

Zuma's legal advisors 'led him astray', turned healthcare professionals into criminals



President Jacob Zuma's legal advisors 'led him astray', resulting in him 'irrationally' signing into existence a law that criminalised the provision of healthcare services in South Africa and flouted several provisions of the Constitution. That is the nub of the Constitutional Court's 27 January finding after Zuma, his Minister in the Presidency Jeff Radebe, Minister of Health Dr Aaron Motsoaledi and National Health Director-General (DG) Precious Malebona Matsoso applied to have the controversial Certificate of Need (CoN) provisions deproclaimed.



'Irrational' – President Jacob Zuma on the CoN.

The earlier and premature proclamation brought into effect sections 36 - 40 of the National Health Act from April 2014, forcing tens of thousands of healthcare providers to apply to Matsoso for a CoN within a very narrow time frame (2 years), and making it impossible for her department to properly process and decide on the 'appropriate' geographical placement of each practitioner, or for her to consult widely before drafting appropriate regulations. It was always a non-starter – in spite of the health department's brave assertions to the contrary as multiple and furious healthcare organisations protested. Penalties for non-compliance included a jail term of up to 5 years.

CoN: not dead, just sleeping ...

The law is not dead. It will be re-proclaimed, probably *in toto*, once a more pragmatic time frame has been written up, almost certainly leading to another High Court or

Constitutional Court application, this time by its adversaries. One or several of the more bold, cash-fluid healthcare bodies will probably argue that the CoN is a blunt instrument, giving almost unfettered power to the Health DG to restrict and control the placement of healthcare practices – or even effectively close them down, with unintended consequences including accelerating the overseas migration of newly qualified healthcare professionals, thus undermining the very National Health Insurance scheme the CoN intends to support.

Government's embarrassing legal somersault brings into serious question the quality and competence of Zuma's top legal advisors and the health department's own legal architects, and/or the quality of communication between them and the country's health policy implementers. It was left up to the South African Dental Association (SADA) to properly examine the 'teeth' of the legal provisions and warn the presidency that they were effectively criminalising all healthcare provision in the country (SADA and the Hospital Association of South Africa were cited as co-respondents in the Constitutional Court application, having brainstormed with several other healthcare bodies, including the South African Medical Association and the SA Private Practitioners Forum). All agree with government that better access to healthcare is vital and are willing to help address the geographical mismatch of services and patients – but differ strongly on the use of the CoN to do this.

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The protestors see the certificate as arbitrary and dictatorial, in spite of Motsoaledi's and the DG's repeated reassurances that they won't use it to crowbar healthcare professionals in an over-served area out of their current practices. Motsoaledi is even on record as saying that the law will merely be used 'incrementally' to prevent new practitioners buying into already well-staffed practices in adequately served geographical areas. However, unlike several similar pieces of overseas legislation, it goes well beyond that, enabling any less enlightened future DG to strong-arm healthcare prof-



Director-General of Health, Precious Malebona Matsoso.

essionals, arguably in defiance of several Constitutional provisions. In agreeing with the government's admission that its CoN proclamation was premature and irrational, the Constitutional Court judges said that the poor timing resulted in a failure to respect, promote and fulfil fundamental tenets of the Bill of Rights, including the right to life, the right of access to healthcare and the right to transparency and accountability. Zuma's actions were described as 'untenable and unintended', and 'ill-advised, irrational and thus invalid'. He was led astray by his legal advisors, who gave him mistaken counsel. Zuma didn't know at the time that signing the proclamation into law was fruitless because nobody could apply for a certificate without the vital regulations being in place, nor could the regulations be drafted without widespread consultation. He was unable to withdraw the proclamation because the date for its commencement had long since passed and there was no mechanism contained in the Act itself to remedy the situation. The judges said that the other remedy – taking the parliamentary legislative amendment route – would be 'lengthy and burdensome' and would fail to address the 'precarious position the health service industry finds itself in'.

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