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This information was prepared for **all OTASA members** by our legal counsel, Elsabe Klinck, on the Constitutional Court judgment on the constitutionality of the NHI Act of 2023 that was held on the 5th-7th May 2026.

INFORMATION SHEET ON THE CERTIFICATE OF NEED & THE CONSTITUTIONAL COURT RULING OF MAY 2026

Background

The Certificate of Need (CON) was included in the National Health Act, 2003. Sections 36 to 40 set the requirements for the CON. Draft regulations were issued for comment in 2021.

The CON would be issued if one wanted to:

- (a) set up a practice/health establishment;
- (b) buy a practice/health establishment; or
- (c) continue to operate a practice/health establishment. A CON could be valid for a maximum of 20 years, but no final duration was known.

A CON could be withdrawn based on non-compliance with the Office of Health Standards Compliance (OHSC), health and safety or minimum operational norms, or for persistently violating constitutional rights. Section 40 made operating a practice or health establishment without a CON, a criminal offence.

Court challenges

The CON was successfully challenged in the High Court in 2024. However, as it meant that a part of a national Act was declared unconstitutional, the Constitutional Court had to confirm, or refuse to confirm, the declaration of unconstitutionality.

The Constitutional Court ruled on this matter on 18 May 2026. In a unanimous decision, the Court **confirmed the High Court's declaration that sections 36 to 40 of the National Health Act 61 of 2003 are unconstitutional and invalid**. The Court did not rule on all the aspects raised, e.g., the system being centralised and negating provincial powers, or on all the human rights at stake.

The main findings were:

- Late filing: The opposition and cross-appeal were filed 117 days late and about five months late. The Court accepted the explanation, e.g., changes in the State Attorney/legal team, post-election delays and the need to appoint private attorneys.
- Is this an abstract/theoretic challenge? The NDoH argued that the provisions were not yet operative and no regulations had been made, so the challenge was speculative. The Court held that enacted legislation has a constitutional character even before commencement; the challenge concerned the facial constitutional defects of the provisions themselves, not a speculative future application.

- **Purpose of the certificate of need scheme:** The Court accepted that broadening access to health care, achieving equitable geographic distribution of health services, correcting historical inequities, and regulating health services to ensure quality are legitimate governmental purposes.
- **Any government purpose must be achieved rationally so:**
 - The Court found that the scheme did not create a coherent, workable statutory framework.
 - The NDoH did not explain why existing licensing, regulatory mechanisms or other provisions of the Act were insufficient and no objective evidence showed that it would achieve the enforcement of health care norms and standards.
 - The scheme appeared to regulate location rather than quality.
 - Overall rationality finding: Sections 36 to 40 failed - no rational connection had been shown between the CON and the stated purposes of enhancing access to health services or creating uniformity in the provision of health services. The provisions therefore offended the principle of legality, a part of the rule of law under section 1(c) of the Constitution.
- **Due consideration of rights and interests:** The Court found that the statutory factors did not require the Director-General to consider the rights and interests of affected health establishments, agencies or providers.
- **Can future regulations “rescue” broad provisions in an Act?** The CON’s scope depended on future regulations identifying the “prescribed health services” and “prescribed health technology”. This left the scope of the scheme to ministerial discretion and made it impossible to assess, from the Act itself, whether the scheme rationally advanced equitable geographic distribution.
- **Delegation to the Minister through regulations:** The Minister could not be left to determine the true scope of the legislative scheme through regulations. The absence of a choate scheme (an undefeatable scheme that is totally valid and cannot be subsequently lessened or altered by later claims) in the Act meant that providers could not know how to comply, and the Court could not determine that the statutory scheme coherently served the public good.
- **Section 22, the right to choose a trade, occupation or profession freely:** The Court held that the scheme did not merely regulate how a profession is practiced; it affected entry into, and continuation in, the provision of health services. Location, nature of services, specialty, profitability and financial sustainability are all integral to professional choice. The scheme allowed the Director-General’s decision to prevail over those choices, backed by criminal sanction.
- **Section 36 limitation analysis:** The limitation of the rights in Section 22 was not reasonable and justifiable. Although the purpose of broadening access to health care was important, the scheme was not rational. It did not require proper balancing of the rights and was unduly restrictive and not tailored to balance the competing interests. The Court held that less restrictive means were available.
- **Other rights and constitutional issues:** The applicants had also raised dignity, equality, property, access to health care, freedom of movement, and provincial/local government competence arguments. The Court held that once it had found an unjustifiable infringement of Section 22, it was unnecessary to decide the remaining rights and competence issues.

- **Remedy: Sections 36 to 40 were severed from the Act**, and the declaration was not suspended. Severing only parts of the provisions would amount to impermissible “textual surgery” because the defect went to the heart of the scheme. Parliament remains free to legislate again, provided it does so constitutionally.

Responses to the ruling

The Minister of Health has indicated that the NDoH will go back to the drawing board and look at how other countries are implementing such measures.

The Health Portfolio Committee said that the committee respects the authority of the Constitutional Court. The judgment provided important legal guidance on the constitutional limits of legislative intervention, particularly where measures adopted by the state have implications for fundamental rights and freedoms.

Relevance for the NHI Act matters

It was argued by the National Department of Health that the CON is central to the NHI. The NHI Act contains provisions akin to those in the CON. For example, section 39 requires Health Care Professionals to be accredited by the NHI Fund and, as part of that process, must provide the “minimum required range of personal health care” and allocate the “appropriate number and mix of health care professionals”, in addition to being certified by the OHSC. Treatment of patients must be according to the NHI protocols and formularies. It is for these reasons that commentators view the NHI Act’s section 39 as susceptible to a similar fate.

Another relevant aspect of relevance is the argument that the NHI Act cannot provide for all the details, and that any gaps or uncertainties would be clarified through regulations. The CON ruling makes clear that regulations cannot rescue matters that should have been adequately provided for by Parliament in an Act.

[Summary Provided by Klinck & Samuels Pty Ltd, 29 May 2026]