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Selected developments in law and ethics in 2024

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We'll look at...

Part A

1. HPCSA Ethical Rules
2. HPCSA new policies
3. Office of Health Standards Compliance (OHSC)
4. Medico-legal liability

Part B

1. NHI Act
2. Court ruling on the Certificate of Need (CON)
3. Cannabis: at home and at work

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- Part A

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HPCSA developments: rules and policies

HPCSA amended Ethical Rules, 17 Nov 2023

- Rule 7: Can share fees with another practitioner
- Rule 8: Can be in multi-disciplinary practices (with any other professional whose Council allows it)
- Rule 8A: Can share rooms with other practitioners and at other Councils (but not entities)
- Rule 18: Anyone can employ HCPs (no more permission necessary) = now rescinded …
- Rule 23A: HCP-shareholders in hospitals / health facility must provide info to HPCSA, also ancillary agreements

https://www.gov.za/sites/default/files/gcis_document/202311/49720bn510.pdf

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Criteria set for new models (rules 7, 8 and 18)

- express agreement, arrangement or model
- structured to:
  - provides high quality health-care services or products,
  - contain costs and
  - enhance access to appropriate healthcare
- For employment: Not extracting profit from the HCP-employee
  - Employee liable for adherence by the employer to the ethical rules in the employment relationship *[now rescinded]*

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Updated Business Practices Policy due to new ethical rules

- Par 2.2.2: Direct or indirect corporate ownership of a professional practice by a person other than a health practitioner registered in terms of the Act is not permissible
- 2.4: Employment: [must now apply again under old rule 18]
  - One may employ another (but note Annexures – also see par 3.6)
  - Other employment must align with interest of the profession and patients
  - HCP must make sure contract is conducive to ethical practice
  - Guidelines the same as with approval under previous ethical rule 18, incl peer review and clinical governance
- 3.3: Managed care models: professional independence
- 3.4: Clinical advisors must be registered at HPCSA, etc.

https://www.hpcsa.co.za/Content/upload/professional_practice/business_practice/Business_Practices_Policy_March_2024.pdf

Hospital or health facility ownership: new sub-rule (h)
Ethical rule 23A(h) Report

"23A(h) … Report on … following supporting information and documents:

(i) the number of patients referred by him or her or his or her associates or partners to such hospital or health care institution and the number of patients referred to other hospitals in which he or she or his or her associates or partners hold no shares;

(ii) the agreements concluded in relation to the acquisition and/or ownership of the interests of shares in the hospital or health care institution;

(iii) how the acquisition of the financial interest is funded and whether there are other ancillary contractual relationships between all the parties to the transaction or with related parties and entities and if so, the nature of such contractual relationships;

(iv) policies or peer review protocols for admission of patients into such hospital or health care institution and quality monitoring mechanisms which serve to ensure that practitioners will comply with the ethical rules of council;

(v) Any other information or document which the council may deem relevant.

(i)Health practitioner shall ensure that the criteria above is compliant at all times."

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Form 23A:

1) Number/nature of shares/financial interest being declared (circle the appropriate word)
   ……
2) Percentage of shares/financial interest being declared of the total number of shares issued ……
3) Number/nature of shares/financial interest which you want to hold in the entity……
4) Manner in which you acquired the shares/financial interest (please tick appropriate block(s)-

a. Purchase
b. Received by you as a founder member of the institution
c. Acquired by you at a reduced rate
d. Granted to you free of charge
e. Granted to you on an understanding in regard to certain performance requirements on your part
Other (elaborate)

https://www.hpcsa.co.za/Content/upload/professional_practice/business_practice/DECLARATION_OF_SHARES_OR_FINANCIAL_INTEREST_IN_TERMS_OF_ETHICAL_RULE_23A.pdf

Also being asked if you acquired more shares… or have shares in another facility…

1) Present value of shares which you hold, if any……
2) Period of time for which shares had been held (date)……
3) Your relationship or association with the undertaking other than being a shareholder (Mark appropriate block(s): -

a. Conduct practice on the premises of the undertaking	
b. Tenant of the undertaking	
c. Landlord of the undertaking	
d. Director of the undertaking	
e. Member of the undertaking	
f. Participant in the undertaking	
g. Other (please use additional paper if necessary)	

(a)	Shares/financial interest are purchased at market-related prices in arm's length transactions
(b)	Purchase transaction or ownership of shares does not impose conditions or terms upon the practitioner that will detract from the good, ethical and safe practice of his or her profession
(c)	The returns on investment or payment of dividends is not based on patient admissions or meeting particular targets in terms of servicing patients
(d)	Health practitioner declares not to over-service patients and to this
(e)	The institution has appropriate peer review mechanisms
(f)	The institution has appropriate clinical governance procedures for the treatment and servicing of his or her patients
(g)	Health practitioner declares that he/she will not participate in the advertising or promotion of such institution, or in any other activity that amounts to such advertising or promotion
(h)	Health practitioner declares not to engage in or advocate the preferential use of such health care institution
(i)	Health practitioner declares to submit annually report to the council indicating the number of patients referred by him or her or his or her associates or partners to such health care institution and the number of patients referred to other hospitals in which he or she or his or her associates or partners hold no shares.

Section D:

Ethical Declaration

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Three new / amended HPCSA booklets

- Booklet 6: Chronic Diseases (no more HIV?) = amended
- Booklet 12: Waste Management = amended
- Booklet 19: Ethical Billing Practices = new
  - Informed billing consent IN WRITING
  - Cost estimates [must be CPA compliant]
  - CAN ask up front payment only if: co-payments, prosthesis, custom-made devices and patients who are foreign nationals
  - Details on all accounts

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The Office of Health Standards Compliance

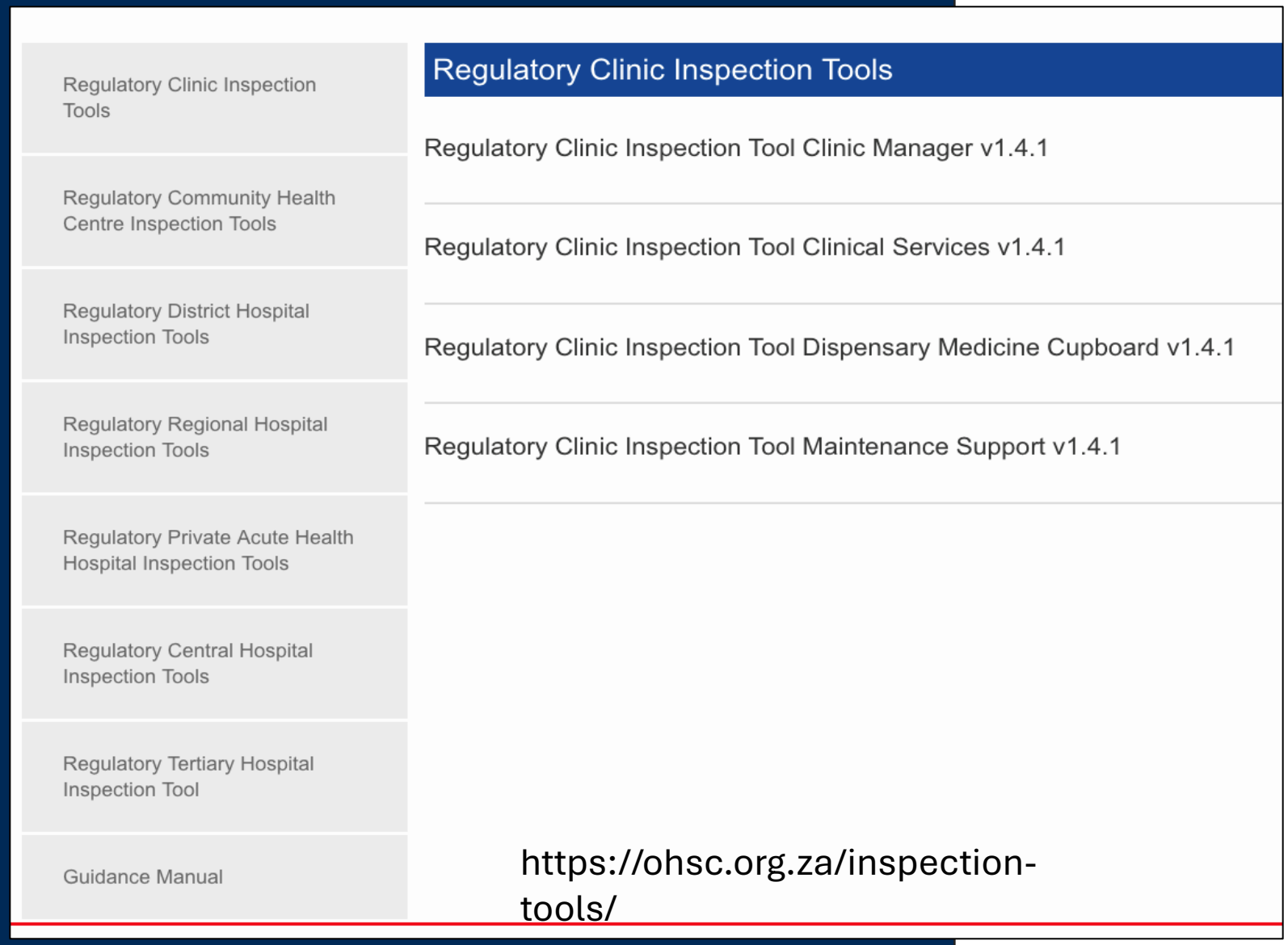
OHSC Bi-Annual Report July 2023-March 2024 (need to be accredited to service NHI patients)

Table 3: Certificates of Compliance issued by the OHSC from 2019/2020 F/Y to 2023/2024 F/Y.

Financial year	Number of Inspections conducted	Number of certified health establishments
2019/2020	647	0
2020/2021	387	33
2021/2022	544	190
2022/2023	832 (781 public 51 private)	222
2023/2024	795 (735 public 60 private)	619
Total	**3205**	**1064**

https://ohsc.org.za/wp-content/uploads/Biannual-Report-July-2023-Mar-2024-INSPECTIONS-CERTIFICATION-combined-002.pdf

Inspection Tools



https://ohsc.org.za/inspection-tools/

- GP Tool being finalized
- Draft 3: https://emconline.co.za/wp-content/uploads/2023/12/GP-tools-draft-3-Workshop.pdf

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Medico-legal liability

24 Aug

Share

SIU probe saves R3bn in dodgy medico-legal claims, finds 'collusion' between lawyers and health staff

Nicole McCain

news24

Comments | Gift article | Boo

The Law Society of South Africa has come out in defence of the legal profession, saying Health Minister Aaron Motsoaledi's "reckless" and "misinformed" remarks relating to medico-legal claims painted the entire profession with the same brush in the eyes of the public.

Speaking during a media briefing at the weekend about the ongoing investigations by the Special Investigating Unit (SIU) into medico-legal claims lodged against the Department of Health, Motsoal said they found lawyers who submitted fraudulent claims, embezzlement of trust funds, tricked people into signing power of attorney to sue and collusion between attorneys, touts, nurses and doctors in both public and private health care, as well the Office of the State Attorney.

https://www.news24.com/news24/southafrica/news/siu-probe-r3-billion-in-dodgy-medico-legal-claims-finds-collusion-between-lawyers-and-health-staff-20240824;
https://www.iol.co.za/capetimes/news/lawyers-hit-back-at-health-minister-motsoaledi-over-reckless-statements-6f558bc2-5bd9-4aae-9d8e-e7a36538427c

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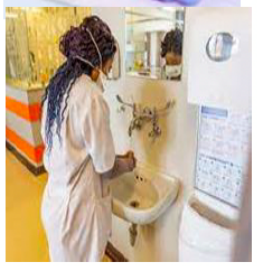
Medico-legal claims

Province	*Total value of total claims (R'000)			Total value of claim payments made (R'000)		
	2023	2022	2021	2023	2022	2021
Eastern Cape	24 565 678	25 076 798	38 608 606	350 685	38 683	866 144,00
Free State	4 645 754	4 663 463	4 501 077	9 863	8 831	584
Gauteng	18 359 387	17 542 171	24 494 229	512 203	369 697	392 000
Kwazulu-Natal	7 342 190	13 180 222	25 244 438	162 681	265 884	92 882
Limpopo	8 848 809	8 334 914	11 939 334	35 500	77 665	72 776
Mpumalanga	7 049 098	7 716 031	9 543 267	163 489	39 640	18 632
Northern Cape	621 640	1 520 424	1 656 795	12 293	59 413	229 814
North West	3 339 470	3 589 144	5 582 950	62 708	18 539	44 856
Western Cape	516 250	186 532	229 655	162 905	47 642	31 990
Totals	**75 288 276**	**81 809 699**	**121 800 351**	**1 472 327**	**925 994**	**1 749 678**



Key Observation

- NDoH did **not meet the targets relating to medico-legal claims** as at 2022-23 reporting period. This could indicate that efforts to curb the medico-legal claims are slow.
- Challenges relating to record keeping were unfortunately still reported in some provinces, mainly due to **inadequate filing** processes.
- Information above indicates that although the claims balance is exorbitant, the actual cash outflow is **2%** (2023), and **1%** (2022) respectively. These could be attributed to the **efforts by the sector to address** medico-legal claims.
- The amounts paid is however, still high with **R 1,45 bn, R926m and R1,75 bn** paid in the past three years, respectively. Payment of these claims puts a strain on the financial viability of the sector.
- Overall, these payments are affecting the budgets of public facilities and in turn will have a **detrimental effect** on the ability of the sector to deliver healthcare services.

*Amounts per annual financial statements

Auditor-general

- “The total amount of medico legal claims as at 31 March 2023, is approximately R75 billion (7% more than the baseline in 2018). Unfortunately, over the years, the balance has increased significantly above the baseline, rather than the planned/intended reduction.”

- On the CMS – case management system:
  - No feasibility study
  - “Only one province is partially utilising the system (FS) and (LP) opted to no longer participate. Some provinces are using manual processes, while some have developed other systems”

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- And again, published for comments in 2022…

- In meantime, amendments to State Liability Act have been shelved in Parliament

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MoH: “Fairer compensation system”:

“We wish to pursue this course of action”

“whereby panels of retired judges, retired senior medical and nursing staff, solicitors, social workers etc, are put together. Their purpose is to determine and arrive at a fair compensation for those who have experienced medical injuries rather than a ‘legal shootout in court’”

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MEC for Health, Gauteng Provincial Government v S.N obo N.N (2015/28120) [2024] ZAGPJHC 770 (5 August 2024)

- DoH wanted case separated for consideration of plea **Public Healthcare Defence** (PHD), with reference to *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* .
- The court however found this misplaced, and referred to *MEC for Health and Social Development, Gauteng v DZ obo WZ* the Constitutional Court held that –
  - *it was open to a defendant to produce evidence that **medical services of the same or higher standard, at no or lesser cost than private medical care**, will be available to a plaintiff in future and that, if the evidence was of a sufficiently cogent nature to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses*.

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- Part B

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THE NHI ACT, 2024

Contents of NHI Act

Implementation in two phases (one of first sections to be brought into effect)

- Section 57(2)(a): Phase 1, 2023 to 2026:
  - Health systems strengthening,
  - Develop NHI legislation (?),
  - Establish the Fund
  - Purchase services for the vulnerable
- Section 57(2)(b): Phase 2, 2026 – 2028:
  - Continue strengthening
  - Mobilise additional resources
  - Selective contracting
- Section 57(4): creates Committees on Benefits, HTA, Tertiary Services and on Training

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Who can benefit? Section 4(1)

(a) South African citizens;

(b) permanent residents;

(c) refugees;

(d) inmates as provided for in section 12 of the Correctional Services Act, 1998 (Act No. 111 of 1998); and

(e) certain categories or individual foreigners determined by the Minister of Home Affairs, after consultation with the Minister and the Minister of Finance, by notice in the Gazette.

BUT, at present:

- S4(3) NHA: "(b) all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health care services"

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One 3 buckets of contract by private sector (section 41)

"accredited primary health care service provider or health establishment"

(paid capitation)

"specialist and hospital services"

(paid an "all-inclusive" fee)

"emergency medical services"

(case-based)

Pathology? (NHI Act only mentions NHLS) / Blood services?

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NHI Act: Providers accreditation (section 39)

Accreditation of service providers

39. (1) Health care service providers and health establishments accredited by the Fund in terms of this section must deliver health care services at the appropriate level of care to users who are in need and entitled to health care service benefits that have been purchased by the Fund on their behalf.

(2) In order to be accredited by the Fund, a health care service provider or health establishment, as the case may be, must—

(a) be in possession of and produce proof of registration by a recognised statutory health professional council;

(b) be in possession of and produce proof of certification by the Office of Health Standards Compliance; and

(c) meet the needs of users and ensure service provider compliance with prescribed specific performance criteria, accompanied by a budget impact analysis, including the—

(i) provision of the minimum required range of personal health care services specified by the Minister in consultation with the Fund and published in the *Gazette* from time to time as required;

(ii) allocation of the appropriate number and mix of health care professionals, in accordance with guidelines, to deliver the health care services specified by the Minister in consultation with the National Health Council and the Fund, and published in the *Gazette* from time to time as required;

Similarities to Certificate of Need (now before Constitutional Court after being declared unconstitutional)

(iii) adherence to treatment protocols and guidelines, including prescribing medicines and procuring health products from the Formulary;

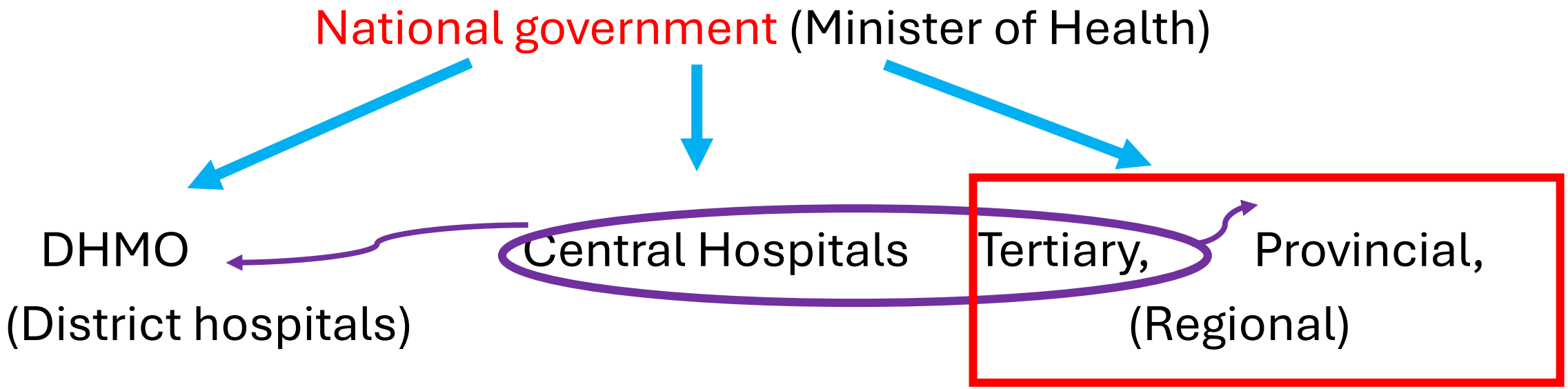
(iv) adherence to health care referral pathways;

(v) submission of information to the national health information system to ensure portability and continuity of health care services in the Republic and performance monitoring and evaluation; and

(vi) adherence to the national pricing regimen for services delivered.

Fund must conclude a legally binding contract with a health establishment

Components of (national) government



"government components" (s32(2)(c))

"government components" (s7(2)(f)(i)), "semi-autonomous" or: "an appropriate form" (s7(2)(f)(ii)))

"autonomous legal entities" ito regulations (s32(2)(b)) (cf semi-autonomous in 4.11)

"function shifts";

"components of government = Schedule 3 entities, PFMA

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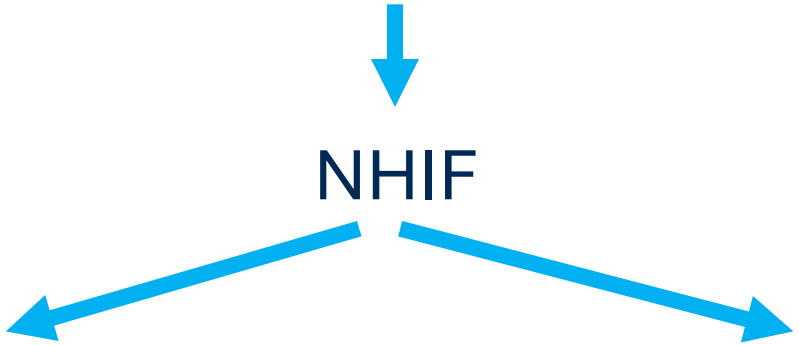
Money flows

Provincial and other (e.g. COIDA) monies to NHIF



DHMO

capitation

Hospitals

(422 “semi-autonomous” public- & 270 private hospitals)

Global budget / DRGs
[for private sector still to be determined]

On taxation:

“57.2% (4,24m) of the just over 7 million taxpayers earn between R8 000 and R29 000 per month”

https://www.treasury.gov.za/documents/National%20Budget/2024/review/FullBR.pdf

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How will the NHI be funded? On the payroll tax Section 49

49(2) The money referred to in subsection (1) must be—

(a) appropriated … in accordance with social solidarity in respect of—

(i) general tax revenue, including the shifting of funds from national government departments and agencies and the provincial equitable share and conditional grants into the Fund; [this is caused by the function shifts]

(ii) reallocation of funding for medical scheme tax credits paid to various medical schemes towards the funding of National Health Insurance;

(iii) payroll tax (employer and employee); [this is the 7m taxpayers] and

(iv) surcharge on personal income tax,

introduced through a money Bill by the Minister of Finance and earmarked for

use by the Fund, subject to section 57

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What is already happening?

- Provider accreditation framework developed (NHI Act requirement) in 2024, to be tested in 2025, finalized by 2026
- Draft capitation model and methodology framework developed Q3 2024 – consultation with GPs
- Phased development of Electronic Medical Record (EMR) for PHC Services, Minimum Viable Product (MVP)1 focusing on TB HIV Q4 2024
- Draft Essential Equipment List for health care service package developed, approved in 2025

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Chief Director:
User and Service Provider Management
Dr Grace Labadarios
View Profile

Chief Director:
Healthcare Benefits and Provider Payment Design
Mr Moremi Nkosi
View Profile

Chief Director:
Health Products Procurement
Ms Khadija Jamaloodien
View Profile

Chief Director:
Health Systems Digital Information
Ms Milani Wolmarans
View Profile

Chief Director:
Risk and Fraud Management
Vacant
View Profile

← NHI Branch in NDOH

NHIF Units in NHI Act

↓

matter contemplated in subparagraph (1).

(3) Subject to the direction of the Board, the Chief Executive Officer must establish the following units in order to ensure the efficient and effective functioning of the Fund:

(*a*) Planning;
(*b*) Benefits Design;
(*c*) Provider Payment Mechanisms and Rates;
(*d*) Accreditation;
(*e*) Purchasing and Contracting;
(*f*) Provider Payment;
(*g*) Health Products Procurement;
(*h*) Performance Monitoring; and
(*i*) Risk Management and Fraud Prevention Investigation.

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Certification of Need (“CoN”)

s36(1) of the National Health Act

(a) establish, construct, modify or acquire a health establishment or health agency;

(b) increase the number of beds in, or acquire prescribed health technology at, a health establishment or health agency;

(c) provide prescribed health services; or

(d) continue to operate a health establishment or health agency after the expiration of 24 months from the date this Act took effect

- + s36(2) – (7)

High Court found:

infringe on

Section 22 (right to choose a profession)

Section 10

(human dignity)

Section 25

(property – practice and personal)

Still need to be confirmed by CC as unconstitutional

https://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPPHC/2024/677.html&query=certificate%20near%20of%20near%20need

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Cannabis ... at home ... and at work

Cannabis for Private Purposes Act, 2024
Molao wa Maitlhomo a Poraefete a Cannabis, 2024

“private purpose’’ means for the exclusive use, possession and cultivation of cannabis by an adult person with the intention to keep, store, transport or be in control of cannabis, in a manner that conceals it from public view

2. (1) An adult person may— (a) use or possess cannabis; and

(b) without the exchange of consideration per occasion provide to, or obtain from, another adult person, cannabis, in a private place for a private purpose. (2) Notwithstanding subsection (1), no adult person may use cannabis in a private place for a private purpose— (a) in the presence of a child or non-consenting adult person; or (b) (i) within a reasonable distance from a window of, ventilation inlet of, doorway to, or entrance into, another place; or (ii) that forms part of any public place where persons congregate within close proximity of one another and where the smoke is likely to cause a disturbance or nuisance to any person at that place. (3) An adult person may possess cannabis in a public place: Provided that such cannabis may not be used in a public place.

https://www.gov.za/sites/default/files/gcis_document/202406/50744-03-06cannabisforprivatepurposesact-72024.pdf

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Labour Appeal Court (2024)

- Employer had Zero tolerance workplace policy
- Use of blood test alone without proof of impairment on work premises is violation of appellant's dignity and privacy
- Policy prevents appellant from engaging in conduct that is of no effect to employer
- No proof of intoxication or increased risk of occupational health and safety
- Unfair discrimination: respondent's policy declared irrational and violates right to privacy.

Enever v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd (JA86/22) [2024] ZALAC 12; [2024] 6 BLLR 562 (LAC); (2024) 45 ILJ 1554 (LAC) (23 April 2024)

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THANK YOU!

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