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Doctors 'operating legally' after Con court ruling

“DOCTORS and healthcare providers are once again operating legally, after the Constitutional Court declared invalid a proclamation by the president bringing into effect sections of the National Health Care Act that regulates where doctors can operate. Following the proclamation issued by President Jacob Zuma, doctors would have had to apply to the Department of Health for a “certificate of need”, or permission to work in an area, by April 1, 2016. Failure to comply with the new law is punishable by a fine or five years imprisonment, or both. The Constitutional Court declared Proclamation 21 of 2014 invalid and set it aside, without making a costs order. Zuma signed the proclamation in March 2014, bringing certain sections of the National Health Act into force as of April last year. However, no providers can yet obtain such a certificate because the Health Minister has not yet prescribed regulations regarding the application and granting of certificates. The court found issuing the proclamation had led to an untenable and unintended situation which could inhibit or discourage healthcare practitioners from providing essential services, at the risk of criminal sanctions for doing so.

As the Act was promulgated without the required regulations being in place, making it impossible for doctors to comply, it forced President Jacob Zuma to apply to the Constitutional Court to declare the section invalid, as he could not withdraw the proclamation because the date of its commencement was long past. Lawyers for Zuma and the Health Department told the court that the President had “acted in good faith when he determined a date for the statutory provisions to take effect, but was led astray by his advisors mistaken counsel”. He said had he been aware of the correct position - namely that the necessary regulations were still pending - he would have selected a later date. It is a temporary reprieve for the sector. Health Minister Aaron Motsoaledi believes there is a need to address health inequalities between rural and urban areas. Health director-general Precious Matsoso said the principle of the so-called certificate of need, which aims to direct healthcare resources to areas where the government believes they are required, was “not in question”, but some of the concerns raised by the healthcare industry needed to be taken into account. Stakeholders complained that aspects of the act were ambiguous and its penalties too harsh. She said a fine might be a more appropriate sanction.

The South African Dental Association and the Hospital Association of South Africa, who supported the President’s application, have mounted a campaign alongside groups like the South African Medical Association and the South African Private Practitioners’ Forum (SAPPF) to have the new requirements reviewed, arguing that it is a blunt and coercive instrument with grave and unintended consequences. SAPPF chief executive Dr Chris Archer said that the Health Department’s central problem is how to deal with the mismatch between the distribution of disease and health services. He said the solution was not regulated distribution of medical practitioners, suggesting that “innovative public/private partnerships that do not depend on the development of fixed capital intensive infrastructure” would be a more practical solution. South African Dental Association CEO Maretha Smit said alternative mechanisms must be found: there could be incentives like tax breaks, rural

allowances, improved working conditions and lower barriers to foreign healthcare professionals.

The Democratic Alliance on welcomed the decision, saying the Constitutional Court has vindicated the DA's long-held contention that Proclamation 21 was at odds with the Constitution, which guarantees everyone the right to life and access to healthcare. DA MP Wilmot James said in a statement that government must now focus on finding ways to incentivise medical professionals to establish clinics and related services in under-serviced areas, instead of adding more red tape."

Chantelle Benjamin: Mail & Guardian, 28 January 2015

Tamar Kahn & Ernest Mabuza: Business Day, 28 January 2015

SAPA, 27 January 2015