health
Department:
Health
REPUBLIC OF SOUTH AFRICA

2030 NDP

MEDIA STATEMENT

To: Editors & Health Journalists
Issued by: Department of Health
Date: Thursday, 25 July 2024

Health Ministry responds to court judgement on the invalidity of sections of the National Health Act

Pretoria: Minister of Health, Dr Aaron Motsoaledi has noted with deep concern the Pretoria High Court, Gauteng Division judgement handed down on Wednesday,24 July 2024 which declared sections 36 to 40 of the National Health Act 61 of 2003 unconstitutional.

Even more concerning and disappointing are misleading media headlines which characterise the judgement as a huge blow to the National Health Insurance (NHI). We must concede that this propaganda has been hugely successful and is in the same mould as the Bell Pottinger propaganda machine of State Capture days.

We have been inundated with calls and enquiries from concerned people who were made to believe that indeed NHI has been declared unconstitutional by a Court of Law.

It has become apparent to us that some organisations and individuals who are using the judgement to criticise NHI have not even read Act No. 61 of 2003 and hence are not in a position to understand what Wednesday's judgement all is about. Nevertheless, they have even started celebrating their perceived demise of NHI.

As the Department we wish to take this opportunity to clarify members of the public who are victims of this toxic propaganda. Hence, we believe it is important to start from the beginning, by providing a brief historical background to the piece of legislation which is the subject of court ruling:

- prior to the democratic breakthrough of 1994, the South African healthcare system was government by a health Act enacted in 1977 (Health Act 63 of 1977). This Act was applicable to what was then white South Africa and worked alongside several pieces of legislation which were operating in the Bantustans.

  Section 44 of Health Act 63 of 1977 enabled the Minister of Health to make regulations in respect of private hospitals, nursing homes, maternity homes, or other similar institutions where patients are being taken care of.

- In 1994 the Interim Constitution repealed all the Bantustan laws but not Health Act 63 of 1977, which was applied to the whole country until 2004.

- In 2003, a new National Health Act, 2003 (Act No. 61 of 2003) was enacted in Parliament, and in the process, completely repealing the 1977 Act.

  Sections 36 – 40 of the new Health Act were not promulgated when it came into effect in 2004, resulting in a lacuna or gap in regulating health facilities. It is during this gap that a myriad of health facilities cropped up, unregulated.

- In replacing the 1977 Act, the 2003 Act sought to provide a far broader mandate which aligns with contemporary developments in health than simply providing for private

hospital licensing. In this regard the 2003 Act intends to regulate all health establishments, not only hospitals. This includes both public and private facilities. This is how the concept of certificate of need arose and is expressed through sections 36-40 of the Act.

- There is a legitimate government purpose served by the introduction of this certificate of need, contrary to what is being said. Certificate of need is meant to achieve two important objectives,

  i. to regulate quality and standard of healthcare being provided in a particular facility.
  ii. determine whether an intention to put up a facility, extend the facility, increase the number of beds or put some particular equipment is appropriate for that area.

- It is because of this legitimate government purpose that many other countries also have a certificate of need.

  For the benefit of those who are being misled, we wish to provide a list of some countries with similar laws. All of them are driven by a common objective which is to regulate or license the establishment of health facilities, equipment and services:

  1. Australia: Private health facilities Act 2017;
  2. Canada: Provincial and Territorial laws, such as Ontario Private hospital Act;
  3. India: Clinical Establishment (Registration and Regulations Act 2010)
  4. Kenya: Private Hospital Act (
  5. Malaysia: Private Healthcare facilities and services Act of 1998
  6. New Zealand: Private Hospitals and Medical Clinic Act of 1959;

7. Nigeria: Private Hospitals and Maternity Homes Registration and Regulation Decree 1992;
8. Philippines: Private Hospital Act 2004;
9. Singapore: Private Hospital and Medical Clinics Act;
10. Sri Lanka: Private Medical Institutions Act of 2006;
11. Tanzania: Private Hospitals Regulation Act 1977;
12. Uganda: Private Health facilities and services Act 2007;
13. United Kingdom: Care Standard Act 2020 (England and Wales, regulation and quality improvement authority. (Northern Ireland), and Healthcare Improvement (Scotland)
14. USA: Certificate of Need in 35 States.

It is important to note that this list is not exhaustive. Additionally, it should be noted that some of these laws are continually updated.

As a constitutional democracy, we fully respect the mandate of the Court to arbitrate on any issue which is a subject of contestation by different sections of society. However as far as this present judgement is concerned, we respectfully wish to differ with the honourable Court. We note that while we execute our mandate of provision of healthcare as a human right, the Court seems to have placed economic property rights at the expense of the right to health.

It is very unfortunate that while we live within the borders of the same country we seem to be existing in two different worlds – one world where it is believed that the right to health must reign supreme and the other world of economic property rights for the privileged few, where the welfare of human beings counts for nothing.

We are even struggling to understand how a right to health by all people in our country interferes with other people's rights to own property.

It is common cause that any section of an Act declared unconstitutional by a court of law, must be confirmed by the Constitutional Court. Ordinarily there would have been no need for us to appeal to the Constitutional Court because the matter is heading there anyway. Nevertheless, we will still consider all our options including an appeal.

We wish to remind the country that a Health Market Inquiry was instituted through the Competition Commission. This Inquiry was chaired by the former Chief Justice Hon. Sandile Ngcobo. Many concerns were raised about the absence of a coherent licensing regime.

The Inquiry has, amongst others, recommended that to address unequal access to healthcare which is so glaring in our country, a standardised centralised licensing regime should be implemented.

The report further added that critical elements of an improved licensing framework include *inter alia*, assessment and protection of market need per speciality, a means of delivery (in-patient, out-patient and day care) and assessment of clinical impact.

It is interesting that the objectives of Sections 36 – 40 of the National Health Act 2003 (Act No. 61 of 2003) are being opposed, whereas the Pharmacy Act provides for the same objectives, but nobody is challenging it, or even worried about it. Where are these property rights when it comes to the location of pharmacies. It is well known that one cannot just place a pharmacy anywhere in the country, because there are rules that regulates that.

Currently, after obtaining a practice number, a doctor can practice anywhere (whether in their office, bedroom or boot of a car, or even hire premises next door to a tavern). Nobody can do anything about it.

Even the Health Professions Council of South Africa (HPCSA), a statutory body that registers doctors cannot provide a comprehensive list of where Healthcare workers are practising, if they are not in public healthcare facilities. Likewise, the Board of Healthcare Funders (BHF), a body that provides private health practitioners with a practice number empowering them to claim money from medical aids, cannot with certainty state where practitioners are practising or what type of facility they are practising in.

We do have questions that need answers. Why is it that in this country you cannot just erect a filling station anywhere or erect a huge mall anywhere, but a healthcare facility is not supposed to be regulated similarly? Where are property rights in these other instances?

Finally, the sections of law that have been ruled unconstitutional are in the National Health Act 2003 (Act 61 of 2003). These provisions were drafted 20 years before the NHI Act. They have nothing to do with the National Health Insurance which is being established by the NHI Act (Act 20 of 2023). It is purely mischief to assert a connection and is a part of the deliberate campaign to discredit the NHI. There is even a claim that the certificate of need is a cornerstone or a central pillar of NHI presumably without which NHI can fly. We have provided a list of countries that have certificate of need, and some of them do not have NHI or any form of universal health coverage.

We wish to conclude by stating that this war going on in the courts, media and all public institutions about provision of healthcare is a proxy war between the rich and the poor and not between the rich and the State. That is why the judgement emphasises on property rights, exactly the same argument which is presented in courts when the poor black majority want access to land.

For our part as a Department we will at all times take the side of the poor.

For more information and media enquiries, please contact:

Mr Foster Mohale
Health Departmental Spokesperson
0724323792
Foster.mohale@health.gov.za