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Dear All,

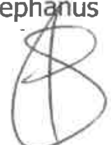
IN RE: CERTIFICATE OF NEED SCHEME IN TERMS OF THE NATIONAL HEALTH ACT, 2003

1. We act on behalf of Solidarity.

2. Solidarity is a trade union registered in terms of the Labour Relations Act 66 of 1995. Solidarity has approximately 200 000 members in all occupational fields, including more than 5 200 members in the medical sector.

3. Solidarity also manages the Solidarity Guild for Health Care Practitioners and the Occupational Nursing Guild. The Guilds aims to protect health care practitioners, provide opportunities for young professionals to build their careers, and serve as a watchdog over matters that may adversely affect health care practitioners. The members of the Guilds share a vision of creating safe working environments where health care practitioners can deliver sustainable care to their patients in terms of a fair funding system.

4. The purpose of this letter is to request the President not to bring into operation sections 36 to 40 of the Health Act 61 of 2003 ("**Act**"). As the President may be aware, sections



36 to 40 of the Act seek to establish a scheme whereby all health establishments, health agencies, and health care personnel must obtain a "certificate of need" before such a facility or person may provide health services. For convenience, we refer to sections 36 to 40 of the Act as "**the scheme**".

5. Solidarity is of the view that the scheme is unconstitutional and liable to be struck down. As a result, the President would be acting irrationally if he brings the impugned scheme into operation.

6. By way of background:

   6.1. **Certificate of need.** Section 36(1)(a) of the Act provides that a person may not (i) "establish, construct, modify or acquire a health establishment or health agency", (ii) "increase the number of beds in, or acquire prescribed health technology at, a health establishment or health agency", (iii) "provide prescribed health services", or (iv) "operate a health establishment or health agency" without being in possession of a certificate of need.

      6.1.1. To show the broad reach of section, it is worth noting that the Act defines:

         (i) health establishment to mean "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".

(ii) health agency to mean "any person other than a health establishment (a) whose business involves the supply or health care personnel to users or health establishments; (b) who employs health care personnel for the purpose of providing health care services; or (c) who procures health care personnel or health services for the benefit of a user, and includes temporary employment services".

(iii) health services to mean "(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".

(iv) prescribed to mean "prescribed by regulation made under section 90". Section 90 of the Act empowers the Minister of Health to make regulations on virtually all aspects of the health care industry, including the provision of health services by health care personnel.

(v) health care personnel to mean "health care providers and health workers", which in turn defines:

a. health care provider to mean "a person providing health services in terms of any law, including in terms of the (a)

Allied Health Professions Act, 1982; (b) Health Professions Act, 1974; (c) Nursing Act, 1978; (d) Pharmacy Act, 1974; and (e) Dental Technicians Act; and

b. health worker to mean "any person who is involved in the provision of health services to a user, but does not include a health care worker".

6.1.2. municipal health services to include "(a) water quality monitoring, (b) food control, (c) waste management, (d) health surveillance of premises; (e) surveillance and prevention of communicable diseases, excluding immunisations, (f) vector control; (g) environmental pollution control; (h) disposal of the dead; and (i) chemical safety."

6.1.3. In sum:

6.1.3.1. Section 36 impacts the whole health care industry. The provision requires every person who establishes and operates a health establishment and health agency <u>and</u> every person involved in providing health care services to hold a certificate of need.

6.1.3.2. Section 36 reaches far beyond the medical industry. For example, an entity that provides services in food control, waste disposal, chemical safety, vermin control, and water and pollution monitoring must obtain a certificate of need before such an entity is permitted to administer such services.

6.2. **The authority to issue a certificate.** Section 36(2) of the Act empowers the Director-General of the National Department of Health to issue or renew a certificate of need.

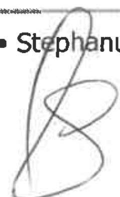
6.2.1. When deciding whether to issue or renew a certificate of need, the Director-General must consider the criteria listed in section 36(3) of the Act. Some of the mandatory criteria are discussed in greater detail below. But it is worth noting that the criteria include the need to "promote and equitable distribution and rationalisation of health services and health care resources" and the need to "promote an appropriate mix of public and private health services". In other words, a central objective of a scheme is to compel the relocation of health establishments, health agencies and health care personnel to relocate to different locations and institutions.

6.2.2. In addition, section 36(5) empowers the Director-General to issue or renew a certificate of need on "any condition" regarding:

(i) the nature, type of quantum of service to be provided by the health agency or health establishment;

(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 section 36(3) of the Act.

6.3. **Duration and withdrawal.** Section 37 of the Act provides that a certificate of need is valid for a prescribed period, but such a prescribed period may not exceed 20 years. In addition, section 36(6) specifies the grounds on which the Director-General may withdraw a certificate of need.

6.4. **Criminal offence.** Section 40 of the Act provides that a person who performs an act contemplated in section 36(1) without a certificate of need is guilty of an offence, and such a person is liable to a fine or imprisonment not exceeding five years or both a fine and such imprisonment. Taken together, these sections criminalise the act of providing any health services without holding a certificate of need. In addition, as set out above, the certificate of need may restrict the holder of the certificate to perform a particular health service in a specific location.

7. The scheme centralises direct control over the entire health industry in the Director-General of the National Department of Health. If the scheme comes into operation:

7.1. The Director-General will control the location of all health establishments and health agencies in the country. This includes the power to decide whether to approve the construction and expansion of hospitals, ambulance services and facilities that provide services in the field of waste management and chemical

safety. It is worth recalling that a certificate of need is not indefinite. Although the maximum period of a certificate of need is 20 years, the Minister of Health has already signalled in the draft regulations that existing health agencies and establishments will only be given a certificate for 10 years. The Director-General may refuse to renew a certificate of need. If this were to happen, the health establishment or health agency would suffer immense financial harm. They would lose their patients, income, and the productive use of their property.

7.2. The Director-General will control the placement of each health care provider and health workers. This includes medical doctors, dentists, nurses. If the Director-General refuses to issue a certificate of need, the health care personnel would effectively be required to relocate away from their home and community.

7.3. The Director-General will control the "nature, type and quantum" of health services performed at a health establishment or health agency. In other words, the Director-General may restrict the type and quantity of health care services that may be provided by a hospital. It must be accepted that the only conceivable reason that the Director-General would limit the nature, type and amount of health services is to force the medical practitioners providing those health services at that facilitate to relocate to other locations and facilities.

7.4. The Director-General also controls the use and deployment of diagnostic and therapeutic equipment. It appears that this power may require private institutions to share the use of their equipment with the public sector. The Act provides no mechanism in terms of which a medical practitioner in the private sector would be compensated for the use of their property.

8. Over the years, the state has failed to attract a sufficient amount of health care personnel to the public sector, including healthcare facilities in underserved communities. This is for a variety of reasons. This includes poor work conditions, inadequate remuneration, and safety concerns. It has reached a point where there is simply not enough "carrots" to entice health care personnel to work in the public sector. The government has now deemed it appropriate to compel health care personnel to provide their services to the public sector and in areas away from their homes and communities. It is particularly alarming that the state has sought to threaten health care personnel with criminal convictions and imprisonment. The scheme reflects poor planning and bad policy.

9. The scheme is also unconstitutional for at least four reasons.

9.1. **The scheme is irrational.** The scheme is irrational because the scheme cannot achieve its purported objective.

9.1.1. A primary objective of the scheme appears to be the equitable distribution and rationalisation of health services and resources. In other words, the aim is to move health care providers (and the operators of health establishments and agencies) from locations where the Director-General perceives there to be a relative oversupply to areas where there is a relative undersupply. But the scheme will not result in a zero-sum game.

9.1.2. The scheme assumes that health care personnel will accept re-location. The assumption is irrational and wrong. Suppose health care personnel are compelled to relocate to areas away from their homes, communities and preferred areas of residence. In that case, there is a high risk that

they will exit the healthcare industry or emigrate. The risk is not hypothetical. It should not have to be stated that health care providers are highly skilled workers, and their skills are demanded worldwide. South Africa has already lost many health care personnel due to migration. The scheme will cause the number of health care personnel will decrease.

9.1.3. In terms of section 36(3)(a) of the Act, another objective of the Act is to "ensure consistency of health services development". With respect, the scheme does not facilitate the development of health services. For example, suppose an operator of a health establishment or health agency is only given a certificate of need for three years. Because there is no expectation of renewal, the operator will simply not invest in upgrading the facilities and equipment at the establishment or agency. Uncertainty will result in a lack of investment in the healthcare industry. And there can be no development without investment.

9.2. **The scheme impairs constitutional rights.** The scheme unjustifiably infringes several constitutional rights. These include:

9.2.1. **The right to choose a trade, occupation and profession.** Section 22 of the Constitution guarantees the right of every citizen to choose their trade, occupation or profession freely. Although the law permits the government to regulate the practice of an occupation or profession, the constitutional right is impaired whenever the state takes measures that restrict and direct the choices of the members of that occupation or

profession. There can be no dispute that the scheme strikes at the heart of section 22 of the Constitution. The entire purpose of the scheme is to relocate health establishments, health agencies, and health care practitioners to new locations and institutions and restrict the type and quantity of health services that such a facility and persons may offer to their patients. This removes the choices they have enjoyed in the past, and denies them the freedoms enjoyed by the members of virtually all other occupations and professions.

9.2.2. **The right not to be arbitrarily deprived of property.** Section 25(1) of the Constitution provides that no law may permit the arbitrary deprivation of property. The scheme impairs section 25(1). Health establishments and agents require property to perform health services. This includes premises and equipment. The scheme however threatened to deprive health establishments and agents of their premises and equipment. For example, the Director-General would impair the right if he refuses to renew a certificate of need thereby leaving the establishment and agent with fixed property and equipment that it cannot use. The right is also unduly impaired if the Director-General restricts the rights of an operator to provide particular types and quantities of health services to patients.

9.2.3. **Expropriation of property.** Section 25(2) of the Constitution provides that property may not be expropriated without compensation. It appears that the scheme permits the Director-General to compel health

establishments, health agents and health care providers in the private sector to share their human resources and diagnostic and therapeutic requirement with the public sector. This would be unconstitutional because the Act does not contemplate providing just and equitable compensation to these facilities and persons for the use of their property.

9.2.4. **Section 27(1) of the Constitution.** Section 27(1) of the Constitution guarantees everyone the right to access healthcare services. The right safeguards existing access to health care services. The Director-General will impair the right if it decides not to renew a certificate of a health care practitioner or establishment. It will take away an existing patient's right to choose the health care establishment and health care provider (and will in all likelihood result in the lowering of health care quality in the area)

9.2.5. The limitations of the rights are unjustifiable.

(i) The means to achieve the objective of the scheme is irrational. And, even if it was rational, there are less restrictive means to achieve the equitable distribution of health services. For example, the state has failed to improve the quality of work conditions at public facilities or to financially incentivise health care personnel to relocate to underserved areas (which is what is done in other countries). The state has also persistently refused to issue work visa to foreign doctors.

(ii) The scheme also fails to have regard to the nature of the constitutional rights impaired by the scheme.

(iii) At the very least, the scheme is unconstitutional because the Act does not require the Director-General to consider whether the issuing or renewal of a certificate of needs impacts the constitutional rights mentioned above. It is striking that the criteria listed in section 36(2) do not consider the rights and interests of health establishments, health agents and health care personnel. As it reads, section 36(2) does not require the Director-General to have regard to the family and community ties of a health care personnel or the property invested by a health establishment.

9.3. **Impermissibly Vague Criteria.** The legislature has prescribed impermissibly vague criteria and has delegated a power to the Director-General of the National Department of Health without proper guidance on how that power should be exercised. In other words, the health establishments, health agencies and health care personnel that are affected by the scheme do not have a sense of how the power will be wielded.

9.3.1. As set out above, section 36(2) of the Act prescribes 13 the criteria that the Director-General must take into account when deciding whether to issue or renew a certificate of need. In addition, section 36(5) empowers

the Director-General to impose "any condition" when issuing a certificate of need regarding a wide range of factors. The sections fail to pass constitutional muster.

9.3.2. Section 36(2) of the Act prescribe criteria that are manifestly vague and risk arbitrary decision-making. For example:

(i) Section 36(3)(e) provides that the Director-General must consider "the potential advantages and disadvantages for existing public and private health services and for any affected community". The criterion is so broadly phrased that it effectively permits the Director-General to consider any "potential" advantage or disadvantage for the health services and the community.

(ii) Section 36(3)(c) requires the Director-General to consider "the need to promote an appropriate mix of public and private health services". The Act does not indicate what an "appropriate" mix would be. The discretion to make such a determination has been left entirely to the Director-General.

(iii) Section 36(3)(k) states that the Director-General must consider "the need to ensure the availability and appropriate utilisation of human resources and human technology". But, again, it is entirely unclear what is meant by the "appropriate utilisation" of people and technology and how the Director-General will apply

these criteria when deciding whether to issue or renew a certificate of need.

9.3.3. To compound matters, section 36(5) fails to prescribe any guidelines or constraints on the Director-General's power to impose conditions on a certificate of need. For example:

(i) Section 36(5)(b)(i) empowers the Director-General to impose "any condition" "on the nature, type of quantum of services" that a health establishment or agency may provide. However, the Act fails to provide any guidance on when and the extent to which the Director-General should curb the nature, type and quantum of services that a particular health establishment or agency can provide.

(ii) Section 36(5)(b)(ii) provides that the Director-General may impose conditions regarding how human resources and diagnostic and therapeutic equipment are deployed. However, again, the Act fails to provide any guidance or constraints on the purpose or ambit of the condition.

(iii) Section 36(5)(b)(v) provides that the Director-General may impose any condition on any criterion contemplated by section 36(3) of the Act. Again, this power is extensive, and will be exercised without any guidance or constraint.

9.4. **The scheme impairs the powers of the provinces.** The scheme is unconstitutional because the provinces have been impermissibly excluded from a decision-making process that will have an immediate, substantial and direct impact on the healthcare system in the provinces.

9.5. It is worth noting that the provinces are constitutionally entitled to be involved in the decision-making process.

9.5.1. Schedule 4 of the Constitution provides that health services, pollution control, air pollution and municipal health services are functional areas of concurrent national and provincial legislative competence; and

9.5.2. Schedule 5 of the Constitution provides that ambulance services are a functional area of exclusive provincial legislative competence.

9.6. But the scheme disregards the constitutional powers and responsibilities of the provinces. The scheme excludes the provinces from the decision-making, and it does not even require the Director-General to consider the preferences of a province. In other words, the provinces have no say in whether a certificate of need is issued or renewed, including the conditions on which the certificate is issued. It is impermissible for the National Health Act to establish a scheme that effectively removes the constitutional powers of the provinces to legislate on aspects of health care services in the provinces.

10. In terms of section 94 of the Act read with section 81 of the Constitution, Parliament has empowered the President to bring into operation sections 36 to 40 of the Act "on a date fixed by the President by proclamation in the Gazette". The power to bring the scheme

into force must be exercised rationally and with due regard to whether the scheme complies with the Constitution (see *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC) para 79). For the reasons set out above, the scheme is palpably unconstitutional.

11. Solidarity contends that it would be irrational for the President to bring into operation unconstitutional legislative provisions.

12. In light of the above, our instructions are to demand on behalf of Solidarity:

    12.1. That the President provide an unequivocal written undertaking that the President will not bring into operation sections 36 to 40 Act;

    12.2. Alternatively, an unequivocal written undertaking by the President to refer the matter to the courts for a ruling on whether sections 36 to 40 comply with the Constitution, and, until the courts have made a final pronouncement on the issue, not to bring into operation sections 36 to 40 of the Act.

13. If the President fails to provide an undertaking within 30 days of the letter, Solidarity will infer that the President disagrees that the scheme is unconstitutional. In that event, Solidary will be left with no option but to approach the high court for an order declaring unconstitutional and invalid sections 36 to 40 of the National Health Act, 2003.

14. Our client's rights are strictly reserved.

Yours faithfully

SERFONTEIN, VILJOEN & SWART

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