if he had any reservations, he should have referred the bill back to Parliament.

The South African Private Practitioners Forum (SAPPF) launched a similar application as its case was joined with the BHF's case. The president's legal team responded that the high court could not review the president's decision and the case should be heard by the Constitutional Court.

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Stay of proceedings

The president and health minister appealed the high court decision in the Constitutional Court. Their legal team also applied for the consolidation of all high court matters and for a stay of proceedings until the Constitutional Court resolved the president's appeal.

This was contested by Sakeliga and the Health Funders Association (HFA), which have each challenged the constitutionality of the act in the High Court.

In February 2026, the consolidation application was put on hold when the parties agreed to await the outcome of the Constitutional Court cases brought by the BHF and the Western Cape premier. The health minister agreed not to ask the president to proclaim any parts of the NHI Act into force until the Constitutional Court decides on the procedural matters. The litigating organisations agreed to stay their applications until the Constitutional Court judgment/s is/are delivered.

The other cases Six other cases before the Gauteng High Court in Pretoria that may or may not proceed include:

A Hospital Association of South Africa application arguing that the NHI Act is unconstitutional and invalid, and should be set aside. Alternatively, it argues that certain sections of the act are unconstitutional and should be declared invalid.

A South African Medical Association application arguing that several clauses in the NHI Act are unconstitutional. The doctors' organisation is challenging clauses pertaining to the exclusions of foreigners from the NHI; compulsory registration of users; changes to the organisation and funding of the public health system; benefits, contracts and accreditation of providers; pricing of health services and reimbursement of providers; powers and functions afforded to the health minister; medical schemes and private insurance; and compliance and amendments to other acts.

An HFA application arguing that the NHI Act is irrational for failing to consider the costs and impact on existing healthcare providers, and is incapable of providing the same level of services to current medical scheme members.

The organisation that represents medical schemes also argues that the act is an unreasonable and unjustifiable infringement of the rights of medical scheme beneficiaries to healthcare, and contravenes the state's obligation to progressively realise access to healthcare for all within available resources.

Lastly, it argues that the sweeping and unchecked powers conferred on the health minister are

unconstitutional.

A Sakeliga application arguing that the NHI Act's provisions are not rationally connected to its purpose and are therefore irrational and unconstitutional. The organisation, which represents businesses, also argues that the act is unconstitutional because it fails to provide reasonable economic and governance measures within the government's means to progressively expand access to health care.

Finally, it argues that the act is inconsistent with several sections of the Constitution.

A Solidarity trade union application arguing that there is no funding model for NHI, and the act's vagueness is unconstitutional. The union also argues that there is no connection between the proposed NHI scheme and its stated aims, as it is neither feasible nor sustainable. It also says the extensive powers granted to the health minister and the act's failure to promote the efficient, economical and effective use of government resources are unconstitutional.

In addition, Solidarity argues that the provisions of the act infringe on the rights to human dignity, life, freedom and security, and freedom of trade, occupation and profession, as well as labour and property rights.

An AfriForum application arguing that the NHI Act contravenes the Constitution by centralising healthcare in violation of provincial powers, restricts patient and provider freedoms, is irrational and not feasible, does not comply with international obligations, and is vague.

Kirby said the legal challenges are often dismissed as being about protecting the profits of private healthcare providers rather than being about constitutional rights.

The legal challenges had to happen because, as laudable as the principles of universal healthcare are, they cannot take precedence over the Constitution, and the government cannot dismantle the private health sector because it can't assure those who rely on private healthcare that they will have access to the same level of care through an NHI fund, he said.

Many speakers at the BHF conference called for the medical scheme and private healthcare industry to do what it could to address South Africa's healthcare problems rather than wait for the legal challenges to be resolved.