



# *Serfontein Viljoen & Swart*

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Your ref :

Date : 14 May 2024

**TO: THE HONOURABLE PRESIDENT CYRIL RAMAPHOSA**

**ATT.: HIS EXCELLENCY, THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

**THE PRESIDENCY, UNION BUILDINGS  
GOVERNMENT AVENUE, PRETORIA  
PRIVATE BAG X1000**

**AND TO: DR GERHARDUS KOORNHOF, MP  
PARLIAMENTARY COUNSELOR TO THE PRESIDENT**

**AND TO: MS MALEBO SIBIYA  
PERSONAL ASSISTANT TO THE PRESIDENT**


**VIA EMAIL**

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Dear Honourable President,

**RE: URGENT PETITION TO WITHHOLD ASSENT TO THE NHI BILL (B11B - 2019) AND REFER THE BILL BACK TO PARLIAMENT PURSUANT TO SECTION 79 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA**

1. We confirm our representation on behalf of Solidarity regarding the aforementioned Bill. Acting upon Solidarity's instructions, we urgently address this letter to you.
2. It is important to begin by stating that Solidarity not only acts in its own interest but also in the interest of its members and the public at large. Solidarity sees itself as obligated by the overall principles and objectives of the Constitution of the Republic of South Africa to make this urgent appeal to the Honourable President of the Republic of South Africa. This appeal aims to uphold the values and procedures enshrined in the Constitution and to safeguard the right to healthcare services for all South Africans.
3. Yesterday, it was announced that the Honourable President will sign the NHI Bill into law at the Union Buildings at 14:00 on Wednesday, 15 May. This decision has been made despite significant public opposition to the Bill and its objectives. Solidarity aligns itself with those who have criticized the NHI Bill due to its numerous substantive flaws and the clear procedural irregularities that have surrounded its progression.



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4. On previous occasions, Solidarity has written to the Honourable President expressing grave concerns about the constitutional validity of the NHI Bill. However, these letters and appeals were not heeded. Additionally, like many other concerned citizens, Solidarity submitted written submissions outlining the inherent substantive flaws of the NHI Bill, yet these submissions also appear to have been disregarded.
5. Solidarity has already detailed its views on the substantive aspects of the NHI Bill in its public submission to the National Assembly and will not fully ventilate them here. Suffice it to say that Solidarity believes the legislation is inadequate and represents a missed opportunity for meaningful reform in a critical area essential to South Africa's development and prosperity.
6. To add to the aforesaid substantive issues, we emphasize Solidarity's views thusly:

6.1. The NHI Bill signifies a fundamental overhaul of South Africa's healthcare system: the scheme established under it will disrupt both public and private healthcare systems, necessitate extensive reorganization of the current healthcare structure, and demand substantial structural changes. The NHI Bill acknowledges this through various provisions:

6.1.1. Section 3(4) states that funding for state organs regarding healthcare services remains unchanged until relevant legislation,

as specified in sections 77 and 214 alongside section 227 of the Constitution, is enacted or amended.

6.1.2. Section 57 includes comprehensive transitional measures such as the migration of centrally funded hospitals to semi-autonomous entities, restructuring of the Contracting Unit for Primary Health Care at the district level, establishment of the NHI Fund and its governance structures, development of a Health Patient Registration System, accreditation processes for healthcare service providers, and legislative reforms across multiple statutes.

6.1.3. Section 58 repeals or amends provisions in 11 statutes, including significant changes to the National Health Act 61 of 2003 (NHA) and the Medical Schemes Act 131 of 1998 (Medical Schemes Act).

6.2. The scale of this reform is immense: the NHI Bill primarily aims to establish a National Health Insurance Fund (NHI Fund) as the sole purchaser of healthcare, exempt from the Competition Act 89 of 1998. This relegates medical schemes to funding services not covered by the NHI Fund. While the specific services excluded remain unclear, the NHI Bill prohibits medical schemes from providing coverage for services covered by the NHI Fund (NHI Bill section 33). The Bill assumes that

the NHI Fund's scale and purchasing power will lead to efficient contracts.

- 6.3. Furthermore, the Bill redirects revenue that would typically go to provinces for healthcare provision to the NHI Fund. Provincial governments become NHI Fund agents receiving health service reimbursements, effectively altering provincial health administration.
- 6.4. However, the NHI Bill lacks clarity on benefits, contracting terms, capacity, systems, management, governance, and implementation plans. Its implementation is seen as financially unsustainable, requiring tax increases to unsustainable levels. While morally commendable, the Bill fails constitutionally, not meeting the criteria of "*taking reasonable legislative and other measures to achieve the progressive realisation*" or utilizing "*available resources*" adequately to fulfil the right to healthcare services. The NHI Bill is simply not capable of facilitating the realisation of the right to health care services as intended.
- 6.5. The Bill lacks a rational basis, with its feasibility hinging on an impending money Bill yet to pass Parliament. It infringes unjustifiably on various rights, disregarding alternatives, and the State's duty to uphold social and economic rights. The absence of a feasibility study raises concerns about sustainability, echoing past tragedies like the Life Esidimeni incident.

7. Given the circumstances, the NHI Bill violates the Constitution for several reasons, including but not limited to:
  - 7.1. Lack of rationality in its provisions.
  - 7.2. Breach of the rule of law due to vagueness.
  - 7.3. Granting excessive powers to the Minister of Health.
  - 7.4. Impairment of provincial powers as per the Constitution.
  - 7.5. Failing to ensure the progressive availability of healthcare, thereby affecting asylum seekers and medical scheme members.
  - 7.6. Negative effects on bodily integrity and property rights.
  - 7.7. Infringement on dignity and equality rights.
8. There are substantial procedural issues regarding the passage of the NHI Bill. Despite receiving over 100,000 submissions and numerous oral presentations expressing various concerns, the Portfolio Committee on Health, responsible for gathering public input, reviewing, and presenting the NHI Bill to the National Assembly, proceeded with minimal engagement on the substantive issues raised during the process.

9. Furthermore, this situation follows an expedited and inadequate parliamentary process. It is now evident that both houses of Parliament have failed in their respective duties to facilitate reasonable and effective public participation in the legislative process, thereby violating sections 59, 72, and 118 of the Constitution, among others.
10. To add to the above, on the 15th of March 2023, the Portfolio Committee received legal advice from the Parliamentary Legal Advisor and the State Law Advisors regarding issues raised during public hearings. The legal opinion highlighted several procedural and substantive flaws in the proposed NHI Bill and concluded that the Bill would not withstand constitutional scrutiny in court. Despite this advice from Parliament's own legal experts, the Bill was passed without seeking further objective opinions from stakeholders.
11. The primary concern prompting this letter is that it is evident the Bill's passage through Parliament has been deeply flawed, undemocratic, and defective. These flaws alone may suffice as grounds for invalidation in the Courts.
12. Solidarity views the approach taken as irrational, bordering on farcical. It seems clear that this Bill, like many others in recent times, has been rushed through Parliament for political rather than democratic purposes.
13. In summary, this highly complex and technical Bill, which will come at an immense financial burden to the loyal taxpayer who already find themselves financially distress, will see State resources being allocated and disbursed on

a healthcare “project”, which experts have already forewarned is incapable of being implemented.

14. Section 195 of the Constitution requires that the public administration must be governed by the democratic values and principles enshrined in the Constitution which includes the efficient, economic, and effective use of resources. Solidarity is of the view that should you assent to the Bill you will act contrary to these very Constitutional obligation you have sworn to uphold as the President of this country.
15. Further to this the rushed and inadequate time frames have been noted by several observers, further adding to the Bill's inherent invalidity. This goes against the constitutional duties mentioned earlier, as the constitutional provisions in sections 59, 72, and 118 of the Constitution do not mention factors such as time, finances, or assessment. In essence, these constitutional provisions require parliament to follow a legal process, even if there are time limitations set by itself.
16. Public participation in the legislative process is crucial, especially for Bills with significant public impact. As emphasized by the Constitutional Court, it is essential to offer a reasonable opportunity for the public and interested parties to be informed about the issues and have a meaningful say.
17. In conclusion, Solidarity asserts that the Bill's passage was unconstitutional and that it is both substantively and procedurally unconstitutional. This



indicates that the entire process has been tainted by unlawfulness, rendering the Bill invalid.

18. Therefore, Solidarity urges the Honourable President to use discretionary powers to halt the current legislative process. The Bill cannot be lawfully or reasonably be signed into law in its current state. Therefore, we insist that the NHI Bill be sent back to parliament for revaluation.
19. Due to the blatant disregard for the constitutional values and duties mentioned earlier, we are instructed to hold the public official personally accountable for the current situation. This may involve a personal order for costs if legal action becomes necessary. We urge the Honourable President to prioritize your focus on your constitutional responsibilities rather than political interests. Our client's rights in this matter are preserved.
20. For any future correspondence regarding this letter and its contents, please contact the undersigned.


Yours faithfully

**SERFONTEIN, VILJOEN & SWART**

**MR. CN VENTER**

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*[ELECTRONICALLY TRANSMITTED, THEREFORE UNSIGNED]*



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