LERASA

LABOUR AND EMPLOYMENT RELATIONS ASSOCIATION OF SOUTH AFRICA

NEWSLETTER

1ST EDITION

WELCOME MESSAGE

President of LERASA

Frikkie De Bruin

During the ILERA Africa 10th Regional Congress held in Zambia earlier this year, Mr. Frikkie De Bruin, President of the Labour and Employment Relations Association of South Africa (LERASA), highlighted the organization's unwavering commitment to growing and strengthening its membership base. Expressing gratitude for the ongoing support and dedication of its members, he underscored the importance of expanding LERASA's reach and influence

Mr. De Bruin emphasized the collective effort required to enhance LERASA's capacity to address the challenges and opportunities within the field of labour and employment relations, both in South Africa and beyond. In recognition of South Africa's 30 years of democracy, LERASA is directing initiatives aimed at honouring the contributions of workers and employers, while promoting fair labour practices across the nation.

In his speech, the President reiterated LERASA's alignment with the core objectives of the International Labour Organisation (ILO), with a focus on promoting workers' rights, ensuring decent employment opportunities, and fostering social protection. LERASA remains committed to encouraging dialogue on work-related issues, which is seen as essential to achieving these goals.

As a member of the International Labour and Employment Relations Association (ILERA), LERASA is dedicated to the global advancement of labour and employment relations. Mr. De Bruin highlighted the significance of promoting basic rights, fostering sound relationships between social partners—including the state—and providing valuable services to the labour and employment relations community.

Looking forward, Mr. De Bruin affirmed LERASA's ongoing commitment to its members. The organization aims to enhance knowledge, practice, and understanding within the field of labour and employment relations, which is crucial for the social and economic development of South Africa. LERASA will continue its efforts to expand and work towards its vision of promoting fair and equitable labour and employment relations for the benefit of all.

ILERA 10TH African Congress Articles

Insights

The Labour and Employment Relations Association of South Africa (LERASA) hosted the ILERA 10th Africa Congress in Zambia from 03-04 April 2024. The event's theme was **"Challenges in the World of Work in the Wake of the Global Polycrisis: African Perspectives."** The Congress featured various stakeholder organizations presenting their papers. In the section below, we will provide an overview of some of the papers that were presented during the Congress:

Youth Unemployment in South Africa - A Comprehensive Analysis

By Mr. Frikkie De Bruin

PSCBC General Secretary

The paper presented provided an in-depth analysis of youth unemployment in South Africa, focusing on the persistent and critical issue of high unemployment rates among the youth. During the first quarter of 2023, the youth unemployment rate reached an alarming 46.5%, significantly surpassing the national average of 34.5%.

This pervasive issue not only leads to poverty, social marginalization, and mental health challenges for individuals but also has broader societal implications, including heightened crime rates and social instability. The paper underscored the urgent need to address the root causes of youth unemployment, including inadequate education, lack of job experience, and limited job opportunities.

Moreover, the paper offered a comprehensive historical analysis of youth unemployment trends in South Africa from 2003 to 2022, examining the impact of significant events such as the Global Financial Crisis and the COVID-19 pandemic, which exacerbated the situation. South Africa's youth unemployment rate is revealed to be the highest in the Southern African Development Community (SADC) region, underscoring the severity of the issue compared to its regional peers. Furthermore, it provides insights into the youth unemployment landscape across the African continent, highlighting the disparities between different regions.

Several contributing factors to youth unemployment in South Africa are explored in the paper, including a mismatch between labour supply and demand, insufficient entrepreneurial support, and systemic barriers within the education system.

The paper proposes a multi-faceted approach to address these issues, suggesting strategies such as promoting entrepreneurship, enhancing technical and vocational education, fostering public-private partnerships, and attracting foreign direct investment to create more job opportunities. These measures aim to provide young people with the necessary skills and opportunities to successfully enter the workforce.

Additionally, the paper evaluates various government and private sector initiatives aimed at reducing youth unemployment. Programs such as the National Youth Policy 2020-2030, the Itukise Programme, the Youth Employment Service, and the Presidential Employment Stimulus Program are highlighted for their efforts in providing training, employment opportunities, and financial support to the youth.

Despite these initiatives, the paper underscores the need for more comprehensive and scalable interventions to significantly reduce youth unemployment and mitigate its adverse impacts on South African society.

Role of Collective Bargaining in implementing C190 - Violence and Harassment Convention, 2019 (No. 190)

By Mrs Sharlaine Oodit
GPSSBC General Secretary

Ms Oodit, presented a compelling paper which delved into the significant topic of understanding the role of collective bargaining in implementing the International Labour Organisation's Convention No. 190 (C190). The presentation highlighted how collective bargaining can be a powerful tool in adapting the legal framework to combat violence and harassment in the workplace, ensuring safe and respectful working environments for all.

Convention 190 is groundbreaking as it is the first international treaty to address violence and harassment in the world of work, recognising everyone's right to a work environment free from these threats. This convention sets a comprehensive framework for preventing and addressing workplace violence and harassment, including gender-based violence (GBV). It emphasised the responsibility of employers to ensure a safe workplace and mandates respectful treatment of workers. C190 offers several critical protection and benefits for workers, enhancing workplace policies to ensure safety and respect. These include provisions for paid leave for victims/survivors of domestic violence, allowing them time to address their situations without financial hardship. It also promotes flexible work arrangements for those dealing with domestic violence, facilitating a gradual return to work. Moreover, it safeguards employees from adverse actions or discrimination based on their experience or disclosure of domestic violence and supports the establishment of trained workplace representatives to assist employees experiencing domestic violence.

South African unions have actively combated gender-based violence through various initiatives. These include advocacy and awareness campaigns, pushing for protective policies, and establishing support systems within workplaces to assist victims. Unions have successfully incorporated C190 provisions into their bargaining agendas, emphasising workplace safety and respect. Since the adoption of C190 in 2019, there has been significant global progress in its ratification and implementation. Thirty-six countries have ratified C190, with another twenty expected to do so by 2024. A survey by the International Trade Union Confederation (ITUC) revealed that 92% of unions are working to secure the ratification and implementation of C190, and 85% are engaged in social dialogue to align national laws with the convention.

The paper concluded with several recommendations for ending violence in the workplace. It emphasised the need for strong legal frameworks, urging governments to align national laws with C190 and ensure robust enforcement mechanisms. Employers must be held accountable for maintaining a safe and respectful workplace. Comprehensive policies addressing all forms of violence and harassment should be implemented in workplaces. Inclusive stakeholder engagement is crucial, involving workers, employers, and unions in developing and implementing these policies. The paper highlighted the critical role of collective bargaining in implementing C190, emphasising the need for strategic vision, leadership, and inclusive stakeholder engagement.

The insights gained from international examples and the proactive efforts by unions can guide South Africa in creating safer and more respectful workplaces, ensuring that all workers can enjoy their right to a world of work free from violence and harassment.

South African National Health Insurance

By Dr Christopher Phiri

PSCBC Senior Manager: Strategic Monitoring and Evaluation

This research paper explored the integration of social determinants of health (SDH) into South Africa's National Health Insurance (NHI) system. The presentation, was delivered by Christopher Phiri, the PSCBC Senior Manager: Strategic Monitoring and Evaluation.

The paper focused on the South African government's efforts to achieve Universal Health Coverage (UHC) by addressing disparities and improving access to high-quality healthcare services for all citizens. The paper highlighted the fragmented healthcare system in South Africa, which has left a significant portion of the population underserved and discussed how the NHI aims to consolidate funds into a single-payer system to ensure equitable healthcare access.

The presentation detailed the extensive restructuring required to merge the public and private healthcare systems under the NHI. It outlined challenges such as inadequate political support, limited human and financial resources, poor coordination, and a lack of robust monitoring systems, particularly during the pilot phase of NHI implementation. The paper emphasised the need to address these challenges for the successful implementation of the NHI, which has the potential to reduce health disparities and improve access to quality healthcare services.

A significant portion of the paper concentrated on the potential impact of the NHI on the South African population. It stressed that while the NHI could help alleviate health disparities, it must also address broader social determinants such as poverty, unemployment, and food insecurity, which disproportionately affect low-income and marginalised communities. Integrating SDH into the NHI strategy is therefore crucial for achieving the desired health outcomes and ensuring that all South Africans benefit from improved healthcare services.

The paper concluded by examining the debates surrounding NHI implementation, including concerns from private healthcare providers about financial implications and constitutional issues. It emphasised the need for strategic vision, leadership, and inclusive stakeholder engagement to navigate these complexities. Additionally, it discussed lessons from international examples of UHC implementation and underscored the need for tailored, context-specific approaches that address South Africa's unique challenges and socio-cultural dynamics.

The presentation emphasised the requirement for a comprehensive and collaborative effort to embed SDH into the NHI, ensuring that the system not only provides healthcare but also addresses the root causes of health inequities.

CASE LAW

SOLIDARITY AND THE MINISTER OF HEALTH AND OTHERS

Summary:

Implementation of a Bill before Parliament - the National Health Insurance Bill- ultra vires – s3(7)(a) of the Public Service Act – executive authority in terms of s 85 of the Constitution- constituting capacity in advance of law reform and implementing a bill- s 25 of the Public Service Regulations- in consultation with- misrepresentation- a representation is not false if it may be true.

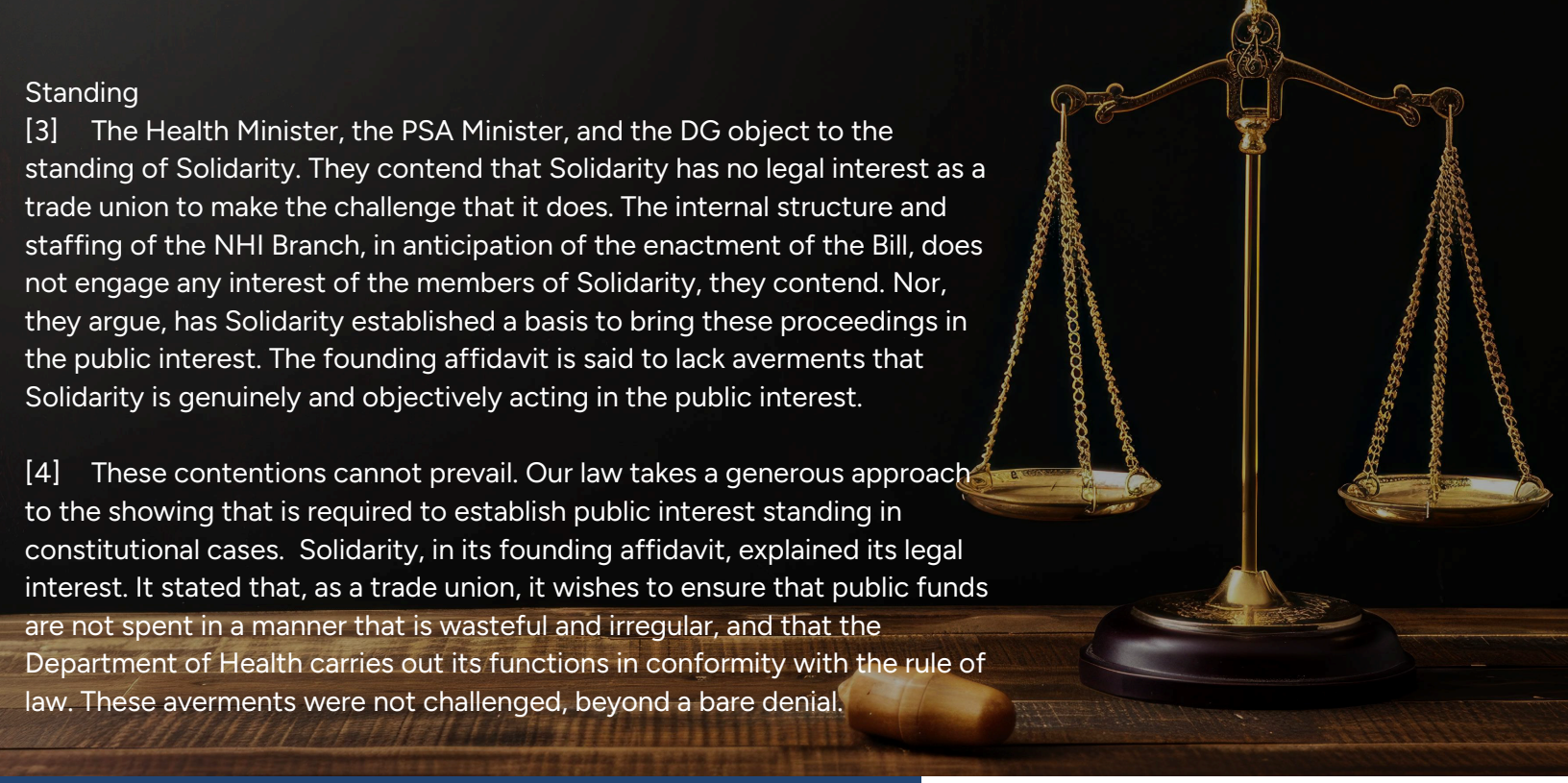
UNTERHALTER J

The applicant, Solidarity, is a trade union. Until its recent enactment, there served before Parliament the National Health Insurance Bill ('the Bill'). Solidarity brings under review five decisions. These decisions, Solidarity complains, were taken to bring into operation the National Health Insurance Fund ('the NHI Fund'). The NHI Fund is a central part of the Bill. To take these decisions, Solidarity contends, in advance of the Bill becoming law is unlawful, irrational, and fails to respect the constitutional doctrine of the separation of powers.

Solidarity seeks, with one exception, to have the decisions reviewed, set aside and declared unlawful. It cited as the respondents, the Minister of Health ('the Health Minister' as first respondent), the Director General of the Department of Health ('the DG' as the second respondent), the Minister of Public Service and Administration ('the PSA Minister' as the third respondent), Minister of Finance ('the Finance Minister' as the fourth respondent), and the National Treasury ('the Treasury' as the fifth respondent). The respondents were responsible, in their different capacities, for taking one or more of the five decisions.

[1] The decisions that Solidarity seeks to impugn are these. First, a decision taken by the DG to advertise and fill 44 vacancies for the 'recruitment of competent technical specialists to assist with the preparation of the NHI Fund' ('the recruitment decision'). Second, the decision of the Health Minister and the DG to establish 5 chief directorates in the National Health Insurance Branch ('the NHI Branch') of the Department of Health ('the directorates decision'). Third, the Health Minister and the DG took the decision to establish the NHI Branch. ('the NHI Branch decision'). Fourth, the respondents established a transitional functional organisation, with the establishment of posts on 2 June 2022 ('the establishment decision'). Fifth, the Treasury approved 'the shifting of funds to the compensation of Employees Budget: National Health Insurance' on 9 June 2022, and the delegation of authority in terms of s 8 of the Appropriations Bill, 2018 ('the funding decision'). I refer to these decisions, collectively, as 'the decisions'.

[2] In its amended notice of motion, Solidarity sought to review and set aside, and declare constitutionally invalid, the decisions. However, in the light of the position taken by Treasury and the Finance Minister, counsel for Solidarity, at the oral hearing of this matter, no longer sought any relief against these two respondents, nor did it persist in challenging the funding decision.



Standing
[3] The Health Minister, the PSA Minister, and the DG object to the standing of Solidarity. They contend that Solidarity has no legal interest as a trade union to make the challenge that it does. The internal structure and staffing of the NHI Branch, in anticipation of the enactment of the Bill, does not engage any interest of the members of Solidarity, they contend. Nor, they argue, has Solidarity established a basis to bring these proceedings in the public interest. The founding affidavit is said to lack averments that Solidarity is genuinely and objectively acting in the public interest.

[4] These contentions cannot prevail. Our law takes a generous approach to the showing that is required to establish public interest standing in constitutional cases. Solidarity, in its founding affidavit, explained its legal interest. It stated that, as a trade union, it wishes to ensure that public funds are not spent in a manner that is wasteful and irregular, and that the Department of Health carries out its functions in conformity with the rule of law. These averments were not challenged, beyond a bare denial.

The invocation of the public interest by a litigant requires substantiation. Trades unions represent significant numbers of workers. Workers, and their representative organisations, the trade unions, are an important constituency in our national life. They, as with all South Africans, have an interest to ensure that the executive is organised to secure public goods in conformity with the law. Solidarity brings this case to contest the legality of the decisions taken by the respondents in anticipation of legislation that was still to become law. Nothing before me suggests that Solidarity is not acting with a genuine concern to ensure that the executive complies with the rule of law. Solidarity thus has standing to bring this case. The objection to its standing must fail.

Solidarity's case
[5] Solidarity's challenge rests upon two propositions. First, it contends that the decisions constitute the implementation of the Bill. At the time the decisions were taken, the Bill was before Parliament. The executive, constituted by the respondents, Solidarity argues, cannot take decisions to implement the Bill. To do so assumes a power that the executive does not have because the Bill is not law, and hence does not confer any power to act. The respondents may have anticipated that the Bill would become law. But that is neither respectful of the deliberative autonomy of Parliament, nor does it afford the respondents any legal basis to act. Until the Bill, in its final form, is enacted by Parliament, given Presidential assent, and comes into force, the respondents enjoyed no competence to take actions as if the Bill were legislation. I shall refer to this challenge as the vires challenge, though the challenge also embraces the contention that the decisions are unconstitutional because they violate the separation of powers, and that they are also irrational.

[6] The second proposition upon which Solidarity relies is that the decisions now challenged were not lawfully taken because they failed to comply with Regulation 25(2)(a)(i) of the Public Service Regulations ('the Regulations'), promulgated in terms of s 41 of the Public Service Act, 1994 ('PSA'). In terms of s 3(7)(a) of the PSA, an executive authority (which includes the Minister responsible for a department of state) has all the powers and duties necessary 'for the internal organisation of the department concerned'. Regulation 25 of the Regulations concerns the duty of an executive authority to prepare a strategic plan. Regulation 25(2)(a)(i) provides as follows: 'Based on the strategic plan of the department, an executive authority shall –

(a) determine the department's organisational structure in terms of its core mandated and support functions – (i) in the case of a national department or national government component, after consultation with the Minister and National Treasury'. ('the Consultation Regulation'). The Health Minister was thus required to consult with the PSA Minister and the Treasury in determining the Department of Health's organisational structure.

[7] Solidarity references the correspondence sent by the Health Minister to the PSA Minister dated 16 May 2022. This letter sought approval for the establishment of 'the nucleus staff establishment for the National Health Insurance (NHI) Branch'. The Health Minister stated in the letter that 'National Treasury has allocated earmarked funds in Vote 18 for the establishment of the NHI Capacity since 2020/21 and has continued to provide a MTEF Allocations for 2022/23 to 2024/25 for the establishment of this capacity' ('the representation'). Solidarity alleges that the representation was false.

The Health Minister claimed that Treasury had approved the allocation of funds for the establishment of the NHI Branch, when it had not. This was a material misrepresentation, relied upon by the PSA Minister in giving his concurrence. As a result, his concurrence was vitiated by a material error: it was not a valid concurrence. Hence, there was no lawful consultation in compliance with the Consultation Regulation, and the reorganisation of the Department of Health, effected by the decisions, was invalid, and falls to be set aside. I shall refer to this challenge as 'the misrepresentation challenge'

[8] It appeared to be common ground between the parties that a department of state may take some actions that prepare for the adoption of legislation, most especially legislation of the kind proposed by the Bill that would effect profound changes to the provision of health care services in this country. The parties are not in agreement as to the scope and source of the power to do so. The respondents rely upon s 27 of the Constitution. Section 27(1) confers the right upon everyone to have access to health care services, and then, in terms of s27(2), the state is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 85(2)(e) of the Constitution confers executive authority to perform any other executive function provided for in the Constitution. The 'other measures' that s 27(2) contemplates fall within the executive functions described in s 85(2)(e). These other measures, the respondents maintain, include the decisions that are challenged by Solidarity.

They are decisions to ensure that when the Bill becomes law it may be implemented effectively, and thereby move towards the universal provision of health care in conformity with what s 27 of the Constitution requires. In Treatment Action Campaign (No 2) , it was argued, there is recognition of the power of the state to take reasonable measures to fulfil its obligations in terms of s 27(2) of the Constitution.

[9] Treatment Action Campaign (No 2) was a case that addressed the restrictions the state had imposed on the availability of Nevirapine to address mother-to child transmission of HIV. The state was found by the Constitutional Court to have breached its obligations under s 27(2), read with s 27(1)(a) of the Constitution. The restrictions that breached these provisions of the Constitution were to be found in a policy adopted by the Government. This policy was subjected to constitutional scrutiny and found wanting. Here, however, we are not concerned with a government policy that must be measured against a constitutional yardstick. Rather, the Health Minister has introduced the Bill into Parliament so as to effect a radical legislative change to the provision of, and access to, health care. That is the measure chosen to give effect to the obligations resting upon the state in terms of s27(2). Once that is so, the issue is not whether the proposed legislation meets the constitutional standard of reasonable measures that s27(2) requires. That, no doubt, is a dispute for another day. The issue is rather what executive powers permit of the decisions that have been taken in anticipation of the Bill becoming law. And that is a matter that was not in issue in Treatment Action Campaign (No2).

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[10] The correct enquiry is to identify the executive authority and the scope of that authority enjoyed by the Health Minister in deciding how to organise the Department of Health in anticipation of the Bill becoming law. Section 85(2)(e) of the Constitution refers to: 'performing any other executive function provided for in the Constitution or in national legislation.' One such item of legislation is s3(7) of the PSA which, as I have observed, confers upon the Health Minister the powers and duties necessary for the internal organisation of the Department of Health. Something is necessary, if it is required to achieve a particular end. Section 3(7) confers powers upon the relevant Minister that are required to effect the organisational matters described in s3(7)(a). The Health Minister enjoys the power to structure the Department of Health and employ persons, as required, to carry out its functions. Although this is a broad power, like any power, it is not without limits.

[11] Those limits are determined by the demarcation of the lawful functions of the Department of Health. The Health Minister has no power, in terms of s3(7), to organise the Department of Health so as to discharge a function it does not have or could not undertake. A decision to organise the Department of Health in this way would not be necessary, and hence it would be unlawful. And so the organisational freedom that s3(7) confers is disciplined by the lawful functions that the Department may discharge. What are these functions, when a Minister has introduced proposed legislation into Parliament, and awaits the legislation that Parliament enacts (or fails to enact) ?

[12] In the ordinary course of government business, a Minister, as here, will have prepared and initiated legislation, as s85(2)(d) of the Constitution contemplates. Sometimes that proposed legislation will be modest, but, as in the case of the Bill, the proposed legislation entails a radical change, with significant consequences for the way in which a sector of the economy is to function. In these circumstances, there would be a considerable risk to the public good if the responsible Minister failed to take any steps to organise the relevant department of state in preparation for the proposed legislation becoming law. True enough, as Solidarity pressed in argument, the Bill envisages a staged implementation of the legislation. But, as a matter of principle, it is hard to see how it is a sound basis for public administration that preparation for the implementation of radical law reform can only commence upon a bill becoming law. Imagine that our country faced a war, and mobilisation by way of conscription was to be enacted. It would be a matter of grave public concern if the Department of Defence could only commence preparations for compulsory conscription once Parliament had passed the required legislation.

[13] Solidarity's central contention is this. Preparation is one thing, but the implementation of a Bill, not yet law, cannot be lawful because a department of state cannot do what Parliament has yet to pass into law. This contention is correct. But it must be properly understood. If a power has not been conferred upon the Health Minister to act, he may not do so. That is the time- honoured postulate of the ultra vires doctrine and the principle of legality. And it matters not that the Health Minister anticipates that he will be given the power when the Bill enjoys the force of law. That does not mean, however, that the Minister may not make organisational changes to the Department of Health to prepare and plan for the day that the Bill does become law. To constitute an organisational structure that would be utilised for the implementation of proposed legislation; to create posts for this purpose; and allocate a budget to do so; all of this is prudential planning in anticipation of an important law reform. And, in my view, falls within the functional remit of a department of state.

[14] Put simply, there is a distinction between creating organisational capacity within a department in anticipation of proposed legislation becoming law, and taking administrative actions that assume a power that does not (yet) have a basis in law. I observe the following. First, this distinction rests upon the proposition that it is lawful for a department of state to enjoy a functional competence to plan, prepare and create dedicated capacity in anticipation of a significant change to the law. This is a necessary incident of s 3(7) because the very matters there referenced by way of internal organisation postulate a forward-looking and anticipatory vantage point. Hence, the power and duty to engage human resource planning, to abolish and add posts and transfer functions. The internal organisation of a department must be dynamic and fit for purpose, one of which is that it may be required to render public service to administer new law that is before Parliament and forms part of the legislative programme of the government of the day.

[15] Second, to create capacity and design a department's organisational structure in a manner suited to an anticipated law change need not be wasteful expenditure. What systems will be needed; what competences and training will be required; how programmes will be designed and by whom– these, and no doubt many other matters, prepare the ground for change, without implementing proposed legislation that is not yet law. Of course, if Parliament does not pass the legislation and abandons it, resources will have been used to no end. But that does not of necessity mean that the expenditure was wasteful, as Solidarity appears to assume. The executive authority may initiate legislation. This is foundational to the way in which an elected government discharges its democratic mandate. Public administration must be ready to implement this legislative programme. To do so it must plan and create capacity. Provided that is done with reasonable prudence, it is not wasteful, but essential to the functioning of a democracy. Solidarity fears that resources used in this way deplete what is available to service the needs of the NH Act. Resource allocation within a department of state will no doubt always be a difficult balance to strike against the constraint of limited resources, but provided the requirements of legality are met, this is an area in which courts exercise considerable restraint.

[16] Third, as a matter of application, the distinction between planning an organisation and creating capacity in readiness for a change to the law and implementing that law may appear to make fine distinctions. But it rests, ultimately, on what is done. To configure the organisation, to create capacity, and to plan for change is not the same thing as taking administrative actions that assume a power not (yet) conferred. For example, to send out call up papers and muster conscripts in advance of any law that permits of this is unlawful; but to plan for the day when a bill before Parliament becomes law and requires this is both lawful, and often prudent.

[17] Solidarity's legality challenge thus turns on the decisions and how they are to be characterised, given the distinction I have drawn between lawful planning and capacity creation, on the one hand, and the unlawful implementation of a bill before Parliament, on the other. And it is to this matter that I now turn.

[18] I have described above the decisions that Solidarity seeks to review and set aside. I will consider whether the decisions were taken ultra vires. In order to do so, it is necessary to have regard to the Bill, and its essential features. For it is the Bill that Solidarity contends is being implemented by way of the decisions, in advance of the Bill becoming law. The Bill has as its purpose to achieve affordable universal access to quality health care services. To do this, the Bill would establish and maintain a NHI Fund, funded by mandatory prepayments. The NHI Fund is central to the design of the Bill. It will be constituted as a National Government Component as contemplated in s 7 of the PSA. The NHI Fund will procure health services, medicines and health related products, and users will receive health care services free at the point of care. The chief source of funding for the NHI Fund is money appropriated annually by Parliament, principally by way of taxation. The NHI Fund is governed by a Board, appointed by the Health Minister.

[19] Solidarity's case is that the decisions implement key provisions of the Bill, most especially the establishment of the NHI Fund. The DG decided to establish the NHI Branch; the Health Minister and the DG decided to create 5 chief directorates in the NHI Branch; the DG decided to advertise and fill 44 vacancies to secure technical specialists to assist with the preparation of the NHI Fund; and to establish a transitional organisational structure. Solidarity places some emphasis upon a document, styled 'the business case for amendment to the organisational structure of the national department of health to establish a comprehensive national health insurance fund administration'. I shall refer to this document, less compendiously, as the 'organisational change document'.

The organisational change document was signed on 4 May 2022 by, amongst others, Dr Crisp, then the Deputy Director General: NHI in the Department of Health. It evidences, Solidarity contends, that the proposed organisational changes to the Department of Health mirror the provisions of the Bill, and in particular s11, to manage the NHI Fund, to set up the procurement of health services under the auspices of the NHI Fund and, more generally, to operationalise the NHI Fund.

[20] The organisational change document sets out in its executive summary why it is that an amendment is required to the organisational structure of the Department of Health. It observes that 'National Health Insurance (NHI) will be implemented as one of the most comprehensive and fundamental reforms that the South African health sector has seen. The capacity to develop and sustain the functions required to run the NHI Fund needs to be built as a matter of urgency.' (my emphasis) What follows is a lengthy motivation to strengthen the NHI component in the Department of Health.

[21] There can be little doubt that the detailed specification of the work to be undertaken by the NH Branch, the 5 chief directorates that will direct the work of the NH Branch, and the posts to be created and filled in the NH Branch are intended to lay the groundwork for the establishment of the NHI Fund set out in the Bill. Among the functions that require attention is how to manage what is termed 'sector-wide procurement'. The organisational change document also makes it clear that technical posts need to be created and personnel appointed 'to develop the draft policies and procedures for the Schedule 3A entity' (i.e. the NHI Fund) and the NHI Fund will 'be deeply reliant on digital systems (ICT). Work has been done on building the architecture of the system and in rolling out terminals to public Health Care facilities across the country'. There can be little doubt that the decisions were taken to create capacity, develop policies, build systems, and recruit technical expertise that will be used by the NH Fund, on the assumption that the NHI Fund will come into being.
[22] The decisions must be understood by reference to the organisational change document. It is the blueprint, authorised by high-ranking officials within the Department of Health, as to what the decisions were intended to effect. The decisions go beyond mere planning for the NHI Fund. They create capacity to be used by the NHI Fund, they work out how the NHI Fund will be operationalised, and the systems it will require. Where then do the decisions fall: do they implement the Bill or prepare and create capacity for the NHI Fund when and if it is constituted?

[23] There can be no doubt that the respondents who took the decisions assumed the Bill would become law, and the NHI Fund would be constituted as the Bill proposes. The executive authorities responsible for organising the public service in anticipation of significant law reform should recognise that Parliament decides what to legislate, and its deliberative process may yield outcomes that do not align with the legislation that was initiated by the responsible Minister. Parliament is not, under the Constitution, an extension of executive authority. But nor can the executive authorities simply wait upon final presidential assent to legislation before anything is done in anticipation of legislative change. Hence, the delineation I have sought to make between unlawful implementation of a Bill that fails to respect the separation of powers, and lawful planning and capacitation which permits the public service to ensure that the legislative programme of the government of the day is capable of effective implementation when Parliament legislates.

[24] I am of the view that the decisions fall within the confines of legality. That is so because the decisions propose actions that do not, ultimately, constitute the NHI Fund, or commence its operation. The organisational change document is clear that the NHI Fund can only be constituted once the Bill becomes law. The Bill requires that the Board manages the NHI Fund. The Board does not exist. The radical change the Bill would bring into being can only be effected by NHI Fund. The universal provision of health care services and the large-scale procurement this entails has not taken place. The provision of health care continues within the framework of the NH Act. Medical schemes continue to make provision for private health care. And the central theme of the organisational change document is to create capacity and undertake the work needed so that the NHI Fund can be operationalised. Doubtless the posts created, those recruited, the systems that are developed, and the policies formulated are intended to be used by the NHI Fund, and will be so utilised if the Bill becomes law. But ultimately capacitation in anticipation of a radical change to the law is not implementation of a Bill that is not yet law. Accordingly, I find that Solidarity's vires challenge must fail. And in consequence the decisions do not want for constitutional validity, nor are they irrational.
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[26] There can be little doubt that the detailed specification of the work to be undertaken by the NH Branch, the 5 chief directorates that will direct the work of the NH Branch, and the posts to be created and filled in the NH Branch are intended to lay the groundwork for the establishment of the NHI Fund set out in the Bill. Among the functions that require attention is how to manage what is termed 'sector-wide procurement'. The organisational change document also makes it clear that technical posts need to be created and personnel appointed 'to develop the draft policies and procedures for the Schedule 3A entity' (i.e. the NHI Fund) and the NHI Fund will 'be deeply reliant on digital systems (ICT). Work has been done on building the architecture of the system and in rolling out terminals to public Health Care facilities across the country'. There can be little doubt that the decisions were taken to create capacity, develop policies, build systems, and recruit technical expertise that will be used by the NH Fund, on the assumption that the NHI Fund will come into being.

[27] The decisions must be understood by reference to the organisational change document. It is the blueprint, authorised by high-ranking officials within the Department of Health, as to what the decisions were intended to effect. The decisions go beyond mere planning for the NHI Fund. They create capacity to be used by the NHI Fund, they work out how the NHI Fund will be operationalised, and the systems it will require. Where then do the decisions fall: do they implement the Bill or prepare and create capacity for the NHI Fund when and if it is constituted?

[28] There can be no doubt that the respondents who took the decisions assumed the Bill would become law, and the NHI Fund would be constituted as the Bill proposes. The executive authorities responsible for organising the public service in anticipation of significant law reform should recognise that Parliament decides what to legislate, and its deliberative process may yield outcomes that do not align with the legislation that was initiated by the responsible Minister. Parliament is not, under the Constitution, an extension of executive authority. But nor can the executive authorities simply wait upon final presidential assent to legislation before anything is done in anticipation of legislative change. Hence, the delineation I have sought to make between unlawful implementation of a Bill that fails to respect the separation of powers, and lawful planning and capacitation which permits the public service to ensure that the legislative programme of the government of the day is capable of effective implementation when Parliament legislates.

[29] I am of the view that the decisions fall within the confines of legality. That is so because the decisions propose actions that do not, ultimately, constitute the NHI Fund, or commence its operation. The organisational change document is clear that the NHI Fund can only be constituted once the Bill becomes law. The Bill requires that the Board manages the NHI Fund. The Board does not exist. The radical change the Bill would bring into being can only be effected by NHI Fund. The universal provision of health care services and the large-scale procurement this entails has not taken place. The provision of health care continues within the framework of the NH Act. Medical schemes continue to make provision for private health care. And the central theme of the organisational change document is to create capacity and undertake the work needed so that the NHI Fund can be operationalised. Doubtless the posts created, those recruited, the systems that are developed, and the policies formulated are intended to be used by the NHI Fund, and will be so utilised if the Bill becomes law. But ultimately capacitation in anticipation of a radical change to the law is not implementation of a Bill that is not yet law. Accordingly, I find that Solidarity's vires challenge must fail. And in consequence the decisions do not want for constitutional validity, nor are they irrational.

Conclusion

[33] For these reasons the application must be dismissed. As to costs, Solidarity brought a case that raised important questions as to the powers of an executive authority, and its limits, in addressing fundamental changes to the law. There is no reason, under the principles in Biowatch, to make Solidarity liable for the costs incurred by the respondents. The parties will each bear their own costs.

[34] In the result, the application is dismissed.

LERASA

LABOUR AND EMPLOYMENT RELATIONS ASSOCIATION OF SOUTH AFRICA

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