SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

2021-08-13

TO: Director-General of Health

ATTENTION: Dr Aquina Thulare
Technical Specialist
Health Economist for NHI

DELIVERED: By email: con@health.gov.za

Dear Dr Thulare

SUBMISSION: REGULATIONS RELATING TO THE CERTIFICATE OF NEED FOR HEALTH ESTABLISHMENTS AND HEALTH AGENCIES

Sakeliga has taken note of the proposal to require certificates of need for practice by medical professionals in South Africa as stipulated in the *Government Gazette*, No. 44714, 15 June 2021.

Should the opportunity arise, Sakeliga wishes to present oral evidence on this submission.

We do not support this proposal and consider it likely unconstitutional as far as it empowers the state with discretion to determine where medical professionals may practice. Choice of location of a practice or facility is important economically, socially, and, in our view, constitutionally.

We submit that the medical sector is already subjected to a range of harmful and detrimental regulatory measures that affect the working of the market in medical services. In effect, the proposed regulation is likely to introduce another layer of red tape, cost, and state bureaucracy upon those that practice medicine, thereby raising the cost to practice and serving as a disincentive to practice medicine in South Africa. To our knowledge, South Africa has lost numerous medical professionals. The proposal, in our estimation, will not help the matter.

Constitutional concerns

Mandating a certificate of need for health care professionals is in breach of important constitutional institutions, such as the Rule of Law and the guaranteed rights to freedom of association and of trade and profession.

We are concerned that mandating certificates of this nature by regulation infringes on the principle of the Rule of Law that substantive law will only be crafted and enacted by the democratically elected representatives of the public assembled in legislatures, such as Parliament.

No argument can be made that this matter is of a purely regulatory – that is, technical, implementory – nature. The regulation does not operationalise a rule of law that has been established by the lawmaker; the regulation establishes its own rule of law by fiat.

The legislation that bestows upon the Minister the power to 'legislate from the hip', as it were, in this way, is arguably inconsistent with the founding value of the Constitution found in section 1(c) of the highest law, providing that the Rule of Law is supreme in South Africa. The Minister exercising that power in the way herein contemplated, is in our view without a doubt inconsistent with section 1(c) of the Constitution.

We agree with the trade union, Solidarity, that certificates of need amount to an effective regulatory deprivation of medical practices. It allows government the power to infringe on the freedom of trade of medical professionals. In effect, it nationalises and bureaucratises the labour of medical professionals, where medical professionals may be unable to establish a practice in their area of choice.

Moreover, as Solidarity has pointed out, the freedoms of patients and medical professionals to associate freely is also likely infringed upon.

Sections 18 and 22 of the Constitution respectively guarantee the rights to freedom of association and to choose one's trade or profession. The right to freedom of association is unqualified, and may only be limited by operation of section 36(1) of the Constitution – the limitations provision. Freedom of profession freely is qualified, in that government may regulate the practice, albeit not the choice, of the profession.

It is clear to us that no section 36(1) inquiry would be capable of justifying this regulation's infringement on section 18 of the Constitution.

To assume a medical professional will simply move to where there is a so-called "need" for medical professionals around the country is problematic. The more likely event is that the areas to which medical professionals would be willing to move will be very few in number, and if they are not issued a certificate for those areas, they will look abroad. A fundamental freedom, allowing patients and medical practitioners to associate in whatever way and wherever they please, is being infringed at the altar of a goal that cannot be achieved. An unachievable government goal can never justify a limitation of rights within South Africa's constitutional order.

In any event, government likely has other avenues at its disposal to ensure service in underserved communities. Incentivising practices in such areas – through various means such as tax exemptions, etc. – is an example of an alternative that is available to government, and which infringes on no constitutional right.

The limitation on section 22 is also arguably unjustifiable. While this is a regulation of the practice, not the choice, of a profession, the regulation's extent is in effect, if not theory, also regulating the choice of profession. A person might see the suffering in Soweto and decide that they wish to become a doctor to serve the community of Soweto. If they are then denied a certificate because government deems there to be no "need" for an additional doctor in Soweto, that person's choice of profession, not merely the practice of it, has been denied.

Considering the potentially disastrous foreseeable, and likely plethora of unforeseen, consequences of this regulation, we recommend that the regulation be withdrawn. South Africa's medical service sector is not equipped to deal with the kind of disruption that this form of regulation will undoubtedly bring about.

Prepared by:

Gerhard van Onselen
Senior Analyst: Sakeliga

Martin van Staden
Legal Fellow: Sakeliga

t. 012 880 1951 I diens@sakeliga.co.za
109 Gerhard Street / Gerhardstraat 109, Centurion, SA

Sakeliga NPC (Reg. nr. 2012/043725/08)

www.sakeliga.co.za