

An evaluation of the legal framework for African traditional healers in South Africa

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ABSTRACT

The quest for health includes alternative methods to treat and cure illnesses. The centuries-old method of alternative traditional healing has been used in many countries. The importance of traditional healing was realised by the South African government, which has attempted to regulate traditional health practitioners, with the *Traditional Health Practitioners Act 22 of 2007* being the final and current result.

Traditional healing has been around for many years, encompassing many African traditions and cultures. It is important to establish the definition of a traditional health practitioner and to determine how the World Health Organisation, other organisations and other countries describe a traditional health practitioner.

National and regional legislation regulating traditional health practitioners is of importance, as well as establishing the impact of existing regulations such as the Natal Codes and the *Traditional Health Practitioners Act 22 of 2007*.

The Act is evaluated in this study, as well as the criticisms of some writers. Mainstream critique will come to light, such as the established Traditional Health Practitioners Council and its seeming inability to commence with the registration of traditional healers.

The *Traditional Health Practitioners Act 22 of 2007* has been in the making for more than 12 years but there are still many shortcomings which have not been addressed. This is to the detriment of the communities that make use of the services of traditional healers, the practitioners and employers.

OPSOMMING

Die soektog na gesondheid sluit ook alternatiewe metodes vir die behandeling en genesing van siektes. Die metode van alternatiewe tradisionele genesing is al vir eeue gebruik in verskeie lande. Die belangrikheid van tradisionele genesing word in Suid Afrika erken en met die oog daarop om tradisionele geneesheers te reguleer, is die *Traditional Health Practitioners Act 22* van 2007 en regulasies verorden.

Tradisionele genesing bestaan al vir talle jare in Suid Afrika en behels Afrika tradisies en kultuur. Dit is van belang om te bepaal wie as 'n tradisionele geneesheer kwalifiseer. Die vraag hou verband met die beskouing van ander internasionale organisasies soos die "World Health Organisation" en die benadering in ander lande van hoe 'n tradisionele geneesheer beskryf moet word.

Nasionale en regionale wetgewing wat tradisionele geneesheer reguleer is van belang en die status van die sogenaamde Natal Kodes en van die *Traditional Health Practitioners Act 22* van 2007. Die Wet is van naby bestudeer, asook die kritiekpunte van sommige skrywers. Hoofkritiekpunte ten opsigte van die "Traditional Health Practitioners Council" wat tot op datum geen tradisionele geneesheer geregistreer het nie, sal aandag geniet.

Die *Traditional Health Practitioners Act 22* van 2007 is meer as 12 jaar in die omloop, maar steeds het dit heelwat tekortkominge wat nog nie aangespreek is nie. Die tekortkominge is nadelig vir gemeenskappe wat gebruik maak van die dienste van tradisionele geneesheer, asook tot die nadeel van die geneesheer en werkgewers.

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LIST OF ABBREVIATIONS

ABET	Adult Basic Education and Training
AIDS	Acquired Immune Deficiency Syndrome
AJIKS	African Journal of Indigenous Knowledge Systems
AJPHRD	African Journal for Physical Health, Education, Recreation and Dance
AMJ	Australasian Medical Journal
ANC	African National Congress
AU	African Union
BCEA	Basic Conditions of Employment Act
BMJ	British Medical Journal
CCMA	Commission for Conciliation, Mediation and Arbitration
CILSA	Comparative and International Law Journal of Southern Africa
HIV	Human Immunodeficiency Virus
HR	Human Resources
JTMCN	Journal of Traditional Medicine and Clinical Naturopathy
KZN Council	KwaZulu-Natal Traditional Healers Council
NCOP	National Council of Provinces
NHI	National Health Insurance
OAU	Organisation of African Unity
PELJ	Potchefstroom Electronic Law Journal
SA	South Africa
SA Merc LJ	South African Mercantile Law Journal
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAMJ	South African Medical Journal
SAPC	South African Pagan Council
T&CM	Traditional and Complementary Medicine
THO	Traditional Healers Organisation
THP	Traditional health practitioner
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
WHO	World Health Organisation

WHO Afro
ZINATHA

World Health Organisation African Regional Office
Zimbabwe National Traditional Healers Association

Chapter 1 Introduction

1.1 Problem statement

1.1.1 Background to the study

The World Health Organisation¹ defines health as:²

[A] state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.

Health is the primary state for which every human being strives. Not only just physical health but mental, spiritual and emotional. There are fundamental differences between conventional and traditional approaches to achieving health.

Western-trained medical doctors focus on treating the physical bodies of their patients, and sometimes treat them mentally with the help of psychology. Traditional African healers, on the other hand, focus on treating the whole physical body. This includes the mind and spirit of the patient.³ Dime declares:⁴

As you ought not to attempt to cure the eyes without the head, or the head without the body, so neither ought you to attempt to cure the body without the soul; and this ... is the reason why the cure of many diseases is unknown to the physicians of Hellas, because they are ignorant of the whole, which ought to be studied also; for the part cannot be well unless the whole is well...

The WHO acknowledges traditional healing and describes it as:⁵

the sum total of the knowledge, skill, and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness.

Traditional healing is growing in popularity under Western communities. Increasingly, people are switching to or making use of traditional health

¹ Hereafter the WHO.

² Osuji *African Traditional Medicine: Autonomy and Informed Consent* 108.

³ Osuji *African Traditional Medicine: Autonomy and Informed Consent* 102-103.

⁴ Dime *African Traditional Medicine: Peculiarities* 82-83.

⁵ WHO *Traditional Medicine Strategy 2014-2023* 15.

practitioners (THP's) and their medicines.⁶ THPs play an important role, particularly to people and communities living under a system of customary law in both the rural and the urban areas of South Africa. It is estimated that there are more than 200 000 THP's practising traditional healing in its various forms all over the country.⁷ Eastman states that:⁸

70 to 80 per cent of South Africans use traditional healers either exclusively or in tandem with biomedicine.

Despite the statistics, THP's were never recognised or regulated in South Africa until recently.

In 1994 the African National Congress⁹ was instrumental in the formulation of the White Paper for the Transformation of the Health System in South Africa. The White Paper recognised that THP's could play a more important role in health care in South Africa if they were regulated.¹⁰

In 2014 the situation changed considerably with the enactment of the *Traditional Health Practitioners Act 22 of 2007*.¹¹ This Act recognises traditional healing and makes provision for a regulatory framework for traditional health care services. This applies to all THP's and students thereof engaged in traditional health practices in South Africa. The Act will have a profound influence on traditional healing in the future.¹²

In addition, regulations were issued to give effect to the Act.¹³ It is apparent from the legislation passed in the last few years that the position of THP's in South Africa

⁶ Osuji *African Traditional Medicine: Autonomy and Informed Consent* 94.

⁷ Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

⁸ Eastman 2011 *Rainbow Healing: Traditional Healers and Healing in South Africa* 184.

⁹ Hereinafter the ANC.

¹⁰ The Department of Health's White Paper for the Transformation of the Health System in South Africa.

¹¹ Hereafter the THP Act 2007. The *Traditional Health Practitioners Act* 35 of 2004 was declared unconstitutional in *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC). Discussed at 3.2.2.2.

¹² Tshela 2015 *African Journal of Indigenous Knowledge Systems* 44.

¹³ *Traditional Health Practitioners Regulations*, 2015 GN 1052 in GG 39358 of November 2015. According to Street and Rautenbach the regulations are not clear. See Street and Rautenbach

is changing rapidly. For example, once the legal framework has been established, THP's will be required to register in order to continue practising as THP's. They will also have to undergo training at accredited training institutions.

The purpose of this dissertation is to discuss certain relevant sections of the former and current legislation that regulated and is currently regulating traditional healers in South Africa. As it does so, the advantages and disadvantages of the relevant sections of the current legal framework will be discussed, evaluated and critiqued.

1.1.2 Scope and limitations of the study

It is important to note that traditional healing encompasses traditional practitioners and traditional medicine. This study addresses the legal position of THP's only in South Africa. Traditional medicine falls outside the scope of the investigation and it will thus not be specifically dealt with, except where necessary for the purpose of this study.

1.1.3 Rationale of the study

Unravelling the legal framework applicable to THP's is necessary, for the existing gaps that currently exist in the regulating legislation need to be determined. Further, possible solutions to remedy the gaps should be presented, in order to promote justice for both patients and practitioners.

1.1.4 Research question

Is the current legal framework sufficient for the regulation of THP's practising in South Africa?

1.2 Assumptions and hypotheses

1.2.1 Assumptions

- a) THPs were, until recently, not formally recognised in South Africa.
- b) The *Traditional Health Practitioners Act 22 of 2007* creates a legal framework for the recognition and regulation of THPs since 1 May 2015.
- c) Section 27 of the *Constitution of the Republic of South Africa, 1996* confirms that everyone has the right to have access to health care services.

1.2.2 Hypotheses

- a) The *Traditional Health Practitioners Act 22 of 2007* and its regulations do not effectively regulate THP's.
- b) The ineffective regulation of THP's undermines the cultural and health rights of traditional healers and communities protected in terms of the *Constitution of the Republic of South Africa, 1996*.

1.3 Aim of the study

The aim of this study is to investigate the previous and current regulatory framework for THPs in South Africa. Specific emphasis will be placed on relevant sections of the THP Act 22 of 2007 as well as its regulations in order to determine if the legislator made provision for the sufficient regulation of THP's.

1.4 Framework

Chapter One provides an introduction to the research, describing the title and research question of this dissertation, the problem statement with its various sub-headings, the assumptions and hypothesis, aims and objectives, and the research methodology, and explains its relevance to the research unit theme.

Chapter Two gives a background on traditional healing, focussing on the definition of a THP, different categories of THP's, and the recognition of THP's in South Africa, and it also gives a brief outline of the origin and history of THP's in South Africa.

Chapter Three places emphasis on the legal framework for THPs, past and present. National and regional policies and legislation are evaluated, focussing particularly on the regulation of THPs in South Africa. Other relevant legislation impacting the THP Act is also discussed.

Chapter Four sets out the critique and opinions of mainstream writers on traditional healing. This also includes a discussion of case law and real-life issues of THP's, followed by a conclusion.

1.5 Research methodology

This study is mainly a literature review, the literature includes legislation, textbooks, case law, government policy documents and applicable electronic resources. It is a narrative review consisting of descriptive and normative research. It discusses South African legislation and certain international law.

Although not a comparative study, law from other African countries provides valuable guidance, therefore some comparisons with a limited scope will be done. The countries that are compared with South Africa are Namibia,¹⁴ Tanzania¹⁵ and Zimbabwe.¹⁶ These countries were randomly selected out of the 16 Southern African Development Community (SADC) countries which have legislation and/or policies regulating THP's.

1.6 Relevance to the research unit

The study is relevant in the research unit: Law, Justice and Sustainability: Vulnerable societies. One may argue that if THP's are not recognised and regulated, that would negate their cultural rights and those of the communities who prefer to use them

¹⁴ Discussed at 2.3.3.1.

¹⁵ Discussed at 2.3.3.2.

¹⁶ Discussed at 2.3.3.3.

as healers, thus impacting on the general health of such communities. Furthermore, the communities who utilise traditional healing services require the protection that adequate regulation would provide. The relevant regulating legislation must thus be twofold. First it must protect the rights of the communities and second, it must protect the rights of THPs to perform their practices.

1.7 Conclusion

Every human being seeks and strives for health, to which there are many pathways, western or alternative.

Upon the acknowledgement of THPs by the WHO their importance in communities was realised. There are more traditional healers than western medical practitioners worldwide and most individuals and communities make use of traditional health services first, before approaching a western medical practitioner.

The South African government was pressured by the WHO, as well as THP's, to implement regulating legislation. Many occurrences led to the establishment of the THP Act 2007, and this history will be discussed in short in the next chapter.

Chapter 2 Background and definitions

2.1 Introduction

Throughout the decades individuals and communities alike have used alternative healing for their ailments and sicknesses.¹⁷ It may be seen as simple human nature to maintain health above indisposition, be it physical or mental, but in this case, it is generally part of the culture of those individuals seeking traditional healing.¹⁸ There is no doubt that THP's play a significant role in the lives of individuals who follow cultural practices.¹⁹ In seeking solutions to health problems, there have been numerous attempts by THP's to diagnose and treat ailments and sickness with African traditional medicine and healing, with conflicting results.²⁰

It is estimated that there are around 200 000 to 300 000 THPs across South-Africa, with a ratio of THPs to the population of approximately 1:500.²¹ It is estimated that 70%–80% of the South African population make use of THP services.²² The WHO indicates that THPs greatly outnumber western medical practitioners.²³ Thus, THP's are probably the first to be consulted by the majority of South Africans when a

¹⁷ Which include physical, mental and social issues; Shiza and Charema 2012 *International Journal of Psychology and Counselling* 59.

¹⁸ Zuma et al 2016 *BMC Complementary and Alternative Medicine* 2.

¹⁹ Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>, Mokgobi 2014 *AJPHRD* 31-32.

²⁰ Shiza and Charema 2012 *International Journal of Psychology and Counselling* 59.

²¹ Speech by the Minister of Health at the Official Opening of the Conference on Traditional Medicine, Kopaneng, 30 March 2004, <http://www.polity.org.za/article/m-tshabalalamsimang-conference-on-traditional-medicine-opening-30032004-03-30>. See De Roubaix 2016 *SAMJ* 160; Rautenbach 2007 *Obiter* 518; Truter 2007 *SA Pharmaceutical Journal* 56; Gqaleni et al 2007 *South African Health Review* 178; Zuma et al 2016 *BMC Complementary and Alternative Medicine* 2; Rautenbach 2010 *THRHR* 12-13; Shiza and Charema 2011 *International Journal of Psychology and Counselling* 61; Kale 1995 *BMJ* 1182; Cook 2009 *Journal of the National Medical Association* 261; McFarlane 2015 *Insight on Africa* 60; Flint and Payne 2012 *Forum for Development Studies* 51; Lidell et al 2005 *Social Science and Medicine* 696; Pretorius 1999 *South African Health Review* 249.

²² Rautenbach 2007 *Obiter* 518-519; Truter 2007 *SA Pharmaceutical Journal* 56; Gqaleni et al 2007 *South African Health Review* 176; Rautenbach 2010 *THRHR* 12-13; Kasilo et al 2010 *The African Health Monitor* 7; Kale 1995 *BMJ* 1182.

²³ WHO *Traditional Medicine Strategy 2002-2005*; Shiza and Charema 2011 *International Journal of Psychology and Counselling* 60.

health-related problem arises.²⁴ According to Mokgobi²⁵ the main function of THPs is to "promote and maintain the health status of health care users in all contexts of health care delivery".

Until recently South African THPs functioned without the direct involvement of the government.²⁶ A number of healer-led organisations have been established to regulate, promote and recognise the functioning of traditional healing in some way. For example: the African National Healers Association,²⁷ the Association of Traditional Healers of Southern Africa, the Congress of Traditional Doctors of South Africa, the Africa Dingaka Association and the African Skilled Herbalists Association, have all been established by groups of THPs.²⁸ One of the largest non-governmental organisations is the Traditional Healers Organisation (THO), which has its head office in Johannesburg.²⁹ According to the description on its Blog, the THO is a non-profit organisation:³⁰

... of traditional health practitioners and associates who are committed to harnessing, developing and promoting traditional health care practices and systems. Provide leadership and guidance on matters related to traditional healing and traditional health practitioners. Facilitate and monitor the training and development of members and their patients.

This chapter provides a theoretical background to the scope and meaning of THP's in South Africa and focusses on historical events preceding the commencement of the THP Act 2007 and its regulations before concluding with an analysis of the latter.

²⁴ Van Niekerk 2012 *SAMJ* 105; Rautenbach 2007 *Obiter* 520-521; Truter 2007 *SA Pharmaceutical Journal* 56.

²⁵ Mokgobi 2014 *AJPHRD* 21.

²⁶ Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

²⁷ The Association is an independent body consisting of a group of traditional healers. See the official website of the Association at <https://www.africannationalhealersassociation.org/>.

²⁸ Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>; Kale 1995 *BMJ* 1183; and Dixon *Regulating Complementary Medical Practitioners* 54.

²⁹ De Roubaix 2016 *SAMJ* 160; Summerton 2006 *African Studies* 300; Rautenbach 2007 *Obiter* 519; Shiza and Charema 2012 *International Journal of Psychology and Counselling* 60; Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

³⁰ See Traditional Healers Association <https://www.blogger.com/profile/06558397179933144381>.

2.2 Brief origins of traditional health practice

Traditional health practice can be directly linked with traditional African religion, which was present in South Africa before Dutch settlement in the 17th century.³¹ The link between traditional African religion and traditional healing can be established by the "ancestral calling" experienced by certain THPs, especially those regarded as diviners.³² With the help of their ancestors, THP's produce their own medicines to treat illnesses.

Over the years, THP's were often negatively regarded as practitioners of witchcraft, which led to the prohibition of traditional health practice across numerous regions in Africa.³³ Traditional healing was misinterpreted and was thought at the time not to accord with what was regarded as modern medicine.³⁴ Shiza also indicates that traditional healing was "viewed as superstitious and unscientific" by many Western societies.³⁵

THPs use a holistic approach to deal with health and illness, which entails treatment of the physical body, the spirit and the social symptoms of an individual.³⁶ The traditional healing process consists of two steps, namely identifying the illness, be it physical or spiritual, and treating the illness by means of traditional health methods.³⁷

More and more individuals in South Africa and other countries make use of the services of THP's for psychological and metaphysical reasons.³⁸ THP's perform

³¹ Kale 1995 *BMJ* 1182; Mokgobi 2014 *AJPHRD* 25.

³² Mokgobi 2014 *AJPHRD* 30.

³³ McFarlane 2015 *Insight on Africa* 60.

³⁴ Shiza and Charema 2012 *International Journal of Psychology and Counselling* 63; McFarlane 2015 *Insight on Africa* 61.

³⁵ Shiza 2008a *Australian Journal of Indigenous Education* 81; Rautenbach 2007 *Obiter* 520; Moshabela 2016 *BMJ* 89; Rautenbach 2010 *THRHR* 18.

³⁶ Truter 2007 *South African Pharmaceutical Journal* 57.

³⁷ Truter 2007 *South African Pharmaceutical Journal* 57.

³⁸ As cited in Mokgobi 2014 *AJPHRD* 14; Ramgoon *et al* 2011 *South African Journal of Psychology* 90-91.

duties formally associated with physicians, counsellors, psychiatrists and priests, which are important positions in African societies.³⁹

Traditional healing has been on the agenda of the WHO for a considerable time. In 1977 it adopted a resolution on the "Promotion and Development of Training and Research in Traditional Medicine" at the 30th World Health Assembly in Geneva, which called upon governments "to give adequate importance to the utilization of their traditional systems of medicine, with appropriate regulations suited to their national health systems."⁴⁰ In 1978 the *Declaration of Alma Ata*⁴¹ gave prominence to THPs and recognised the role they had to play in primary healthcare and called on governments to "formulate national policies, strategies and plans of action to launch and sustain primary health care as part of a comprehensive national health system."⁴²

At a national level, the Department of Health's *White Paper for the Transformation of the Health System in South Africa* recognised the importance of THP's in primary healthcare in 1997.⁴³ This was the beginning of a lengthy consultation process that culminated in the THP Act of 2007 and its regulations. Devenish refers to this process as the "professionalisation of traditional healers in South Africa."⁴⁴

Despite the increasing attention being given to THP's, considerable uncertainty regarding the exact meaning of concepts such as THP, traditional healing and traditional practice still exist. The next paragraph deals with some of the definitions for the purpose of this study.

³⁹ Hewson 1998 *Annals of Internal Medicine* 1029 – 1034; Moshabela 2016 *BMJ* 86; Shiza and Charema 2012 *International Journal of Psychology and Counselling* 61; Mokgobi 2014 *AJPHERD* 31-32.

⁴⁰ WHO https://apps.who.int/iris/bitstream/handle/10665/86036/Official_record240_eng.pdf?sequence=1&isAllowed=y, see WHA30.49.

⁴¹ See https://www.who.int/publications/almaata_declaration_en.pdf for a copy of the Declaration.

⁴² For more information, see Devenish *Negotiating Healing* 11-12.

⁴³ Department of Health *White Paper* para 1.1.2.

⁴⁴ Devenish *Negotiating Healing* 8.

2.3 The meaning of "traditional health practitioner" or "traditional healer"

Unpacking the meaning of the term "traditional health practitioner" or "traditional healer" is important in order to determine who would qualify in terms of the legal framework for THP's discussed in this study. For the purpose of this study the terms "traditional health practitioner" and "traditional healer" are used as synonyms, unless otherwise indicated.

There are many different ideas, viewpoints and definitions regarding THP's and their related practices. MacLean suggests that:

For many people, the mention of African medicine still conjures up fearsome images of the witch-doctor, featured in innumerable sensational films, clad in fur and feathers, prancing around the fire to the inexorable rhythms of tom-toms.⁴⁵

However, this is far from the truth. Traditional healing is no longer regarded as something fearsome that should be kept in the dark. There is a worldwide drive to recognise and regulate the practice of traditional healing, and South Africa is no exception. Therefore, it is important to find a workable definition of a THP. The section that follows deals with the different definitions of THP's, before the focus shifts to international law and a few other African countries.⁴⁶

2.3.1 General dictionary definitions

There is no general definition of a THP or traditional medicine in the *Oxford English Dictionary*.⁴⁷ However, a combination of the definitions of the words "traditional", "health" and "practitioner" provide a good idea of what one means:

- a) "Traditional" (or "tradition") means the passing on of customs or beliefs from generation to generation.

⁴⁵ MacLean *Magical Medicine. A Nigerian Case-Study* 3.

⁴⁶ Although this is not a comparative study, the laws of other African countries provide valuable guidance. The focus is on the following countries: Namibia, Tanzania and Zimbabwe.

⁴⁷ Oxford English Dictionary 2012.

- b) "Health" means the state of being free from illness or injury and is also indicative of a person's mental or physical condition.
- c) "'Practitioner' is a person who practices a particular profession or activity".

In terms of these three definitions, a THP can thus be described as a person who heals patients from sickness or injury through the passing on of customs or beliefs carried down from generation to generation.

The *Online Collins Dictionary*⁴⁸ also does not provide a definition for a THP but defines "traditional medicine" as follows:

Systems of medicine developed before the era of modern medicine, based on cultural beliefs and practices handed down from generation to generation.

Considering this definition, a THP will be someone who uses traditional medicine in his or her treatment of illnesses. It is worth noting that although traditional medicine systems were developed before the era of modern medicine, traditional medicine systems are constantly changing to respond to different diseases (such as HIV) and are often influenced by different cultures.⁴⁹

Interestingly, *TheFreeDictionary*⁵⁰ online dictionary provides a definition and describes a "traditional healer" as follows:

A person in a primitive society, who uses long-established methods passed from one healer to another to treat a person suffering from various illnesses, many of which have psychological underpinnings. Methods used by traditional healers include the use of roots, fetish dolls, voodoo dolls and the smoking out of a possessing spirit or spell.

There may be merit in not providing dictionary definitions of a THP but an explanation of the terms associated with one instead. The concepts culture and tradition are both fluid and flexible and therefore it would be difficult to find a definition of a THP that would be universally agreed upon. It can be concluded from the above that a THP is generally someone who conducts the practice of healing in

⁴⁸ Accessible at <https://www.collinsdictionary.com/dictionary/english/traditional-medicine>.

⁴⁹ See Mills *et al* 2005 *Nutrition Journal* 1-6.

⁵⁰ Accessible at <https://medical-dictionary.thefreedictionary.com/traditional+healer>.

the context of traditional customs or beliefs passed on from generation to generation, although there have been modern developments, as already alluded to.

In my opinion, because of the fluidity of the definition of a THP, a rigid definition would be insufficient for it is difficult to include everything that will lead to a sufficient definition. There will always be something that needs to be included.

2.3.2 International and regional definitions

2.3.2.1 The World Health Organisation (WHO)

The WHO does not provide a definition of a THP, but it provides a definition of "traditional medicine". Although this study does not focus on traditional medicine,⁵¹ its definition can assist in determining the meaning of a THP. In one of its earlier publications, in 1978, the WHO defined "traditional medicine" in line with earlier definitions provided by the WHO Regional Office for Africa that met in Brazzaville in 1976, namely:⁵²

[T]he sum total of all the knowledge and practices, whether explicable or not, used in diagnosis, prevention and elimination of physical, mental or social imbalance and relying exclusively on practical experience and observation handed down from generation to generation, whether verbally or in writing.

Traditional medicine might also be considered as a solid amalgamation of dynamic medical know-how and ancestral experience.

Traditional African medicine might also be considered to be the sum total of practices, measures, ingredients and procedures of all kinds, whether material or not, which from time immemorial had enabled the African to guard against disease, to alleviate his sufferings and to cure himself.

In a later publication, the WHO provided its own definition that reads as follows:⁵³

Traditional medicine has a long history. It is the sum total of the knowledge, skill, and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as

⁵¹ Traditional medicine and traditional healing and practices thus go hand in hand with each other.

⁵² WHO *The Promotion and Development of Traditional Medicine* 8; Truter 2007 *SA Pharmaceutical Journal* 57; Shiza and Charema 2011 *International Journal of Psychology and Counselling* 60; Mokgobi 2014 *AJPHRD* 27-28. Also see the discussion at 2.3.2.2.

⁵³ WHO *Traditional Medicine Strategy 2014-2023* 15; also see Rautenbach 2010 *THRHR* 6.

well as in the prevention, diagnosis, improvement or treatment of physical and mental illness.

In terms of these definitions, traditional medicine consists of the following elements:

- a) knowledge, skill and practices;
- b) longevity;
- c) indigenous theories, beliefs and practices;
- d) handed down from generation to generation; and
- e) oral or written tradition.

The WHO's approach to traditional medicine is broad enough to include not only products but also practices and practitioners.

2.3.2.2 WHO African Regional Office (WHO Afro)

The WHO Afro is a regional office of the WHO. It comprises 47 member states, of which South Africa is one. The mission statement of the WHO Afro is set out as follows:⁵⁴

Our work involves translation of global health initiatives into regional plans that respond to the specific needs and challenges of countries in the Region. We support countries to achieve better health outcomes through technical and policy advice, development of norms and standards, generation and sharing of knowledge and convening health partners. Together with countries, we attain health objectives by supporting national health policies and strategies.

All the activities of the WHO Afro are geared towards the development of member states to improve the health and well-being of their people. Interestingly enough, an expert group of the regional office adopted a definition of a THP as early as in the 1970s. This definition reads as follows:⁵⁵

... a person who is recognized by the community in which he lives as competent to provide health care by using vegetable, animal and mineral substances and

⁵⁴ See the official website of the regional office at <https://www.afro.who.int/about-us>. The regional office is hosted in Brazzaville, Republic of Congo.

⁵⁵ WHO *African Traditional Medicine: Report of the Regional Expert Committee* 3-4.

certain other methods based on the social, cultural and religious background as well as on the knowledge, attitudes and beliefs that are prevalent in the community regarding physical, mental and social well-being and the causation of disease and disability.

Recognition by the community appears to be an element that the WHO Afro deemed important at that time. The website of the regional office does not provide a definition and only defines traditional medicine in line with all the other existing definitions, namely:⁵⁶

Traditional medicine refers to the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, used in the maintenance of health and in the prevention, diagnosis, improvement or treatment of physical and mental illness.

2.3.2.3 The African Union (AU)

The AU was originally established as the Organisation of African Unity (OAU), of which South Africa became a member on 6 June 1994. In 2002 the OAU was reformed into the AU, as it is known today. The AU adopted the Regional Strategy on Promoting the Role of Traditional Medicine in Health Systems as well as its resolution.⁵⁷ The strategy and its resolution does not make mention of any definition of a THP or "traditional medicine". In April 2001 the Abuja Declaration⁵⁸ identified traditional medicine and THPs as important,⁵⁹ which thus led to the AU declaring the period 2001-2010 as the Decade of African Traditional Medicine.⁶⁰ The Abuja Declaration unfortunately makes no mention of a definition of a THP or "traditional medicine". It is not clear why so little attention is given to THP's on an African regional level.

⁵⁶ See <https://www.afro.who.int/health-topics/traditional-medicine>.

⁵⁷ Regional strategy and resolution accessible at <https://africacheck.org/wp-content/uploads/2013/07/AFR-RC50-9-Promoting-the-role-of-traditional.pdf>.

⁵⁸ Abuja Declaration on HIV/AIDS, Tuberculosis, and other related infectious diseases, accessible at http://www.un.org/ga/aids/pdf/abuja_declaration.pdf.

⁵⁹ Abuja Declaration paras 14, 16 and 32.

⁶⁰ Kasilo *et al* 2010 *The African Health Monitor* 9; De Roubaix 2016 *SAMJ* 160; Gqaleni *et al* 2007 *South African Health Review* 176; Rautenbach 2010 *THRHR* 12.

2.3.2.4 Southern African Development Community (SADC)

The SADC operates on a sub-regional level and consists of 16 member states including South Africa.⁶¹ On 18 August 1999 the member states signed a Protocol on Health.⁶² Article 20 of the Protocol encourages member states to regulate the practice of traditional healing and to provide mechanisms for co-operation with THP's. Article 1 defines "Traditional Health Practitioners" as follows:

People who use the total combination of knowledge and practices, whether explicable or not, in diagnosing, preventing or eliminating a physical, mental or social disease and in this respect may rely exclusively on past experience and observation handed down from generation to generation, verbally or in writing, while bearing in mind the original concept of nature which included the material world, the sociological environment whether living or dead and the metaphysical forces of the universe

In terms of the definition given by the Protocol on Health, a THP consists of the following elements:

- a) knowledge and practices;
- b) diagnosing, preventing and eliminating;
- c) physical, mental and social disease;
- d) relying on past experiences or observations;
- e) handed down from generation to generation; and
- f) verbally or in writing.

When one compares this definition with the definition of "traditional medicine" as given by the WHO, the two definitions have corresponding elements. Traditional medicine and THP's both include knowledge and practices based on indigenous theories used over time, which is handed down from generation to generation

⁶¹ See the official website of the SADC, accessible at <https://www.sadc.int/about-sadc/>.

⁶² See https://www.sadc.int/documents-publications/show/Protocol_on_Health1999.pdf.

through verbal communication or in writing, in order to diagnose, treat and prevent physical and mental diseases.

2.3.3 Comparative perspectives on definitions for THPs

Although this dissertation is not a comparative study, it would be beneficial to look at the definitions of THP's in other African countries where THP's practice. A few examples have been randomly selected and are described below.

2.3.3.1 Namibia

Namibia shares many elements with South Africa - its legal system in particular. The practice of traditional healing is also widespread in Namibia.⁶³ Namibia took a decision to formalise the position of THPs by enacting legislation, but it was only in 2014 that the *Traditional Health Practitioners Bill*⁶⁴ was introduced in parliament. To date the Bill has not been transformed into legislation and the Council has not been established. Thus, the status of THP's remains uncertain and controversial.⁶⁵

As indicated by the preamble to the *Traditional Health Practitioners Bill*, its purpose is to provide for the "establishment, constitution, powers and functions" of the Traditional Health Practitioners Council.⁶⁶ It also purports to regulate the registration and practising of THP's in Namibia. The Bill is in many ways similar to the South African THP Act 2007.⁶⁷ The Bill makes provision for the establishment of a council, the registration of THP's and the disciplinary powers of the council, like the THP Act 2007.

Also similar to the South African THP Act 2007, the Namibian *Traditional Health Practitioners Bill* does not provide a definition for a THP but refers to a THP as someone registered in terms of clause 22 of the Bill.⁶⁸ Clause 22 prescribes the

⁶³ Du Toit and Pretorius 2018 *Epilepsia Open* 375.

⁶⁴ Traditional Health Practitioners Bill [B2-2014].

⁶⁵ Du Toit and Pretorius *Epilepsia Open* 375.

⁶⁶ Preamble of Traditional Health Practitioners Bill [B2-2014].

⁶⁷ See 2.3.4 for an explanation of the situation in South Africa.

⁶⁸ Clause 1 of the Bill reads: "'traditional health practitioner' means a person registered as a traditional health practitioner under section 22 of the Act".

requirements for registration. It must be read with clauses 19,⁶⁹ 20⁷⁰ (minimum requirements) and 21⁷¹ (the application process).

The application process and requirements for registration are quite complicated and far-reaching. The final decision to register or not to register lies with the council, which must be satisfied that the applicant "possesses adequate knowledge, skills and competence to practise as a traditional health practitioner in the category of traditional healing in which such person applied for registration."⁷² Furthermore, the council must be satisfied that he or she is "proficient in the indigenous languages spoken in the region in which the applicant is residing or intends to practise as a traditional health practitioner."⁷³

Like the definition of "traditional health practice" in the South African THP Act 2007,⁷⁴ the Bill provides a definition of "traditional healing" as follows:⁷⁵

... the performance of a function, activity, process or service based on a *traditional healing philosophy* that includes the utilisation of traditional medicine or traditional practices, and that has the object of —

- (a) maintaining or restoring the physical or mental health or functions of a person;
- (b) diagnosing, treating or preventing a physical or mental illness in a person;
- (c) rehabilitating a person to enable the person to resume normal functioning within his or her family or the community; or
- (d) preparing a person for puberty, adulthood, pregnancy, childbirth or death, either physical or emotional, but excludes —
 - (i) the performance of professional activities or functions of a person registered under the Allied Health Professions Act, 2004

⁶⁹ Clause 19 gives a wide discretion to the minister to determine the categories and the "minimum requirements of study"; "scope of practice"; and "conditions and restrictions" applicable to the different categories.

⁷⁰ Further to the study requirements in clause 19, the minister may prescribe additional minimum requirements for registration in terms of s 20.

⁷¹ Clause 21(1) is quite clear: "A person may not practise as a traditional health practitioner, except if the person is registered under this Act as a traditional health practitioner to practise one or more of prescribed categories under section 19". The remainder of the clause prescribes the application process which commences with an application that must be submitted in prescribed form to the registrar and accompanied by a prescribed fee.

⁷² See clause 22(2)(a).

⁷³ See clause 22(2)(b).

⁷⁴ See discussion at 2.3.4.

⁷⁵ Traditional Health Practitioners Bill [B2-2014] 6. Emphasis added.

- (Act No. 7 of 2004), the Medical and Dental Act, 2004 (Act No. 10 of 2004), the Nursing Act, 2004 (Act No. 8 of 2004), the Pharmacy Act, 2004 (Act No. 9 of 2004) or the Social Work and Psychology Act, 2004 (Act No. 6 of 2004), or any other activity not based on a traditional healing philosophy; and
- (ii) any act or other activity prohibited by or under the Witchcraft Suppression Proclamation, 1933.

This definition agrees with the definition provided by the WHO in that it recognises that a function or activity which occurs must be based on traditional practices in order to maintain, diagnose, rehabilitate or prepare a patient who approached a THP. However, the definition does not mention the passing down of information from generation to generation and does not indicate if the information is conveyed verbally or in writing. However, the definition of "traditional healing" must be read with the definition provided for "traditional healing philosophy", where the passing down from generation to generation and the documentation or absence of documentation are indeed referred to, namely:⁷⁶

... the indigenous techniques, principles, theories, ideologies, beliefs, opinions and customs, and the use of traditional medicines communicated from ancestors to descendants or from generation to generation, with or without written documentation, whether or not supported by science and that are generally used in traditional healing.

The fact that the "techniques, principles, theories, ideologies, beliefs, opinions and customs, and the use of traditional medicines" need not be supported by science is indeed one of the controversial points in the area of traditional healing.⁷⁷

2.3.3.2 Tanzania

Tanzania is one of the SADC countries that has legislation in place to regulate THPs. The *Traditional and Alternative Medicines Act*⁷⁸ was enacted in 2002. The Act defines a THP as:

A person who is recognised by the community in which he lives as competent to provide health care by using plants, animal, mineral substances and other methods based on social, cultural, and religious background as well as on the knowledge,

⁷⁶ THP Act 2007: S 1. Also mentioned at 2.3.4.2.2.

⁷⁷ Discussed in Chapter 4.

⁷⁸ *Traditional and Alternative Medicines Act* 23 of 2002.

attitudes and beliefs that are prevalent in the community regarding physical, mental and social wellbeing and the cause of disease and disability.⁷⁹

The Tanzanian definition consists of the following elements:

- a) recognised by the community as competent;
- b) methods of a social, cultural and religious background;
- c) knowledge, attitudes and beliefs; and
- d) physical, mental and social well-being.

The definition given by the Tanzanian Act correlates with the definition given by the WHO, for it must be knowledge or activities which stem from cultural, religious or social backgrounds in order to treat physical, mental and social impairments.

The definition introduces a whole new element by placing emphasis on the fact that the THP must be recognised by the community as one who is competent to provide healing to any patient. This is something South Africa should take note of, namely that a THP should be recognised by the community. It is counter-intuitive to allow for the registration of a THP that objectively complies with all requirements but is not accepted by the community as such.

Section 14 of the *Traditional and Alternative Medicines Act* makes provision for the registration of a THP and although the definition of a THP does not mention registration, section 49(1) makes it a punishable offence if someone practises without being registered.⁸⁰

2.3.3.3 Zimbabwe

Traditional healing was recognised as a profession in Zimbabwe in 1981 upon the establishment of the Zimbabwe National Traditional Healers Association (ZINATHA).⁸¹ The Association had the blessings of the first cabinet minister of

⁷⁹ Section 3 of the *Traditional and Alternative Medicines Act* 23 of 2002.

⁸⁰ *Traditional and Alternative Medicines Act* 23 of 2002: Ss 14 & 49(1).

⁸¹ Shoko 2018 *Journal of Traditional Medicine and Clinical Naturopathy* 254; Cavender 1988 *Human Organization* 252.

health, Dr Chris Ushewokunze.⁸² In 2010 about 55 000 THPs were registered with ZINATHA.⁸³ The Association has also been quite active in setting up traditional healing training institutions, conferences and workshops.⁸⁴

Zimbabwe was also one of the first African countries to promulgate legislation regarding THPs, evidence thereof being the *Traditional Medical Practitioners Act*, which dates to 1981.⁸⁵

Despite Zimbabwe's being the first state in Africa to promulgate such important legislation, the *Traditional Medical Practitioners Act* does not give an explicit definition of a THP but describes the "practice of traditional medical practitioners" to mean,⁸⁶

[e]very act, the object of which is to treat, identify, analyse or diagnose, without the application of operative surgery, any illness of body or mind by traditional methods.

This definition specifically deals with the treatment of an illness influencing the body or the mind by means of traditional methods. To bring this definition in line with the WHO definition, there has to be a mention of the use of knowledge and the passing on of this knowledge from generation to generation, whether it be in writing or orally. However, given the fact that the guidelines of the WHO are just guiding principles there is nothing preventing a member state from formulating its own definitions.

Like the South African THP Act 2007, the *Traditional Medical Practitioners Act* makes provision for the establishment of a Traditional Medical Practitioners Council to "supervise and control the practice of traditional" health practitioners⁸⁷ and a Registrar to oversee the registration of THP's.⁸⁸ All applications must, however, be

⁸² Shoko 2018 *Journal of Traditional Medicine and Clinical Naturopathy* 254.

⁸³ Latif *Integration of African Traditional Health Practitioners and Medicine into the Health Care Management System in the Province of Limpopo* 67; WHO *Legal Status of Traditional Medicine and Complementary/Alternative Medicine* 40.

⁸⁴ Shoko 2018 *Journal of Traditional Medicine and Clinical Naturopathy* 255.

⁸⁵ *Traditional Medical Practitioners Act* 38 of 1981.

⁸⁶ *Traditional Medical Practitioners Act* 38 of 1981: S 2(2).

⁸⁷ *Traditional Medical Practitioners Act* 38 of 1981: Ss 3-16.

⁸⁸ *Traditional Medical Practitioners Act* 38 of 1981: Ss 17-22.

referred to the Council for its final approval, and the Council will grant the application for registration if it is satisfied that the practitioner "possesses sufficient skill and ability to practise as a traditional medical practitioner and is of good character."⁸⁹ Although more recent official statistics could not be found, popular media report that over 30 000 traditional and faith healers were registered in 2013.⁹⁰ It is a punishable offence to practice without being registered or falsely claiming to be registered in order to practise.⁹¹

An interesting provision in the *Traditional Medical Practitioners Act*, is that the Council is allowed to direct the appointment of an "honorary traditional medical practitioner" without paying any registration fees. Section 23 of the Act reads as follows:

[T]he Minister, after consultation with the Council and any one or more associations, may direct the Registrar to register as an honorary traditional medical practitioner, with or without the qualification as a spirit medium, any person who, by reason of his special standing as a traditional medical practitioner, deserves to be so registered.

However, statistics on the exact number of practitioners appointed as honorary, if any, are not available in the public domain.

2.3.4 South African definitions

Given the fact that traditional healing is quite common in South Africa, it is fitting that there have been many scholarly and legislative attempts to define the concepts associated with it. Only a few examples will be covered.

2.3.4.1 Scholarly definitions

Mokgobi identifies different types of THP's in his writings. He makes it clear that the term THP is an umbrella concept that includes various types of THP's, depending

⁸⁹ *Traditional Medical Practitioners Act* 38 of 1981: S 22(2).

⁹⁰ Anon 2013 <https://relzim.org/news/traditional-medical-practitioners-council-urges-unregistered-witch-hunters-to-get-licences/>.

⁹¹ *Traditional Medical Practitioners Act* 38 of 1981: S 19.

on their training, skills and knowledge.⁹² According to Mokgobi, the following categories exist:⁹³

- a) Diviners or *ngaka ya ditaola*, also known as *sangomas*, *izangoma* or *amagqirha*. They are healers that use bones and spirits of the ancestors to diagnose and prescribe medication for physiological, psychiatric and spiritual defects.
- b) Herbalists, which are known as *inyangas*, *izinyanga*, or *amaxhwele*. A herbalist is a person who collects certain herbs with medicinal qualities that he or she prescribes to patients to cure certain ailments.
- c) Sanusi or *sedupe*. This is a person possessed by the Holy Spirit. They can predict the future and provide advice thereupon.
- d) Traditional surgeons, also known as *ingcibi* or *iingcibi*. Surgeons are authorised, trusted and acknowledged by village chiefs to, for example, perform circumcisions.
- e) Traditional birth attendants, also known as *ababelekisi*, *ababelethsi* or *abazalisi*. Birth attendants are mainly older women with midwifery skills and many years of experience in birth assisting and the witnessing of births.

These types are in line with the categories of THP's set out in the THP Act 2007 which will be covered below.⁹⁴

Other scholars have provided their own definitions of a THP. For example, Dixon⁹⁵ describes a THP as:

⁹² Mokgobi 2014 *AJPHRD* 29.

⁹³ Mokgobi 2014 *AJPHRD* 29-30, also see Rautenbach 2007 *Obiter* 525-526; Truter 2007 *SA Pharmaceutical Journal* 57 – 58; Zuma *et al* 2016 *BMC Complementary and Alternative Medicine* 7-8; Moshabela 2016 *BMJ* 86; Krige 2009 *The Journal of the European Medical Writers Association* 6; Kale 1995 *BMJ* 1182-1183; Mankazana 1979 *SA Medical Journal* 1005-1006.

⁹⁴ See the discussion at 2.3.4.2.2.

⁹⁵ Dixon *Regulating Complementary Medical Practitioners* 53.

[S]omeone that treats physical and psychological illnesses through a variety of traditional methods, such as treatments using curative herbs and medicine of animal origin, treatment through ancestral spirits and treatment using prayer.

According to Krige a THP can be defined as:⁹⁶

[S]omeone who is recognised by the community in which he lives as competent to provide health care by using vegetable, animal and mineral substances and certain other methods based on the social, cultural and religious backgrounds as well as the prevailing knowledge, attitudes and beliefs regarding physical, mental and social well-being and the causation of disease and disability in the community.

As in the Tanzanian definition, Krige recognises the role the community plays in accepting a person as a THP. Even if a healer has the necessary skills he or she will not be regarded as a THP if he or she is not recognised by the community as such.

2.3.4.2 Statutory definitions

South Africa has enacted national legislation dealing with THP's, but so-called "territorial legislation" that operates only in the former province of Natal and the former KwaZulu homeland remains on the statute book. The territorial legislation will be addressed first before the national legislation is analysed.

2.3.4.2.1 Territorial legislation

Although South Africa fairly recently adopted national legislation dealing with THPs, two earlier regional statutes also exist.⁹⁷ The first one is the *Natal Code of Zulu Law* (the *Natal Code*)⁹⁸ that applied in the former Natal Province, which has been the Province of KwaZulu-Natal since 1994. Chapter 11 of the Code regulates the position regarding "medicine men, herbalists and midwives", and requires them to be registered, and to pay an annual registration fee. The regulation still contains many references to race, and it is doubtful whether it could still be regarded as

⁹⁶ Krige 2009 *The Journal of the European Medical Writers Association* 6.

⁹⁷ They stand to be repealed by s 53(1) of the *KwaZulu-Natal Leadership and Governance Act* 5 of 2005 but the date of repeal has not yet been published.

⁹⁸ *Proclamation* R151 of 1987. In terms of *Proclamation* R166 of 31 October 1994 the administration of this proclamation has been assigned to the newly formed Province of KwaZulu-Natal in 1994. It has not yet been repealed. Discussed at 3.2.1.

constitutional. The Code does not have a definition of a THP but regulation 83(1) reads:⁹⁹

Black medicine men, herbalists and Black midwives are known as *inzinyanga zokwelapha* (those skilled in healing), *izinyanga zemithi* (herbalists) and *ababelethisi* (midwives), respectively, and any Black may practise as such for gain if duly licensed, but not otherwise.

The status of a THP thus depended on his or her registration as one, and it is a punishable offence if someone practised as a healer without being registered.¹⁰⁰ It is not clear if the registration system is still in operation and if the annual fee is still being paid to the relevant officials. Although the Code is still on the statute books, there is no evidence in the public sphere that points towards its continued implementation in the former territory of Natal.

Similar legislation is the *KwaZulu Act on the Code of Zulu Law* (the *KwaZulu Code*).¹⁰¹ The Act applied in the former Zululand, one of South Africa's notorious homelands, which was reincorporated into South Africa in 1994. The Act was also assigned to the Province of KwaZulu-Natal in the same year and has not been repealed yet.¹⁰² Chapter 11 of the Act is almost identical to chapter 11 of the *Natal Code* and also does not define a THP but has a provision identical to that in the *Natal Code*, except that the race of the healer is not mentioned, namely:¹⁰³

Medicine men, herbalists and midwives are known as *izinyanga zokwelapha* (those skilled in healing), *izinyanga zemithi* (herbalists) and *umbelitsi* (midwife) respectively and any person may practice as such for gain if duly licensed but not otherwise.

The Act also requires registration and makes it an offence if someone practises without a licence.¹⁰⁴ Neither the *Natal Code* nor the *KwaZulu Code* provides a definition of a THP, even though they refer to the three main categories, namely

⁹⁹ *Natal Code*: Reg 83(1).

¹⁰⁰ *Natal Code*: Reg 87.

¹⁰¹ 16 of 1985. Discussed at 3.2.1.

¹⁰² In terms of *Proclamation* 107 of 17 June 1994.

¹⁰³ *KwaZulu Code*: S 83(1).

¹⁰⁴ Devenish *Negotiating Healing* 15 points out that the attempt to register traditional healers in the former province and homeland was largely unsuccessful although the government did recognise the Inyangas' National Association as an official body of traditional healers.

healers (diviners), herbalists and midwives. Even if registration is still the determining factor for the practice of traditional healing in KwaZulu-Natal, research suggests that THP's, especially those who received a "calling" to become one, continue with their practices regardless of the fact that they are not registered with a government body or an unofficial body of healers.¹⁰⁵

According to Bennett and Pillay the application of this legislation is problematic for a variety of reasons. It creates uncertainty, it contains contradictory provisions, and it is discriminatory.¹⁰⁶ They have called for the repeal of the two pieces of legislation, but to date they remain on the statute books.

The potential for conflict between the *Natal Code* and the *KwaZulu Code* and the THP Act 2007 has not been addressed, and the 2007 Act does not mention the two territorial statutes at all, which might be an oversight or due to the fact that they have been assigned to the Province and are no longer within the national sphere of government.

While there is no doubt as to the existence of THPs in South Africa, there is no official statistical information regarding their numbers. Estimates suggest that there are about 25 000 practising in KwaZulu-Natal but that only about 7 000 of them are registered with their professional bodies.¹⁰⁷ The eThekweni Municipality issued a document in 2007 in which it described the outcome of the "Traditional Healers Project" that has been active since 1992.¹⁰⁸ The document mentions the establishment of an umbrella body for THPs to act as their mouthpiece. This "informal" body was established in 1995 and its membership, consisting of different traditional healers' organisations, increases year by year.¹⁰⁹ The umbrella body was eventually transformed into the KwaZulu-Natal Traditional Healers Council (KZN

¹⁰⁵ For example, see the recent study by Zuma *et al* 2016 *BMC Complementary and Alternative Medicine* 304.

¹⁰⁶ Bennett and Pillay 2003 *SAJHR* 217-238.

¹⁰⁷ Zuma *et al* 2016 *BMC Complementary and Alternative Medicine* 305.

¹⁰⁸ eThekweni Municipality http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf.

¹⁰⁹ Also see Devenish *Negotiating Healing* 48-57.

Council) in 1996,¹¹⁰ which operates on a more formal level in KwaZulu-Natal.¹¹¹ Although it is not clear what the continued role of the provincial council is, since the establishment of the national Interim Traditional Health Council in 2014, it is understood that one of the functions of the KZN Council is to assist the Interim Council.¹¹² However, the THP Act 2007 makes no mention of the involvement of the KZN Council in its day-to-day operations and it is not specifically included as one of the 22 persons that must be appointed as council members. Nevertheless, it seems that nothing prevents the KZN Council from continuing with its usual functions on a provincial level.¹¹³

2.3.4.2.2 National legislation

After a few setbacks, which will be discussed in the next chapter, the THP Act 2007 was assented to on 7 January 2008, although its provisions came into operation on three different dates, namely:

- Sections 7, 10, 11(3), 12-15, 47-48 and 50: Commenced on 30 April 2008.
- Sections 4-6, 8-9, 16-46, 49 and 51: Commenced on 1 May 2014.
- Sections 1, 2, 3, 11(1) and 11(2): Commenced on 1 October 2018.

Curiously, the provisions dealing with definitions (section 1), the purpose of the Act (section 2) and the application of the Act (section 3) were the last to commence. It is difficult to imagine how the other provisions of the Act could have been applied successfully when these three provisions commenced only many years later. The reasons for this anomaly are unfortunately not known and one can only speculate about them. When the Interim Traditional Health Practitioners Council was established on 1 May 2014,¹¹⁴ it had to operate without the assistance of the

¹¹⁰ Discussed at 3.2.1.3.

¹¹¹ A detailed discussion of the Council falls outside the scope of this study. For more information, see Devenish *Negotiating Healing* 58-102; and Richter "Traditional Healers in South Africa" 11.

¹¹² Devenish *Negotiating Healing* 61.

¹¹³ It seems, however, that the relationship between traditional healers and the KwaZulu-Natal Council is not without conflict and that a number of challenges remain. In general, see Devenish *Negotiating Healing* 79 *et seq.*

¹¹⁴ THP Act 2007: Ss 4-17. Tshehla 2015 *SAMJ* 279 points out that the Council was inaugurated as early as in February 2013, although it became effective only on 1 May 2014, when the relevant provision came into operation.

provisions dealing with the definitions, purpose and application of the Act because they had not commenced yet.¹¹⁵

Like the Namibian *Traditional Health Practitioners Bill*, the THP Act 2007 does not provide a comprehensive definition for a "traditional health practitioner" specifically, but defines one in general terms, namely:¹¹⁶

A person registered under this Act in one or more of the categories of traditional health practitioners.

A few aspects of this definition are important. Firstly, a person can be regarded as a THP only if he or she is "registered".¹¹⁷ Thus, if a THP does not comply with the registration requirement, he or she is not recognised as one by government. Chapter 3 of the THP Act 2007 deals with the appointment of the Registrar, its staff and the registration procedures. It commenced on 1 May 2014. Chapter 3 has been supplemented by the draft *Traditional Health Practitioners Regulations* of 2015, but those regulations have not commenced yet.¹¹⁸ Considering the fact that not one THP has been registered in terms of this Act,¹¹⁹ there are quite a large number of healers operating outside the parameters of the newly created legal framework.

¹¹⁵ It is not uncommon for certain parts of legislation to come into effect at different times. It creates a way for the sufficient functioning of the proposed Act and its regulatory body.

¹¹⁶ THP Act 2007: S 1.

¹¹⁷ Also see Chapter 3 for a discussion of the registration requirement.

¹¹⁸ GN 1052 in GG 39358 of 3 November 2015. The return date for comments was 3 February 2016 but it was later extended to 4 April 2016 (GN 171 in GG 39685 of 12 February 2016). A date of commencement has not yet been published, and all indications are that their implementation is fiercely being resisted by traditional healers. See *The Traditional and Natural Health Alliance* 2016 <https://www.tnha.co.za/traditional-healers-tnha-reject-draft-regulations-for-the-registration-of-traditional-health-practitioners/>.

¹¹⁹ Fokazi 2015 <https://www.iol.co.za/news/politics/still-no-traditional-healers-registered-1841714>.

Secondly, the definition refers to different types of health practitioners. The Act does not contain a specific list, but reading the definitions indicate that there are at least six types of healers, provided that they are registered as such.¹²⁰ They are:¹²¹

- a) a diviner (also known as a "*sangoma*"), who is a person who engages in traditional health practice and is registered as a diviner;
- b) a herbalist (also known as an "*invanga*"), who is a person who engages in traditional health practice and is registered as herbalist;
- c) a student, who is a person training to be a traditional health practitioner;
- d) a birth attendant, who is a person who engages in traditional health practice and is registered as such;
- e) a tutor, who is someone who is accredited by the Council to teach traditional health practice; and
- f) a surgeon, who is registered as one.

Tutors and students do not practise traditional health and are strictly speaking not THPs, a fact that is confirmed by clause 3 of the draft *Traditional Health Practitioners Regulations* that only refers to categories of "health practice" and not categories of "health practitioners". The categories included in the draft regulations are divination, herbalism, birth attendant's practice and surgeon practice.

This brings us to the third aspect of the definition of THP. The description of the different types of THP's requires that they be engaged in "traditional health practice". According to the THP Act 2007 this means:¹²²

¹²⁰ Section 1 THP Act 2007; Le Roux-Kemp 2010 *CILSA* 278; De Roubaix 2016 *SAMJ* 160; Rautenbach 2007 *Obiter* 526-527; Gqaleni *et al* 2007 *South African Health Review* 178; Zuma *et al* 2016 *BMC Complementary and Alternative Medicine* 2; Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

¹²¹ THP Act 2007: S 1.

¹²² THP Act 2007: S 1. Emphasis added.

... the performance of a function, activity, process or service based on a *traditional philosophy* that includes the utilisation of *traditional medicine* or traditional practice and which has as its object-

- (a) the maintenance or restoration of physical or mental health or function; or
- (b) the diagnosis, treatment or prevention of a physical or mental illness; or
- (c) the rehabilitation of a person to enable that person to resume normal functioning within the family or community; or
- (d) the physical or mental preparation of an individual for puberty, adulthood, pregnancy, childbirth and death,

but excludes the professional activities of a person practising any of the professions contemplated in the Pharmacy Act, 1974 (Act 53 of 1974), the Health Professions Act, 1974 (Act 56 of 1974), the Nursing Act, 1974 (Act 50 of 1974), the Allied Health Professions Act, 1982 (Act 63 of 1982), or the Dental Technicians Act, 1979 (Act 19 of 1979), and any other activity not based on traditional philosophy

This definition must be read with the definitions of "traditional philosophy" and "traditional medicine". Traditional philosophy is defined as:¹²³

... indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs and uses of traditional medicines communicated from ancestors to descendants or from generations to generations, with or without written documentation, whether supported by science or not, and which are generally used in traditional health practice.

Traditional medicine is defined as:¹²⁴

an object or substance used in traditional health practice for-

- (a) the diagnosis, treatment or prevention of a physical or mental illness; or
- (b) any curative or therapeutic purpose, including the maintenance or restoration of physical or mental health or well-being in human beings,

but does not include a dependence-producing or dangerous substance or drug.

In accordance with the THP Act 2007 a person will thus be regarded as a THP if he or she engages in "traditional health practice" based on "traditional philosophy" and includes "traditional medicine", provided that they are registered as such under the Act. Rautenbach points out that the broad meanings of the terms might create

¹²³ THP Act 2007: S 1.

¹²⁴ THP Act 2007: S 1.

difficulties in a legal context, especially where unwritten and unscientific practices are concerned.¹²⁵

It is to be concluded that there is no exact legal definition of a THP in South Africa. This could be one of the reasons why not a single THP has yet been registered in terms of the THP Act 2007, resulting strictly speaking in their practicing without authority, which could lead to prosecution in terms of section 49 of the Act.¹²⁶

However, considering the complex nature of the THP's profession and the fact that traditional practices are usually not scientifically investigated and orally transferred from one generation to the next, it might create problems if one put THP's in "neat" legislative boxes with legal labels on them. As pointed out by Devenish,¹²⁷ the umbrella terms used to refer to THP's are a useful way of distinguishing THP's from conventional doctors, but they are also problematic because they group together different kinds of THP's "suggesting a singular history and identity". She contends that "[a] deeper understanding of these terms [traditional healer, traditional health practitioner and indigenous healer] must realise that there are differences and contestations within the collective category of traditional healers."

The fact that the THP Act 2007 requires a THP to register in order to be able to practice could create problems where a THP is recognised and respected by the community but does not comply with the requirements for registration. It could also complicate the implementation of the THP Act 2007 if it is seen as an unsurmountable hurdle for the recognition of THP's in South Africa.¹²⁸

It seems as if the traditional healers' community is gearing itself up for the changes to come. For example, the Traditional Healers Organisation (THO) based in

¹²⁵ See Rautenbach 2007 *Obiter* 526.

¹²⁶ In terms of s 51 of the THP Act 2007 no legal or disciplinary action will be instituted against a person who engages in a traditional health practice during the period of one year following the date of commencement. Considering the incremental commencement of the Act, it is not certain which date will be used to calculate one year. However, bearing in mind that the last date of commencement was 1 October 2018, it could mean that the time for traditional healers ran out on 1 October 2019.

¹²⁷ Louw and Duvenhage 2016 *AMJ* 517; Rautenbach 2010 *THRHR* 15.

¹²⁸ Devenish *Negotiating Healing* 6.

Johannesburg has membership requirements that are roughly similar to the provisions of the THP Act 2007. It requires people interested in membership to belong to one of the four categories (diviners/herbalists/traditional surgeons/traditional birth attendants) and requires at least two years' experience. In addition, the applicant needs to submit credible character reference forms, complete application documents and pay the registration fee. Also, the application for membership will be forwarded to the Organisation's administration office, which will refer it to the Training and Education department. The Training and Education department will then commence to do the training of the candidate before he or she qualifies for membership.¹²⁹

2.4 Conclusion

In 2004 the former Minister of Health, M Tshabalala-Msimang, referred to the important role of traditional medicine at the official opening of the Conference on Traditional Medicine as follows:¹³⁰

The important role of traditional medicines in the health care delivery systems of many developing countries cannot be overemphasised. Traditional systems of medicine have become a topic of global importance. Traditional medicine is ceasing to be an obscure practice of so-called quacks and witches. This rare discipline is fast becoming a name to be reckoned with in our struggles to fight diseases and ensure the health of our people. This revolution is not only taking place in developing countries but also in the developed world. Traditional medicine has become a global phenomenon.

In line with the WHO's plea to governments to recognise the important role of THP's,¹³¹ the South African government recognised THP's by enacting legislation and regulations, but with certain consequences. THP's can no longer practise outside the parameters of the law and without government interference. Exactly how wide or how narrow these parameters are is debatable. Many stakeholders want the regulation, or "professionalisation" as Devenish calls it, to succeed. They include government, the healers and their patients.

¹²⁹ See <http://tho-news.blogspot.com/2009/10/how-do-you-become-tho-member.html>.

¹³⁰ See <https://www.polity.org.za/print-version/m-tshabalalamsimang-conference-on-traditional-medicine-opening-30032004-2004-03-30>.

¹³¹ Mokgobi 2014 *AJPHRD* 14-15.

The fact that there is no exact definition in the THP Act 2007 should perhaps not be seen as a shortcoming but as a practical way of providing for the inclusion of THP's who could be excluded if a stricter definition were given. On the other hand, the wide powers given the South African Interim Traditional Health Council and the registration requirement could hamper the efforts of THP's to practise legitimately.

As illustrated in this chapter, the process of acquiring recognition was not easy, but after a few detours traditional healing finally received full legislative recognition when the THP Act 2007 commenced in totality.

The next chapter provides an overview of the historical developments that preceded the THP Act 2007, and provides an analysis of its relevant provisions, as well as its regulations.

Chapter 3 Legal framework for traditional health practitioners

3.1 Introduction

The WHO has on a number of occasions called for the statutory regulation by member states of THP's and traditional medicine.¹³² The latest WHO *Strategy on Traditional Medicine 2014-2023* recognises the importance of THP's and their integration into mainstream healthcare.¹³³ In 2013 the WHO declared:¹³⁴

Many countries now recognise the need to develop a cohesive and integrative approach to health care that allows governments, health care practitioners and, most importantly, those who use health care services, to access T&CM [traditional and complementary medicine] in a safe, respectful, cost-efficient and effective manner. A global strategy to foster its appropriate integration, *regulation and supervision will be useful to countries* wishing to develop a proactive policy towards this important - and often vibrant and expanding - part of health care.

As explained by the WHO, the goals of its strategy are to support member states in:¹³⁵

- "harnessing the potential contribution" of traditional medicine to "health, wellness and people-centred health care"; and
- "promoting the safe and effective use" of traditional medicine by regulating, researching and integrating traditional medicine products, practitioners and practice into health systems, where appropriate."

¹³² WHO *Traditional Medicine Strategy 2014-2023* 21 accessible at https://www.who.int/medicines/publications/traditional/trm_strategy14_23/en/. Also see WHO *Traditional Medicine Strategy 2002-2005* 9 accessible <https://apps.who.int/medicinedocs/en/d/Js2297e/>; WHO *Medicines Strategy 2004-2007* 46 accessible at <http://apps.who.int/medicinedocs/en/d/Js5416e/>; and Rautenbach 2007 *Obiter* 524.

¹³³ WHO *Strategy on Traditional Medicine 2014-2023* 25.

¹³⁴ WHO *Traditional Medicine Strategy 2014-2023* 7. Emphasis added; also see De Roubaix 2016 *SAMJ* 160.

¹³⁵ WHO *Traditional Medicine Strategy 2014-2023* 43.

The WHO recognises the fact that all countries are unique and that they are in a better position to understand and regulate THP's within their borders. As explained by the WHO:¹³⁶

While common themes and priorities may exist between Member States, national approaches must be developed to address individual countries' needs. Clearly they will be subject to existing legal frameworks, cultural beliefs about T&CM, and structures to supervise individual products, practices and practitioners.

The regulation of THP's in South Africa is the focus of this chapter. A significant aspect of the South African setting is the existence of regional legislation that predates recent national legislation regulating THP's. The first part of this chapter deals with regional legislation that continues to exist in the Province of KwaZulu-Natal. The second part discusses the events that led to the adoption of the THP Act 2007 and its regulations¹³⁷ on a national level, and other legislation applicable to THPs such as the *Witchcraft Suppression Act*.¹³⁸

3.2 The regulation of THPs in South Africa

3.2.1 Regional Legal Framework: The Codes of Zulu Law

3.2.1.1 Background

There has always been a strong presence of THP's in KwaZulu-Natal. According to Zuma *et al*¹³⁹ there were approximately 25 000 THP's in KwaZulu-Natal in 2007 and about 7 000 of them were registered with their interim (self-regulated) professional

¹³⁶ WHO *Traditional Medicine Strategy 2014-2023* 44.

¹³⁷ The regulations were issued in terms of s 47 of the THP Act 2007. Regulations Relating to the *Appointment of Members of the Interim Traditional Health Practitioners Council of South Africa* – GN R685 in GG 34546 of 22 August 2011; *Nominations of Members of the Interim Traditional Health Practitioners Council of South Africa* – GN 66 in GG 42195 dated 29 January 2019; *Traditional Health Practitioners Regulations 2015* – GN 1052 in GG 39358 of 3 November 2015 (the *THP Regulations 2015* are not in operation yet).

¹³⁸ 3 of 1957.

¹³⁹ Zuma *et al* 2016 *BMC Complementary and Alternative Medicine* 2, see Gqaleni *et al* 2007 *South African Health Review* 178; Mander *The Marketing of Indigenous Medicinal Plants in South Africa: A case study in KwaZulu-Natal* 76.

body.¹⁴⁰ Gqaleni,¹⁴¹ indicates that there are about 15 000 THP's active in KwaZulu-Natal but it is not clear on what statistics he bases his estimates. He has been working closely with THP's in communities to explore the possibilities of their assisting in the prevention, care and treatment of tuberculosis and HIV and has personal knowledge of the situation on ground level.

The strong presence of the Zulu kingdom in KwaZulu-Natal laid the foundations of the two so-called "Codes of Zulu Law" during South Africa's colonial and homeland phases.¹⁴² These are now referred to as the *Natal Code of Zulu Law* 1987 (the *Natal Code*)¹⁴³ and the *KwaZulu Act* 16 of 1985 (the *KwaZulu Code*).¹⁴⁴ The *Natal Code* applied in the former province of Natal whilst the *KwaZulu Code* applied in the former KwaZulu homeland. As a result of the two Codes THP's were allowed to practice openly provided that they were issued with licences.¹⁴⁵ In 1970 they were encouraged to form associations which could eventually assist in their registration.¹⁴⁶ This led to the establishment of small healers' associations both in the former KwaZulu homeland and in the Province of Natal. During the 1980s the Inyangas' National Association was established and recognised by the Natal and KwaZulu government as the mouthpiece of THP's in KwaZulu-Natal.¹⁴⁷

¹⁴⁰ In 1995 this figure represented only 1.4% of the THPs (herbalists) who were operating in Durban, KwaZulu-Natal. This figure increased in 1990 to 11%. See eThekweni Municipality *Traditional Healers Project* 2007 http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf. More recent statistics are not available.

¹⁴¹ Gqaleni *Incorporating Traditional Health Practitioners into Community-Based Healthcare in KwaZulu-Natal, South Africa* 111.

¹⁴² For a detailed historical discussion of the presence of Zulus in KwaZulu-Natal, see Thabethe *Laws and Regulations affecting the Powers of Chiefs in the Natal and Zululand Regions, 1875-1910: A Historical Examination*; Rautenbach 2007 *Obiter* 522.

¹⁴³ See 2.3.4.2.1.

¹⁴⁴ This Act was enacted by the former KwaZulu homeland, which had legislative powers. The administration of the Code was also assigned in 1994 to the newly formed Province of KwaZulu-Natal in terms of *Proclamation* 107 of 17 June 1994. For a discussion of the history of the Codes of Zulu Law see Kerr 1958 *Journal of African Law* 91-94; Bennett and Pillay 2003 *SAJHR* 219-222.

¹⁴⁵ See the discussion of this requirement at 3.2.1.2.

¹⁴⁶ See Devenish *Negotiating Healing* 15.

¹⁴⁷ eThekweni Municipality *Traditional Healers Project* 2007 http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf.

In 1994 the former Province of Natal and former homeland of KwaZulu were merged into one province, KwaZulu-Natal. The interim *Constitution* provided that:¹⁴⁸

... all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.

Both Codes remain on the statute book although certain sections not dealing with THPs have been found to be invalid by the courts.¹⁴⁹ The Codes stand to be repealed in their entirety by the *KwaZulu-Natal Traditional Leadership and Governance Act*,¹⁵⁰ but the date of the repeal has not yet been published. The THP Act 2007 does not mention the two Codes or their repeal, and the relationship between the THP Act 2007 (a national statute) and the two Codes (provincial statutes) is uncertain.¹⁵¹ Although both Codes stand to be repealed they remain relevant with regard to THP's in the Province of KwaZulu-Natal until the date for such repeal has been published.

3.2.1.2 The Codes of Zulu Law

Although it is unclear whether the two Codes are still applied in KwaZulu-Natal, it is interesting to draw a comparison between their wording, and to consider the implications of these differences. An important amendment to the *KwaZulu Code* was made in 1989 when the word "black" was replaced by the word "person" wherever it occurred in the *KwaZulu Code*. In addition, the definition of "black" was removed from the definitional section of the Code.¹⁵² However, the same amendment did not occur with regard to the *Natal Code* and it still contains a definition for "black" meaning "a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa".¹⁵³ Bennett and Pillay¹⁵⁴ correctly

¹⁴⁸ *Constitution of the Republic of South Africa* 200 of 1993, s 229.

¹⁴⁹ See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 96 for a discussion of the case law.

¹⁵⁰ 5 of 2005, s 53(1) which reads: (1) The repeal of the *KwaZulu Act on the Code of Zulu Law*, 1985 (Act 16 of 1985) and the *Natal Code of Zulu Law*, 1987 (*Proclamation* R151 of 1987) takes effect on a date determined by the responsible Member of the Executive Council by notice in the Gazette.

¹⁵¹ Bennett and Pillay 2003 *SAJHR* 222, 237.

¹⁵² See *KwaZulu Amendment Act on the Code of Zulu Law* 21 of 1989.

¹⁵³ Section 1 *Natal Code*.

¹⁵⁴ Bennett and Pillay 2003 *SAJHR* 223.

point out with reference to section 9 of the *Constitution* that the reference to race is a "potential violation of the constitutional guarantee of equal treatment or non-discrimination".¹⁵⁵

Other than the inclusion of the word "black" in the *Natal Code*, which no longer exists in the *KwaZulu Code*, the wording of the two Codes is generally the same. In order to illustrate the commonalities and differences between the two Codes, the different sections are quoted in table form below.

Natal Code	KwaZulu Code
Chapter 11: Medicine, herbalists and midwives.	Chapter 11: Medicine men, herbalists and midwives.

The chapter heading in the *Natal Code* has no reference to "men", but as the provisions in the rest of the chapter refer to men and women, the difference seems to be of no consequence.

Natal Code	KwaZulu Code
<p>83. Medicine men, herbalists and midwives to be licensed and renewal of licences.—</p> <p>(1) Black medicine men, herbalists and Black midwives are known as <i>inzinyanga zokwelapha</i> (those skilled in healing), <i>izinyanga zemithi</i> (herbalists) and <i>ababelethisi</i> (midwives), respectively, and any Black may practice as such for gain if duly licensed, but not otherwise.</p> <p>(2) Any Black who wishes to practise as a medicine man, herbalist or midwife, shall submit his application to the district officer</p>	<p>83. Medicine men herbalists and midwives to be licensed and renewal of licences.—</p> <p>(1) Medicine men, herbalists and midwives are known as <i>izinyanga zokwelapha</i> (those skilled in healing), <i>izinyanga zemithi</i> (herbalists) and <i>umbelitisi</i> (midwife) respectively and any person may practice as such for gain if duly licensed but not otherwise.</p> <p>(2) Notwithstanding anything to the contrary in any other law contained a licence to practice as a medicine man, herbalist or midwife shall not be issued</p>

¹⁵⁵ *Constitution of the Republic of South Africa, 1996 (the Constitution).*

Natal Code	KwaZulu Code
<p>in the form prescribed by Annexure 3 of the Code.</p> <p>(3) Notwithstanding anything to the contrary in any other law contained the district officer shall, if he is satisfied that a Black who applies in terms of subsection (1) and who is able to practice as a medicine man, herbalist or midwife, issue a licence to such Black after the authorisation of the Minister of National Health and Population Development or any person authorised thereto by him, has been obtained for the issue thereof.</p> <p>(4) A licence issued in terms of subsection (3) shall be valid for a period of one year from the date of issue: Provided that such licence may, on application within one month after the date of expiry and on payment of the prescribed fee be renewed for further periods of one year by the district officer of the district where the holder is in practice.</p> <p>(5) The provision of the Associated Health Services Profession Act, 1982 (Act No. 63 of 1982), the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974), and the Nursing Act, 1978 (Act 50 of 1978), shall not be construed as derogating from the right which a Black medicine man, herbalist or</p>	<p>unless the authority of the Minister of Health and Welfare for the issue thereof has first been had and obtained.</p> <p>(3) A licence issued in terms of subsection (2) is valid for a period of one year from the date of issue: Provided that such licence may, on application within one month after the date of expiry and on payment of the prescribed fee, be renewed for further periods of one year by the Commissioner or Magistrate of the district where the licence holder is in practice.</p> <p>(4) The provisions of the Homeopaths, Naturopaths, Osteopaths and Herbalists Act, 1974 (Act 52 of 1974), the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974) and the Nursing Act, 1978 (Act 50 of 1978), shall not be construed as derogating from the right which a medicine man, herbalist or midwife may have by virtue of any licence issued as contemplated in subsection (2).</p>

Natal Code	KwaZulu Code
<p>Black midwife may have by virtue of any licence issued in terms of subsection (3).</p> <p>(6) The Minister of National Health and Population Development or any person authorized thereto by him, may, after proper notice to the holder of a licence to practice as a Black medicine man, herbalist or Black midwife, withdraw such a licence.</p>	

Section 83 in both Codes refers to three categories of THPs (healers, herbalists and midwives) and requires them to be licensed as such. Subsection (6) of the *Natal Code* allows the Minister of Health to withdraw a licence but a similar provision is absent from the *KwaZulu Code*. It is difficult to determine if any such licences are still being issued or renewed, since the information is not available in the public domain.

Natal Code	KwaZulu Code
<p>84. Licence fee to practice as medicine man, herbalist or midwife.—</p> <p>(1) The fee payable annually for a licence referred to in section 83 (3) shall be R6 and the holder of such a licence may practise as both a Black medicine man or as a Black herbalist or as one or the other or as a Black midwife throughout the district for which such licence is issued: Provided, however, that upon payment by the holder of such licence of a fee of R2, the district officer of any other district in Natal outside KwaZulu, may, at his discretion by an appropriate endorsement on such licence extend the</p>	<p>84. Licence fees to practice as medicine man, herbalist or midwife.—</p> <p>(1) The fee payable annually for a licence to practise as a medicine man, herbalist or midwife is six rand and a person may practice as both a medicine man and a herbalist or as one or the other throughout the district for which such licence is issued: Provided however that upon payment by the holder of a licence of a further fee of two rand, the Commissioner or Magistrate of any other district in KwaZulu may, at his discretion, by an appropriate endorsement on such licence, extend the validity of such</p>

Natal Code	KwaZulu Code
<p>validity of such licence to that district and thereupon the holder may also practise in that district.</p> <p>(2) Notwithstanding the provisions of subsection (1) any person holding a licence to practise as a Black medicine man, herbalist or Black midwife throughout Natal outside KwaZulu may continue so to practise during the currency of his and her existing licence or renewal thereof.</p>	<p>licence to that district and thereupon the holder may also practise in that district.</p> <p>(2) Notwithstanding the provisions of subsection (1) any person holding a licence to practise as a medicine man, herbalist or midwife throughout KwaZulu may continue so to practice during the currency of his existing licence or any renewal thereof.</p>

Section 84 is almost verbatim in both Codes and prescribes the annual registration fee that has to be paid by the THP, and the renewal of a licence.

Natal Code	KwaZulu Code
<p>85. Licensed medicine man, herbalist or midwife may claim a fee.—</p> <p>(1) A duly licensed Black medicine man, herbalist or Black midwife may claim a fee (ulugxa) for services rendered.</p> <p>(2) No claim in respect of services rendered by a Black medicine man, herbalist or Black midwife shall be recognised in a court of law unless proof of the issue of a licence to such person be produced.</p> <p>(3) An unlicensed Black medicine man, herbalist or Black midwife may not claim any fee or reward in respect of services rendered by him or her.</p>	<p>85. Licensed medicine man, herbalist or midwife may claim a fee.—</p> <p>(1) A duly licensed medicine man, herbalist or midwife may claim a fee (ulugxa) for services rendered.</p> <p>(2) No claim in respect of services rendered by a medicine man, herbalist or midwife shall be recognised in a court of law unless proof of the issue of a licence to such person be adduced.</p> <p>(3) An unlicensed medicine man, herbalist or midwife may not claim any fee or reward in respect of services rendered by him.</p>

Section 85 in both Codes allows a licensed THP to claim a fee for services rendered and disallows the claiming of fees in the case of a lack of a licence.

Natal Code	KwaZulu Code
<p>86. Liability for negligence.—</p> <p>If a Black medicine man, herbalist or Black midwife commits gross or culpable errors or is guilty of negligence resulting in ill effects, he or she may be sued for civil damages in addition to any criminal charge which may be brought against him or her.</p>	<p>86. Liability for negligence.—</p> <p>Gross or culpable blunders or negligence entailing bad results renders a medicine man, herbalist or midwife liable to a civil action for damages apart from any criminal charge which may be laid against him.</p>

Section 86 in both Codes makes provision for civil and criminal litigation against a THP who caused damages as a result of negligence.

Natal Code	KwaZulu Code
<p>87. Contravention of section 83 an offence.—</p> <p>Any Black who practises or purports to practise as a medicine man, herbalist or midwife in contravention of the provisions of section 83 shall be guilty of an offence.</p>	<p>87. Contravention of section 87 an offence.—</p> <p>Any person who practises or purports to practise as a medicine man, herbalist or midwife in contravention of the provisions of section 87 shall be guilty of an offence.</p>

In terms of section 87 in both Codes, it is a criminal offence to practise as a THP in contravention of the Codes.

Natal Code	KwaZulu Code
<p>88. Medicine man and herbalist may not assume title of "doctor" or "chemist".—</p>	<p>88. Medicine man and herbalist may not assume title of "doctor" or "chemist".—</p>

Natal Code	KwaZulu Code
<p>(1) A Black licensed as a medicine man or herbalist may not assume the title of "doctor" or "chemist" or any other designation mentioned in the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974).</p> <p>(2) A Black licensed as a medicine man or herbalist may prescribe, deal in or sell only medicines known as "imithi yesintu" and only to a person who is his or her <i>bona fide</i> patient and on whom he or she is in personal attendance.</p> <p>(3) No licensed medicine man, herbalist or midwife may publish or cause to be published or send or deliver or transmit or cause to be sent or delivered or transmitted to any person any advertisement in any newspaper, book, pamphlet, circular, poster, letter or other document referring to or describing <i>imithi yesintu</i> or stating the fact that he is practising or is entitled to practise as a medicine man, herbalist or midwife or inviting any person to consult him or purchase his remedies or make use of his services in any way whatsoever, nor may any such advertisement be made through the medium of visual or sound process.</p> <p>(4) For the purpose of subsection (3) <i>imithi yesintu</i> means any liquid or substance which purports to have medicinal value,</p>	<p>(1) A person licensed as a medicine man or herbalist may not assume the title of "doctor" or "chemist" or any other designation mentioned in the Medical, Dental and Supplementary Health Services Professions Act, 1974 (Act 58 of 1974).</p> <p>(2) A person licensed as a medicine man or herbalist may prescribe, deal in or sell only medicines known as "imithi yesintu" and only to a person who is his <i>bona fide</i> patient and on whom he is in personal attendance.</p> <p>(3) No licensed medicine man, herbalist or midwife may publish or cause to be published or send or deliver or transmit or cause to be sent or delivered or transmitted to any person any advertisement in any newspaper, book, pamphlet, circular, poster, letter or other document referring to or describing "<i>imithi yesintu</i>" or stating the fact that he is practising or is entitled to practise as a medicine man, herbalist or midwife or inviting any person to consult him or purchase his remedies or make use of his services in any way whatsoever, nor may any such advertisement be made through the medium of visual or sound process.</p> <p>(4) For the purpose of subsection (3) "<i>imithi yesintu</i>" means any liquid or substance which purports to have medicinal value mixed, prepared or</p>

Natal Code	KwaZulu Code
<p>mixed, prepared or manufactured or purported to have been mixed, prepared or manufactured, by a Black who is not a registered chemist and druggist or a registered medical practitioner and which—</p> <p>(a) is alleged to be capable of procuring for any person wealth or success in any undertaking or occupation or which is stated to be for use as a love potion or to produce in a human being such attributes as courage, fear, despair, strength, weakness, attraction to or revulsion from another being or such like attribute, or immunity from or resistance against or susceptibility to hostile agencies, supernatural powers, witchcraft or unnatural diseases; or</p> <p>(b) is derived from or contains or consists of, or is alleged to be derived from or to contain or to consist of, the fat or any other part of the body or entrails of a human being, animal, insect, reptile or any other thing or a supernatural, legendary or mythical being.</p>	<p>manufactured or purported to have been mixed, prepared or manufactured, by a person who is not a registered chemist and druggist or a registered medical practitioner and which—</p> <p>(a) is alleged to be capable of procuring for any person wealth or success in any undertaking or occupation or which is stated to be for use as a love potion or to produce in a human being such attributes as courage, fear, despair, strength, weakness, attraction to or revulsion from another being or such like attribute, or immunity from or resistance against or susceptibility to hostile agencies, supernatural powers, witchcraft or unnatural diseases; or</p> <p>(b) is derived from or contains or consists of, or is alleged to be derived from or to contain or consist of the fat or any other part of the body or entrails of an animal, insect, reptile or any other thing or a supernatural, legendary or mythical being.</p>

Section 88 in both Codes is similar, prevents a THP from assuming the title of "doctor" or "chemist", and prevents him or her from advertising his or her business or medicine. He or she may deal in and sell only medicine known as "*imithi yesintu*". The provision also contains a description of what is meant by *imithi yesintu* in subsection (4), as it has an element of mysticism attached to it.

Natal Code	KwaZulu Code
<p>89. Fees of medicine woman or midwife belong to her.—</p> <p>The fees and earnings of a medicine woman or midwife shall belong to her and she may institute action for the recovery thereof with the assistance of her husband or guardian, if such is necessary.</p>	<p>89. Fees of medicine woman or midwife belong to her.—</p> <p>The fees and earnings of a medicine woman or midwife belong to her and she may institute action for the recovery thereof with the assistance of her husband or guardian, if such is necessary.</p>

Section 89 in both Codes protects the income of a female THP and allows her to institute an action for the recovery of her fees, albeit with the assistance of her husband or guardian.

Natal Code	KwaZulu Code
<p>90. Offences and penalties.—</p> <p>(1) Any Black who contravenes or fails to comply with any provision of this Chapter shall be guilty of an offence, and liable on conviction to a fine not exceeding two hundred rand or in default of payment to imprisonment for a period not exceeding six months or to both such fine and imprisonment.</p> <p>(2) The court convicting any Black of an offence under subsection (1) or under the Suppression of Witchcraft Act, 1957 (Act 3 of 1957), may, in addition to any other penalty which such court may impose, cancel any licence held by such Black to practise as a medicine man, herbalist or midwife.</p>	<p>90. Offences and penalties.—</p> <p>(1) Any person who contravenes or fails to comply with any provision of this Chapter shall be guilty of an offence, and liable on conviction to a fine not exceeding two hundred rand or in default of payment to imprisonment for a period not exceeding six months or to both such fine and imprisonment.</p> <p>(2) The court convicting any person of an offence under subsection (1) or under the Suppression of Witchcraft Act, 1957 (Act 3 of 1957), may, in addition to any other penalty which such court may impose, cancel any licence held by such person to practise as a medicine man, herbalist or midwife.</p>

Section 90 regulates offences and penalties and is similar in both Codes. It includes offences under the *Witchcraft Suppression Act*.¹⁵⁶

There are minor differences between the *Natal Code* and the *KwaZulu Code*, which is understandable considering the relationship between the two territories. In apartheid days, KwaZulu was in effect the northern part of Natal, and was separately administered. Section 84(2) of the *Natal Code* indicates that a practitioner may practice throughout Natal, while the *KwaZulu Code* indicates that a practitioner may practice only in KwaZulu.

The question remains how the *Natal Code* and *KwaZulu Code* should be used and interpreted in the light of the THP Act 2007. Which Code is regarded as superior and which should be implemented? Botha¹⁵⁷ indicates that acts of parliament, provincial ordinances and legislation of the former self-governing territories or homelands can be classified as original legislation. However, both the *Natal Code* and the *KwaZulu Code* have been assigned to the province of KwaZulu-Natal and, being provincial legislation, they are now subordinate to national legislation.¹⁵⁸ The *Natal Code* and the *KwaZulu Code* are thus outranked by the THP Act 2007. However, the co-existence of a provincial and a national act that regulate THPs is confusing and it is important that the situation be cleared up as soon as possible. The KZN Council is still in existence and its role within the confines of the THP Act 2007 and the Interim Traditional Health Practitioners Council of South Africa has to be addressed as a matter of urgency.

3.2.1.3 KwaZulu-Natal Traditional Healers Council

In 1995 an umbrella body for THP's was established in Durban after deliberations with THP's practicing in KwaZulu-Natal. The purpose was to establish a unified body that could help in the management of the THP-sector, which was extremely

¹⁵⁶ 3 of 1957.

¹⁵⁷ Botha *Statutory Interpretation: An Introduction for Students* 8-9.

¹⁵⁸ Du Plessis *Re-Interpretation of Statutes* 35; Ss 146(2) and (3) *Constitution*.

fragmented and difficult to manage.¹⁵⁹ In 1996, in collaboration with the City Health Department of Durban, a steering committee for THPs to act as a mouthpiece for THP in KwaZulu-Natal was established.¹⁶⁰ The committee eventually developed into the KZN Council, which was divided into eleven regions. The eThekweni Municipality made up one of the regions.¹⁶¹ The development of a KZN Council was an attempt to reassure THP's of their future involvement in the health sector in KwaZulu-Natal. According to the president of the KZN Council, the main functions of the Council are to unite, educate, control and regulate THP's and to intercept THP's practising without required qualifications.¹⁶²

3.2.1.4 Traditional Healers Project

In 2007 the eThekweni Municipality launched a Traditional Healers Project in order to develop and strengthen relationships between THP's and the public health facilities.¹⁶³ This Project indicated the Department of Health's aim to formulate and implement a strategy which upgrades health standards among THP's to ensure that a high standard of hygiene and safety is upheld. The Department of Health is actively involved in the recognition, regulation and training of THP's. This Project has had many positive outcomes, one of which is the training of THP's in primary healthcare.¹⁶⁴

¹⁵⁹ eThekweni Municipality *Traditional Healers Project* 2007 http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf.

¹⁶⁰ Hereafter known as the Umbrella Body. See Devenish *Negotiating Healing* 48, see Nesvåg *D'Urbanised Tradition: The Restructuring and Development of the Muthi Trade in Durban* 39, also see eThekweni Municipality 2007 http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf.

¹⁶¹ eThekweni Municipality 2007 http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf.

¹⁶² See Devenish *Negotiating Healing* 60-61.

¹⁶³ See Gqaleni *et al* 2007 *South African Health Review* 182; also see eThekweni Municipality *Traditional Healers Project* 2007 http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf.

¹⁶⁴ eThekweni Municipality *Traditional Healers Project* 2007 http://www.cityofdurban.co.za/Documents/City_Government/Media_Publications/Traditional%20Healers.pdf.

3.2.2 National legal framework

On 30 May 1994 the government introduced a National Health Plan for South Africa, which led to THP's being escalated to a national level of importance.¹⁶⁵ The Health Plan indicated that:¹⁶⁶

Traditional healing will become an integral and recognised part of health care in South Africa. Consumers will be allowed to choose whom to consult for their health care, and legislation will be changed to facilitate controlled use of traditional practitioners.

The National Health Plan listed its principal tenets relating to the function and status of THP's as follows:¹⁶⁷

People have the right of access to traditional practitioners as part of their cultural heritage and belief system.

There are numerous advantages in cooperation and liaison between allopathic and traditional health practitioners and interaction will thus be fostered.

Traditional practitioners often have greater accessibility and acceptability than the modern health sector and this will be used to promote good health for all.

Traditional practitioners will be controlled by a recognised and accepted body so that harmful practices can be eliminated, and the profession promoted.

Mutual education between the two health systems will take place so that all practitioners can be enriched in their health practices.

In addition, it explained the mechanisms to be used in order to ensure that THP's take their rightful place in the new constitutional dispensation. These mechanisms include the registration of THP's, negotiations between government and THP's,

¹⁶⁵ See Gqaleni *et al* 2007 *South African Health Review* 177, also see "A Health Plan for South Africa" 1994

https://www.sahistory.org.za/sites/default/files/a_national_health_plan_for_south_africa.pdf.

¹⁶⁶ See Gqaleni *et al* 2007 *South African Health Review* 177, also see "A Health Plan for South Africa" 1994 https://www.sahistory.org.za/sites/default/files/a_national_health_plan_for_south_africa.pdf.

¹⁶⁷ See Gqaleni *et al* 2007 *South African Health Review* 177, also see "A Health Plan for South Africa" 1994 https://www.sahistory.org.za/sites/default/files/a_national_health_plan_for_south_africa.pdf.

legislation, training programmes, the establishment of a regulatory body, and interactions between providers of traditional medicine at all levels.

The regulation of THPs remains on the agenda of government, a fact which has given rise to a number of bills and legislation. The discussion that follows is a chronologically organised discussion of all the relevant events since the 1990's.

3.2.2.1 *Traditional Health Practitioners Bill 2003* (THP Bill 2003)

In 1997 the Department of Health acknowledged the importance of THPs in the broader health sector in its *White Paper for the Transformation of the Health System in South Africa*, and indicated that criteria outlining standards of practice and a code of conduct should be developed to ease their registration and transition into the health sector.¹⁶⁸ Legislative steps to accomplish this commenced in 1997 with public hearings taking place in the provinces. Eventually the National Council of Provinces¹⁶⁹ received reports from seven provinces, which it took into consideration before submitting a report to the National Assembly Portfolio Committee on Health.¹⁷⁰ The Committee eventually produced the THP Bill 2003,¹⁷¹ which marked the beginning of the legislative processes to pass an Act regulating the affairs of THPs.¹⁷²

On 11 April 2003 the THP Bill 2003 was published in the Government Gazette.¹⁷³ The Bill attempted to regulate an unregulated profession.¹⁷⁴ As stated in the explanatory summary accompanying the THP Bill 2003, THP's want to be formally recognised and they want to work with Government to obtain such recognition.¹⁷⁵

¹⁶⁸ The Department of Health's *White Paper for the Transformation of the Health System in South Africa* was published in 1997. Although the importance of traditional healing was recognised, the view was held that it should not be put on the agenda yet. The *White Paper* is accessible at <https://www.gov.za/documents/transformation-health-system-white-paper>.

¹⁶⁹ Hereafter known as the NCOP.

¹⁷⁰ Rautenbach 2007 *Obiter* 524-525.

¹⁷¹ B66-2003 (hereafter the THP Bill), also see Gqaleni *et al* 2007 *South African Health Review* 177.

¹⁷² See Devenish *Negotiating healing* 59.

¹⁷³ GN 979 in GG 24751 of 14 April 2003.

¹⁷⁴ THP Bill 2003 25.

¹⁷⁵ THP Bill 2003 24.

3.2.2.2 *Traditional Health Practitioners Act 35 of 2004 (THP Act 2004)*

The THP Bill 2003 was transformed into the THP Act 2004 on 7 February 2005 when it was signed by the President, and it commenced partly on 13 January 2006.¹⁷⁶ The enactment of the THP Act 2004 was to provide a regulatory framework to ensure that traditional health care services are provided in an efficient manner, that the services are safe and of a qualitative standard.¹⁷⁷ The purposes of the THP Act 2004 were to:

- (a) establish the Interim Traditional Health Practitioners Council of South Africa;
- (b) provide for the registration, training and practices of traditional health practitioners in the Republic; and
- (c) serve and protect the interests of members of the public who use the services of traditional health practitioners.¹⁷⁸

On 21 December 2005 the Minister of Health published two notices regarding the appointment of members of the Interim Traditional Health Practitioners Council. The first notice invited people to submit comments on the proposed regulations pertaining to the appointment of Council members and the second invited nominations for candidates to be appointed.¹⁷⁹ The THP Act 2004 and its envisaged regulations were short-lived, however. On 17 August 2006 the Act was declared to be unconstitutional in *Doctors for Life International v Speaker of the National Assembly*.¹⁸⁰ A constitutional complaint was brought directly to the Constitutional Court by Doctors for Life International, who argued that the NCOP, whilst passing

¹⁷⁶ Sections 7, 10, 11(3), 12-15, 47 48 and 50 came into operation on 13 January 2006. The date of commencement of the other provisions of the Act was never published because the Act was declared unconstitutional before it was done.

¹⁷⁷ See Gqaleni et al 2007 *South African Health Review* 177.

¹⁷⁸ Section 2 THP Act 2004.

¹⁷⁹ Rautenbach 2007 *Obiter* 528 points out that: "The latter notice seems to be premature, because the relevant provisions pertaining to the appointment of Council members only came into operation on 13 January 2006 and the date for commentary to the proposed regulations pertaining to the procedure of appointment only lapses in March 2006."

¹⁸⁰ *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC). Hereafter the *Doctors for Life* – case. For a discussion of the *Doctors for Life*-case, see Rautenbach 2007 *Obiter* 532-534. See Tshela 2015 *AJIKS* 44.

specific health bills, never held proper public hearings or invited written submissions in regard to the bills, as required by law.¹⁸¹ In terms of section 72:¹⁸²

- (1) The National Council of Provinces must—
 - (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
 - (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
 - (i) to regulate public access, including access of the media, to the Council and its committees; and
 - (ii) to provide for the searching of any person, and where appropriate, the refusal of entry to, or removal of, any person.
- (2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

Thus, section 72 makes it clear that the NCOP must provide for public involvement when it decides to introduce new legislation to Parliament.¹⁸³ It seems that interested parties are also entitled to a reasonable opportunity to participate in the legislative process in a manner which may influence legislative decisions. It was stated that the THP Bill 2003, which was later transformed into the THP Act 2004, was subject to intense public interest from the start.¹⁸⁴

The Court concluded that public hearings were the method of choice when it came to public involvement in the legislative process.¹⁸⁵ Six of the nine provinces had not

¹⁸¹ *Doctors for Life*-case para 5; Le Roux–Kemp 2010 *CILSA* 277; Rautenbach 2007 *Obiter* 521.

¹⁸² Section 72 *Constitution*.

¹⁸³ For example, the THP Bill.

¹⁸⁴ *Doctors for Life*-case p1457.

¹⁸⁵ *Doctors for Life*-case p1458.

held public hearings, nor were written representations invited, and because of the above-mentioned shortcomings, Ngcobo J concluded that:

The NCOP did not comply with its obligation to facilitate public involvement in relation to the THP Bill as required by section 72(1)(a).¹⁸⁶

Because of the Courts' conclusion, the THP Act 2004 was declared unconstitutional and no longer valid on 17 August 2006. The judgment was followed by a proper public participation process required in terms of section 72¹⁸⁷ which resulted in the publication of the THP Bill 2007.

3.2.2.3 *Traditional Health Practitioners Bill* (THP Bill 2007)

The governments' response to the declaration of unconstitutionality of the THP Act 2004 was to publish the THP Bill 2007.¹⁸⁸ It followed the proper route, commencing with public hearings and then progressing through all the legislative processes before it was signed by the President on 6 January 2008.¹⁸⁹

3.2.2.4 *Traditional Health Practitioners Act 22 of 2007* (THP Act 2007)

The THP Act 2007 is almost a verbatim duplicate of the THP Act 2004, and the sections commenced on different dates.¹⁹⁰ As noted above, sections dealing with the definitions (section 1), the purpose of the Act (section 2) and the application of the Act (section 3) were some of the last sections to commence. There is no obvious reason for this, and it was probably just an oversight from the beginning.¹⁹¹

¹⁸⁶ *Doctors for Life*-case p1458.

¹⁸⁷ Section 72 *Constitution*.

¹⁸⁸ B20-2007.

¹⁸⁹ The history of the Bill can be followed at <https://pmg.org.za/bill/462/>.

¹⁹⁰ See 2.3.4.2.2 where the dates are set out. The reason for the different dates of commencement is that certain implementation mechanisms had to be put in place for the THP Act 2007 to be effective. See Le Roux–Kemp 2010 *CILSA* 277; Gqaleni *et al* 2007 *South African Health Review* 177; Tshehla 2015 *AJIKS* 44.

¹⁹¹ See 2.3.4.2.2.

3.2.2.4.1 Definitions

The THP Act 2007 is the current legislation regulating traditional health practice in South Africa.

Section 1, which commenced on 1 October 2018, contains important definitions relevant to THP's. Some of the definitions were discussed in Chapter 2 above, namely "traditional health practitioner" (including "diviner", "herbalist", "traditional birth attendant" and "traditional surgeon"), "traditional health practice", "traditional philosophy", and "traditional medicine".

As far as I know, this is the first Act to attempt to define the African world view and values by linking traditional healing and traditional African religion.¹⁹²

As already alluded to, for centuries African culture made provision for traditional healing, for a person to receive a calling from the ancestors, which indicated that their life long goal should be to pursue traditional healing and to make use of traditional African medicines and various other healing methods. These methods of healing were never formally documented and were passed down from the "teacher" (*uthisha*) to the "student" (*umfundi*). This could also be directly linked to the right to culture¹⁹³ as indicated in the *Constitution*. With traditional African religion and traditional healing being linked through traditional philosophy, everything is intertwined with traditional African culture. The THP Act 2007 is thus a response to the public outcry for the recognition of THP's and their practices.

3.2.2.4.2 The purpose of the THP Act 2007, and its application

The Act sets out its purposes in section 2.¹⁹⁴ In short, the first purpose of the THP Act 2007 is to establish the Interim Traditional Health Practitioners Council of South Africa.¹⁹⁵ The second objective is to facilitate the registration, training and practice

¹⁹² As discussed at 2.3.4.2.2.

¹⁹³ Section 30 *Constitution*.

¹⁹⁴ For a short discussion of the purposes of the Act, see Street 2016 *SAMJ* 325; Rautenbach 2010 *THRHR* 15.

¹⁹⁵ Hereafter the Council.

of traditional healers,¹⁹⁶ and the third is to serve and protect the interests of members of the public who use the services of THP's.¹⁹⁷

The last purpose (above) is of particular importance. Members of the public who are patients of THP's are particularly vulnerable. What do they do in cases of maltreatment? The THP Act 2007 was clearly implemented to protect them and to serve their interests. It should be noted that the THP Act 2007 does not explicitly provide for the protection of the interests of THP's, but only makes provision for their registration, training and practice. The overarching aim of the THP Act 2007 is thus to regulate the practice, activities and behaviour of traditional health practitioners in South Africa whilst protecting the interest of the public/patients.¹⁹⁸

Section 3 of the Act applies to "traditional health practice" and to "traditional health practitioners and students who are engaged in or learning traditional health practice."¹⁹⁹ As a traditional health practitioner is someone who is "registered" in terms of the Act, it implies that the Act might not be applicable to someone who is not yet registered as such. Since all indications are that no one has yet been registered in terms of the Act, this suggests that the Act is not yet applicable to anyone.

3.2.2.4.3 Interim Traditional Health Practitioners Council

An important purpose of the Act is the establishment of an Interim Traditional Health Practitioners Council (the Council). The Council was established in terms of section 4 of the Act. Besides the fact that the Council was inaugurated in February 2013, very little is known about the doings of the Council in the public domain.²⁰⁰ The term of office of the Council is three years, but this period may be extended for a maximum period of 24 months by the Minister of Health.²⁰¹ On 29 January 2019 the

¹⁹⁶ The independent traditional healers' organisations fulfil this function. Rautenbach 2008 *Emory International Law Review* 123. There appears to be a difficulty in determining the training of traditional healers.

¹⁹⁷ Section 2 THP Act 2007.

¹⁹⁸ Also see Louw and Duvenhage 2016 *AMJ* 437.

¹⁹⁹ Section 3 THP Act 2007.

²⁰⁰ See Tshehla 2015 *SAMJ* 279.

²⁰¹ Section 4(3) THP Act 2007.

Minister of Health published an invitation for nominations of members of the Council to serve for another three-year term. The closing date for the nominations was 15 February 2019.²⁰² The outcome of the nomination process is not in the public domain, however. According to the Interim Registrar, Mr KP Mokwena, who was cited in a newspaper article, the Council is not yet fully operational:²⁰³

Kgereshi P Mokwena, the Interim Registrar of the Interim Traditional Health Practitioners Council of South Africa, says that he is currently the council's only employee, and after promising to clarify the council's role with regards to regulation, he reverted to saying that it was against the department's communication protocol for him to respond directly, and that all communications would have to go through Popo Maja, the head of communications for the National Department of Health. At the time of publication, Maja had not responded to our emails and telephone calls to enquire about the role the National Department of Health plays in the regulation of traditional health practitioners. According to Maseko, from the THO [Traditional Healers Organisation], as things stand, 'there is effectively no formal regulatory body in South Africa that understands traditional medicine'.

The Council consists of a maximum of 22 members appointed by the Minister of Health, which implies that it could also be functional if it has fewer than this number of members.²⁰⁴ The following categories of persons must be included in the membership of the council:

- a) A THP, who must also act as the chairperson of the Council. The appointment will be done by the Minister of Health.
- b) A vice-chairperson, who will be elected by the members from members amongst them.
- c) Nine THP's, one from each province. They must have practical experience of more than five years.
- d) An employee in the service of the Department of Health.
- e) Someone who is knowledgeable of the law.

²⁰² See GN 66 in GG 42195 of 29 January 2019.

²⁰³ Tyilo *Maverick Life* (21 February 2019).

²⁰⁴ Section 7 THP Act 2007.

- f) A medical practitioner who is a member of the Health Professions Council of South Africa.
- g) A pharmacist who is a member of the South African Pharmacy Council.
- h) Three community members.
- i) A representative from each category of health practitioners defined in the Act.²⁰⁵

Section 5 of the THP Act 2007 deals with the objectives of the Council,²⁰⁶ which are to promote public health awareness and maintain appropriate ethical and professional standards;²⁰⁷ to ensure good quality of health care;²⁰⁸ to protect and serve the interests of members of the public;²⁰⁹ to promote and develop interest in the practice and contact between the fields of training;²¹⁰ to promote, compile and maintain a professional code of conduct; and to ensure that the practice complies with universal health care norms.²¹¹

Section 6 lists 11 functions that the Council "may" perform²¹² and 14 functions which it "must" perform.²¹³

Discretionary functions (section 6(1) of the THP Act 2007)

The discretionary functions of the Council are supplementary to the performance of its day-to-day and obligatory functions. In terms of section 6(1) of the THP Act 2007, the Council may enquire into and investigate complaints against registered THPs;²¹⁴ supply guidelines regarding the traditional health practice;²¹⁵ hire, buy and

²⁰⁵ See the discussion of the categories at 2.3.4.2.2.

²⁰⁶ Le Roux–Kemp 2010 *CILSA* 279-280; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2; Tshehla 2015 *AJIKS* 44.

²⁰⁷ Section 5(a) and (d) THP Act 2007.

²⁰⁸ Section 5(b) THP Act 2007.

²⁰⁹ Section 5(c) THP Act 2007.

²¹⁰ Section 5(e) and (f) THP Act 2007.

²¹¹ Section 5(g) and (h) THP Act 2007.

²¹² See s 6(1) THP Act 2007.

²¹³ See s 6(2) THP Act 2007.

²¹⁴ Section 6(1)(a) THP Act 2007; Rautenbach 2007 *Obiter* 530.

²¹⁵ Section 6(1)(b) THP Act 2007.

acquire movable property or proprietary rights, administer a trust and receive donations;²¹⁶ make rules in terms of the Act;²¹⁷ scrutinise a matter affecting the registration of THP's;²¹⁸ delegate any power or duty;²¹⁹ let copies of the registers be printed and published;²²⁰ acquire information from a traditional health practitioner;²²¹ determine the minimum requirements for the training of THP's;²²² appoint staff;²²³ and do those things which are necessary to perform the full functions of the Council.²²⁴

Obligatory functions (section 6(2) of the THP Act 2007)

The obligatory functions are those that the Council is compelled to perform. They generally have to do with the relationship between the Council and the Minister of Health, and the registration of THP's. According to section 6(2) of the THP Act 2007 the Council must perform its duties in the interest of the public, and must promote and regulate cooperation and contact between THP's and other health professionals;²²⁵ must implement health policies with regards to traditional health practice;²²⁶ must advise the Minister in regard to matters falling under the scope of the Act and traditional health care;²²⁷ must communicate any information which is important to the public to the Minister of Health;²²⁸ must consult with authorities on matters regarding traditional health;²²⁹ must determine policy and decide on matters such as fees in consultation with the Minister of Health;²³⁰ must exercise authority in terms of the training and conduct of its members;²³¹ must regulate and

²¹⁶ Section 6(1)(c) THP Act 2007.
²¹⁷ Section 6(1)(d) THP Act 2007.
²¹⁸ Section 6(1)(e) THP Act 2007.
²¹⁹ Section 6(1)(f) THP Act 2007.
²²⁰ Section 6(1)(g) THP Act 2007.
²²¹ Section 6(1)(h) THP Act 2007.
²²² Section 6(1)(i) THP Act 2007.
²²³ Section 6(1)(j) THP Act 2007.
²²⁴ Section 6(1)(k) THP Act 2007.
²²⁵ Section 6(2)(a) THP Act 2007.
²²⁶ Section 6(2)(b) THP Act 2007.
²²⁷ Section 6(2)(c) THP Act 2007.
²²⁸ Section 6(2)(d) THP Act 2007.
²²⁹ Section 6(2)(e) THP Act 2007.
²³⁰ Section 6(2)(f) THP Act 2007.
²³¹ Section 6(2)(g) THP Act 2007.

control traditional health practice in consultation with the Minister of Health;²³² must establish registers for THP's;²³³ must register THP's in accordance with the requirements of the Act;²³⁴ must remove from or restore a person's name to the registry depending on the circumstances;²³⁵ must obtain the prescribed fee from a traditional health practitioner;²³⁶ must suspend or cancel the registration of a traditional health practitioner depending on the circumstances;²³⁷ and must publish information in regard to the functions, objects and operations of the Council.²³⁸

Certain persons may not be appointed as members of the Council. They include non-citizens, a convicted felon, someone guilty of misconduct, a mentally incapable person, an unrehabilitated insolvent, someone who has been disqualified to practise as a THP, and anyone who is a member of the National Assembly, a provincial legislative body, the National Council of Provinces or a municipal council.²³⁹

Section 8 covers the circumstances in which a member of the Council must vacate his or her office. A member loses his or her right to remain in office in the following circumstances: he or she ceases to be a South African citizen;²⁴⁰ he or she is diagnosed with a mental illness;²⁴¹ he or she has been convicted of an offence and received a prison sentence;²⁴² he or she has been disqualified to practise as a THP;²⁴³ he or she no longer holds the qualification necessary for the position;²⁴⁴ he or she resigns in writing to the Minister of Health;²⁴⁵ he or she is absent for two consecutive meetings without permission from the Minister of Health;²⁴⁶ he or she

²³² Section 6(2)(h) THP Act 2007.

²³³ Section 6(2)(i) THP Act 2007.

²³⁴ Section 6(2)(j) THP Act 2007.

²³⁵ Section 6(2)(k) THP Act 2007.

²³⁶ Section 6(2)(l) THP Act 2007.

²³⁷ Section 6(2)(m) THP Act 2007.

²³⁸ Section 6(2)(n) THP Act 2007.

²³⁹ See ss 9(a)-(g) THP Act 2007.

²⁴⁰ Section 8(1)(a) THP Act 2007.

²⁴¹ Section 8(1)(b) THP Act 2007.

²⁴² Section 8(1)(c) THP Act 2007.

²⁴³ Section 8(1)(d) THP Act 2007.

²⁴⁴ Section 8(1)(e) THP Act 2007.

²⁴⁵ Section 8(1)(f) THP Act 2007.

²⁴⁶ Section 8(1)(g) THP Act 2007.

has been sequestered;²⁴⁷ he or she became impaired and not able to carry out his or her duties as a member;²⁴⁸ his or her membership has been terminated as a result of misconduct;²⁴⁹ and his or her period for membership has expired and was not renewed.²⁵⁰

If a member vacates his or her office before the term of office has expired, another person must be appointed for the remainder of the member's term.²⁵¹

Section 10 regulates the office of the chairperson and vice-chairperson, which includes their functions and their participation at meetings, and the circumstances where he or she is not able to fulfil his or her functions. The meetings of the Council are regulated in terms of section 11, and the rules for the executive committee and other committees are set out in sections 13 and 14 respectively. The remuneration and allowances of the members and committees must be determined by the Minister of Health in consultation with the Minister of Finance.²⁵² The funds of the Council consist of money appropriated by parliament, fees raised by the Registrar, penalties, and any other fee contemplated in terms of the Act, and a special bank account must be opened to operate the Council's funds.²⁵³

The Registrar, which position is discussed in the next section, is the accounting officer of the Council, must ensure that proper records are kept, and that regular statements are submitted to the Council and the Minister of Health.²⁵⁴

3.2.2.4.4 The Registrar and registration of THPs

The THP Act 2007 makes provision for the appointment of a Registrar by the Minister of Health in consultation with the Council.²⁵⁵ The functions of the Registrar, as set

²⁴⁷ Section 8(1)(h) THP Act 2007.

²⁴⁸ Section 8(1)(i) THP Act 2007.

²⁴⁹ Section 8(1)(j) THP Act 2007.

²⁵⁰ Section 8(1)(k) THP Act 2007.

²⁵¹ Section 8(2) THP Act 2007.

²⁵² Section 15 THP Act 2007.

²⁵³ Section 16 THP Act 2007.

²⁵⁴ Section 17 THP Act 2007.

²⁵⁵ Section 18 THP Act 2007.

out in section 19, include secretarial and accounting duties,²⁵⁶ including the upkeep of registers.²⁵⁷ The Registrar has the power to delegate his or her functions to staff members but remains the responsible person.²⁵⁸ The Registrar is thus an important figure in realising the aims and objectives of the Council.²⁵⁹

The registration of THP's is one of the most important functions of the Registrar. No person is allowed to practise traditional healing in South Africa unless they are registered in terms of the THP Act 2007.²⁶⁰ Sections 21 to 27 of the THP Act 2007 regulate the registration of THPs. These sections will eventually be supplemented by the *Traditional Health Practitioners Regulations* (the *Regulations*), published in 2015.²⁶¹ However, the regulations are still under discussion and are not in operation yet, which complicates the registration requirements of THP's.²⁶²

The THP Act 2007 stipulates that anyone who wishes to practice as a traditional healer, or a student must apply to the Registrar in order to register as one.²⁶³ The application for registration must be accompanied by:²⁶⁴

- a) proof that the applicant is a South African citizen;
- b) character references by unrelated people;
- c) proof of qualifications;²⁶⁵
- d) the prescribed registration fee;²⁶⁶ and

²⁵⁶ Section 19(1)(a) THP Act 2007.

²⁵⁷ Section 19(1)(b)-(c) THP Act 2007.

²⁵⁸ See ss 19(2) for the power to delegate and s 20 for the appointment of staff.

²⁵⁹ Louw and Duvenhage 2016 *AMJ* 437.

²⁶⁰ Section 21(1) THP Act 2007.

²⁶¹ R1051 in GG 39358 dated 3 November 2015. Hereafter the *THP Regulations* 2015.

²⁶² The regulations have been rejected by some organisations. See *The Traditional and Natural Health Alliance* 2016 <https://www.tnha.co.za/traditional-healers-tnha-reject-draft-regulations-for-the-registration-of-traditional-health-practitioners/>.

²⁶³ Section 21(2)(a) THP Act 2007.

²⁶⁴ Section 21(2)(b)(i) – (v) THP Act 2007.

²⁶⁵ Section 22 THP Act 2007.

²⁶⁶ The fee for registration as a traditional health practitioner is stipulated in the regulations as being R200. 00. See Table of Fees in the Schedule to *THP Regulations* 2015. However, the regulations are not in operation yet.

e) any other information deemed necessary by the Council.

These requirements might be read with the provisions of the *Regulations* which are not in operation yet.²⁶⁷ They might seem straightforward but could prove to be an insurmountable hurdle for some THP's. Firstly, proof of one's citizenship could be problematic in the rural areas where THP's are active. In general, a birth certificate or identity document serves as proof of citizenship, but such documentation often does not exist and is difficult to obtain.²⁶⁸ Secondly, the stipulation that the applicant is to acquire a testimonial from an unrelated person seems to be quite vague and imprecise. The regulations do not expand further on what is meant by "character references" except that they are requesting that the contact particulars of three unrelated people be provided in the application for registration.²⁶⁹

The biggest hurdle, however, is the third requirement, which requires "proof of qualifications". In terms of section 22(1) of the THP Act 2007, the Minister of Health, "on the recommendation of the Council" may prescribe the qualifications needed from an "accredited institution, educational authority or any other authority" in South Africa. It appears that the Minister did indeed prescribe the type of qualifications and training needed in more detail in the *THP Regulations 2015*. Two situations seem to prevail. The registration of a THP (divination, herbalism, birth attendant and surgeon) and the registration of a student-THP. The former applicant needs to apply on a THP 1 form and the latter on a THP 2 form. In the case of a THP, he or she must comply with the requirements in section 21 of the THP Act 2007,²⁷⁰ but in the case of a student THP, additional requirements set out in the *THP Regulations 2015* have to be met.²⁷¹

²⁶⁷ The *THP Regulations* were published for comments on 3 November 2015. Interested persons had until 4 February 2016 to submit comments. The date was later extended to 4 April 2016.

²⁶⁸ Brandsoy 2019 *Mail and Guardian* <https://mg.co.za/article/2010-12-13-they-were-never-born-on-paper>. In rural areas, a birth might not be documented with a birth certificate or such documents can be lost or destroyed. In addition, licensing departments are sometimes located far away from certain rural areas.

²⁶⁹ See Form THPA 1 in the Schedule to *Traditional Health Practitioners Regulations 2015*.

²⁷⁰ Clause 2 *THP Regulations 2015*.

²⁷¹ See clause 4 *THP Regulations 2015*. In addition to the requirements of a THP, the student must submit a letter from his or her accredited tutor or institution and proof of ABET Level 1 or equivalent.

The impression is created that two sets of requirements exist, depending on the question whether you are a THP or a student THP. However, a careful reading of the rest of the provisions in the THP suggests otherwise. In the case of a THP, he or she must provide proof of qualifications. A proof of qualification, in all likelihood, can be obtained only when the THP completes the training required in terms of clause 3 of the *THP Regulations 2015*, which reads:

The following categories of traditional health practice must undergo education or training at any accredited training institution or educational authority or with any traditional tutor:

- (a) Divination;
- (b) Herbalism;
- (c) Traditional birth attendant's practice; and
- (d) Traditional surgeon (circumcision) practice.

The implication of this provision is that all THP's must undergo education or training at an accredited institution or from an accredited tutor. The moment they enrol for training, however, they become students who must comply with the requirements set out in clause 4 of the *THP Regulations 2015*, which entails that they must produce a document to prove that they have Adult Basic Education and Training certificate level 1 (ABET level 1) or an equivalent.²⁷² Street and Rautenbach list the following challenges with regard to training:²⁷³

- The practicalities of how, when or where training will take place are vague, and there are currently no accredited training institutions.
- A prospective trainer will have pay R500 in order to register as a trainer. S/he would also need to provide a list of his/her qualifications, details of the course modules and practical skill that would be acquired by the trainee, and the duration of the training. However, those skills and qualifications are undefined.

²⁷² According to clause 5 of the *THP Regulations 2015* the ABET Level 1 certificate is the minimum standard of education. For more information on adult basic education and learning, see <http://www.dct.co.za/abet-training.html>.

²⁷³ Street and Rautenbach 2016 <https://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

- Trainers need to provide copies of their teaching or learning materials, which might have implications for intellectual property rights.
- Students need ABET level 1 (basic numeracy and literacy skills), which is not always obtainable in the rural areas.
- The age restriction of at least 18 years for student diviners and herbalists and 25 years for birth attendants and surgeons could be problematic because many THPs start to practise at a young age, especially if they have received a calling from the ancestors.
- The onus will be on trainers to ensure that their students are registered with the Council. At the end of their training, students need to submit a logbook to the Council providing details of the observations and procedures they undertook during their training.

The Traditional and Natural Health Alliance released a statement in which it rejected the *THP Regulations 2015* for a number of reasons, which can be summarised as follows:²⁷⁴

- The regulations were not drafted by traditional healers but western-trained people.
- The regulations were published in English only whilst many THP's have a low literacy rate which would influence their understanding of the regulations.
- The government did not involve the approximately 220 traditional healers' organisations in the drafting of the regulations.
- The ABET level 1 training is an unfair requirement considering that many THP's have been practising without this training for many years.
- The age requirement is unfair because many THPs commence their training at ages as young as 12 years.
- Training based on western principles should not be a barrier to entry into the "multidimensional World of the Spirit".
- Training over a long period of time based on western principles would undermine the "unique cultural primary care role" of THP's.

Despite the criticisms raised against the requirements for registration, it is evident that there should be some form of registration. It would be difficult to formulate a

²⁷⁴ *The Traditional and Natural Health Alliance* 2016 <https://www.tnha.co.za/traditional-healers-tnha-reject-draft-regulations-for-the-registration-of-traditional-health-practitioners/>.

set of rules that would satisfy all, but at least these rules are a start. It is quite possible that one would look back a few years from now to realise that the hurdles have all been overcome. Until such a time comes, it is important to find a workable solution which would not prevent the institutionalisation of THP's and would provide them and their clients with legal protection.

The fourth requirement, namely the registration fee, could also be problematic. The regulations should therefore provide for a procedure to dispose of the fee under certain circumstances.

Fortunately, the *THP Regulations 2015* make provision for circumstances under which an applicant may be exempted from any of the requirements when a THP is regarded as such by the community. Obviously, care should be taken not to abuse this concession.

The Registrar is the person who must be satisfied that the applicant is qualified to become a traditional healer.²⁷⁵ The Registrar may refuse an application for registration if he or she is not satisfied that the requirements have been met, but must then refer the application to the Council for its decision if the applicant requests it.²⁷⁶

The removal from or restoration of a person's name to the register is regulated in detail in section 23 of the THP Act 2007. The instructions to remove a person from the list must be given by the Council, which will do it in the following situations:²⁷⁷ death; the THP's permanently leaving the Republic of South Africa; the THP's absence for more than three years; failing to pay the prescribed fee; failing to notify the Registrar of a change of residential or postal address within six months after the change; upon request by a THP that his or her name be removed;²⁷⁸ when a practitioner has been found guilty of improper or disgraceful conduct; when a THP's

²⁷⁵ Section 21(5) THP Act 2007.

²⁷⁶ Section 21(4) THP Act 2007.

²⁷⁷ Section 23(1)(a) - (l) THP Act 2007.

²⁷⁸ Upon which an affidavit of affirmation must be lodged with the Registrar to confirm that no disciplinary or criminal proceedings are pending or are likely to be instituted against the applicable practitioner.

name has been removed from the register, roll or record of any training institution with whom he or she was registered in obtaining his or her qualification; when a THP has been registered through error or fraud; failing to furnish the Registrar with the information required in terms of the THP Act 2007; when the registration of a practitioner was made in error through fraudulent misrepresentation or the concealment of material facts or information; and when a practitioner is found to be mentally impaired.

For the removal to take place, the Registrar must send a notice of removal to the THP via registered mail.²⁷⁹ From the date upon which the Registrar sent the notice to the THP, the registration certificate issued to the practitioner will be deemed invalid and he or she will have to cease to practise as a traditional healer until his or her name can be restored to the register under the conditions prescribed by section 23(4).²⁸⁰

A certificate must be issued upon the completion of registration. A duplicate can be issued by the Registrar if the original was destroyed or lost by the THP, and that registration certificate can be issued under certain conditions.²⁸¹ Sections 25 and 26 deal with the custody and publication of registers, and provide that the register be deemed as *prima facie* proof in all legal proceedings.²⁸² Section 27 of the Act specifically deals with appeals and reads that a person may lodge an appeal to the Council if aggrieved by the decision of the Registrar. If unsatisfied with the decision of the Council, he or she may appeal to the High Court.²⁸³

3.2.2.4.5 Disciplinary inquiries and investigations

Chapter 4 of the THP Act 2007 deals with disciplinary procedures and investigations by the Council. Any person who was maltreated by a THP may lay a complaint with

²⁷⁹ Section 23(2) THP Act 2007.

²⁸⁰ Section 23(3)(a) – (b) and s 23(4) THP Act 2007.

²⁸¹ Section 24 THP Act 2007.

²⁸² Section 25 and 26 THP Act 2007.

²⁸³ Section 27 THP Act 2007. The appeal must be lodged within 30 days from the date of the decision.

the Council, which will be investigated in accordance with specific rules and procedures.²⁸⁴

If a person is found guilty of improper or disgraceful conduct a wide range of penalties may be imposed, such as suspension, removal from the registry, a fine, or community service.²⁸⁵ Section 36 of the THP Act 2007 deals with the effect of suspension and removal from the register and rules that a person who has been suspended or whose name has been removed from the register will be disqualified from continuing his or her profession and the issued registration certificate will be deemed invalid.²⁸⁶

A disciplinary procedure, according to the THP Act 2007, can be instituted only against a registered practitioner, which means that a traditional health practitioner who is not registered could incur criminal liability.²⁸⁷ In terms of section 40 the Council must make rules to specify the acts or omissions in terms of which the Council may take disciplinary steps. It is unknown if such rules exist since they are not in the public domain.

Section 37 of the THP Act 2007 deals with the procedures to be followed by the Council in the case where a THP has been found guilty in a court of law and the Council is of the opinion that the offence constitutes unprofessional conduct.²⁸⁸ Section 41 also empowers the Council to hold inquiries in respect of the mental capacity of a person registered as a THP in terms of the Act. Considering that traditional healing is based on African world views and values which have been misunderstood in the past, this function of the Council should be performed with the necessary caution.

²⁸⁴ Sections 29-34 THP Act 2007; Rautenbach 2007 *Obiter* 530. Ss 30 to 34 deal with inquiries into charges of misconduct, the manner in which certain investigations may be instituted, the entering and search of premises, attachment and removal of documents, the report by an investigating officer and the procedure at inquiry and relevant matters.

²⁸⁵ Section 35 THP Act 2007; Rautenbach 2008 *Emory International Law Review* 125.

²⁸⁶ Section 36 THP Act 2007.

²⁸⁷ Rautenbach 2008 *Emory International Law Review* 125.

²⁸⁸ See ss 38 and 39 THP Act 2007 dealing with false evidence and the limitation of liability respectively.

3.2.2.4.6 Further provisions

THP's are entitled to charge a fee for their healing services. A THP registered in terms of the THP Act 2007 must inform his or her patient or the patient's guardian that fees will be charged for the services rendered.²⁸⁹ This ensures that THP's do not charge outrageous fees for their healing services.²⁹⁰ The latter section deals further with the payment of fees, claims for payments and various other aspects such as that the practitioner must supply the patient with a detailed account.²⁹¹

Section 43 briefly deals with false representations, false entries in the register and impersonation.²⁹² Section 44 stipulates that if a person renders traditional health services but is not registered in terms of the THP Act 2007, no remuneration can be recovered by the unregistered person.²⁹³ Sections 45 and 46 discuss the investigation of matters relating to the teaching or training of certain classes of persons and exemptions.²⁹⁴

Lastly, section 47 confirms that the Minister may make regulations for a variety of circumstances, such as the appointment of members of the Council, the minimum standards of education and training, the fees payable, and "generally any matter which it is necessary to prescribe in order to effect the smooth implementation of the Act." As explained by a former Minister of Health, the whole purpose of the regulation of THP's is to be able to distinguish between a *bona fide* traditional health practitioner and a fake.²⁹⁵ It can be presumed that regulation is in the interest of the public, and to protect the public against an impostor claiming to be a traditional health practitioner.

²⁸⁹ Section 42 THP Act 2007.

²⁹⁰ Rautenbach 2008 *Emory International Law Review* 126.

²⁹¹ Section 42(2)–(8) THP Act 2007. Rautenbach 2008 *Emory International Law Review* 126. The Act is also indicative of the fact that a traditional healer's account may be charged against his patient's medical aid. Rautenbach 2007 *Obiter* 531.

²⁹² Section 43 THP Act 2007.

²⁹³ Section 44 THP Act 2007.

²⁹⁴ Sections 45 and 46 THP Act 2007.

²⁹⁵ Speech by the Minister of Health at the Official Opening of the Conference on Traditional Medicine, Kopaneng, 30 March 2004, <http://www.polity.org.za/article/m-tshabalalamsimang-conference-on-traditional-medicine-opening-30032004-03-30>.

3.2.3 Other legislation relevant to THPs

3.2.3.1 The *Witchcraft Suppression Act* 3 of 1957

Neither the THP Act 2007 nor its regulations contains a reference to the *Witchcraft Suppression Act*, but as this Act has in the past had a link to THP's, it is evident that the Act should be relevant to the discussion.²⁹⁶ The *Witchcraft Suppression Act* commenced on 22 February 1957, its purpose being to deal with harmful practices associated with witchcraft.²⁹⁷ In terms of section 1, the following acts culminate in offences which are punishable by a fine or imprisonment.²⁹⁸

- a) Identifying someone as a witch: If a person credits another person as having supernatural powers to cause any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard.²⁹⁹
- b) Using someone to find a witch: If a person uses a witch-doctor, witch-finder or any other person to name or indicate any person as a wizard.³⁰⁰
- c) Prohibition on spreading knowledge of witchcraft: If a person professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft.³⁰¹

²⁹⁶ As pointed out in the Ralushai Commission of Inquiry Report of the *Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* (1996) paras 9 and 11, THP's are sometimes responsible for providing deadly poison with which witchcraft is practised, and for the "sniffing" out of witches.

²⁹⁷ South African Law Reform Commission *Discussion Document 139 on Project 135* 1. The closing date for comments was 30 April 2016. It integrated existing law relating to witchcraft and increased the punishment of offences related to witchcraft. Horrell 1957 *A Survey of Race Relations in South Africa, 1956-1957* 84-85.

²⁹⁸ Also see South African Law Reform Commission *Discussion Document 139 on Project 135* 63-71.

²⁹⁹ Section 1(a) *Witchcraft Suppression Act* 3 of 1957; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2.

³⁰⁰ Section 1(c) *Witchcraft Suppression Act* 3 of 1957; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2.

³⁰¹ Section 1(d) *Witchcraft Suppression Act* 3 of 1957; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2.

- d) Prohibition on witchcraft: If a person on the advice of a witchdoctor takes steps to injure or damage any person or thing.³⁰²
- e) Prohibition on witchcraft and fortune telling to make money: If a person, for gain, pretends to have the ability to tell fortunes or to discover where and in what manner anything supposed to have been stolen or lost may be found.³⁰³
- f) A witch causing harm to another witch: If a person claims to have a supernatural ability to cause the death of, injury or grief to, disease in, damage to or disappearance of any person or thing.³⁰⁴

During the 1990's there was a drastic spike in witchcraft-related crimes, especially in the Northern Province,³⁰⁵ which led to a Commission of Enquiry into Witchcraft Violence and Ritual Murder, also known as the Ralushai Commission.³⁰⁶ The Commission came to the conclusion that the *Witchcraft Suppression Act* led to unjust results by not punishing those who practise witchcraft but those who name others that practise it.³⁰⁷ It recommended amendments to the Act which could rectify the situation, but the amendments never happened.

On 7 July 2008 the *Witchcraft Suppression Act* surfaced again when the South African Law Reform Commission (SALRC) received a request from the South African Pagan Council (SAPC) and the THO to investigate its constitutionality. The SAPC argued that the practice of witchcraft is part of their beliefs and religion and that there should not be legislation regulating it; instead, its misuse should be dealt with in terms of the common law.³⁰⁸ The THO, however, argued that the Act should be

³⁰² Section 1(e) *Witchcraft Suppression Act* 3 of 1957; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2.

³⁰³ Section 1(f) *Witchcraft Suppression Act* 3 of 1957; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2.

³⁰⁴ Section 1(b) *Witchcraft Suppression Act* 3 of 1957; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2.

³⁰⁵ Rautenbach 2007 *Obiter* 523.

³⁰⁶ Rautenbach 2007 *Obiter* 523. Ralushai Commission of Inquiry Report of the *Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* (1996).

³⁰⁷ Ralushai Commission of Inquiry Report of the *Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* (1996) 54.

³⁰⁸ South African Law Reform Commission *Issue Paper 29 on Project 135* 1.

replaced by another Act which contains a definition of witchcraft and could address the problem of violence associated with witchcraft.³⁰⁹ During the course of the deliberations the problem of muti killings came up, and it was decided that it would be included in the investigation.³¹⁰ The first public document emanating from the investigation was *Issue Paper 29*, which was published on 9 September 2014. *Issue Paper 29* did not contain any recommendations but contained the legal framework, and elicited responses from the public.³¹¹ The general opinion of the Commission was that the *Witchcraft Suppression Act* did not *per se* prohibit the practice of witchcraft but only "conduct that leads to harm as a result of advice given by people who claim to have knowledge of witchcraft or the use of supernatural powers."³¹²

In 2016 the SALRC published the *Discussion Paper 139*.³¹³ The discussion paper dealt with the responses to *Issue Paper 29* and gave a detailed overview of the practice of witchcraft and its regulation in South Africa and other jurisdictions. The Commission agreed with the contentions of the SAPC that the *Witchcraft Suppression Act* violated some of the rights of Pagans and traditional healers who "claim that activities associated with witchcraft are part of their religion and cultural beliefs" but that it is important to remember that a *prima facie* infringement of a right does not lead to unconstitutionality. It could be that the infringement is justifiable in terms of section 36 of the *Constitution*.³¹⁴ After analysing the six offences (a to f above), the Commission came to the conclusion that most of the offences are too broadly described and are potentially unconstitutional without just cause, which means that they should be reconsidered and reworded to bring them in line with the *Constitution*.³¹⁵ In order to do that, the Commission recommended

³⁰⁹ South African Law Reform Commission *Issue Paper 29 on Project 135* 2.

³¹⁰ South African Law Reform Commission *Issue Paper 29 on Project 135* 8.

³¹¹ The closing date for comments was 31 October 2014.

³¹² South African Law Reform Commission *Issue Paper 29 on Project 135* 23-24.

³¹³ South African Law Reform Commission *Discussion Document 139 on Project 135* 1. The closing date for comments was 30 April 2016.

³¹⁴ South African Law Reform Commission *Discussion Document 139 on Project 135* 62.

³¹⁵ South African Law Reform Commission *Discussion Document 139 on Project 135* 63-71.

the repeal of the *Witchcraft Suppression Act* and that it be replaced with an Act that complies with the dictates of the *Constitution*.³¹⁶ As explained by the Commission:³¹⁷

In the African context and among indigenous groups, it is a fallacy to deny that the belief in witchcraft and witchcraft practices that are harmful to others still exist. What is required is a balance between acknowledging traditional belief in witchcraft on the one hand, and on the other hand passing laws that regulate harmful practices associated with witchcraft.

In line with its findings and recommendations, the SALRC proposed a *Prohibition of Harmful Practices Associated with Witchcraft Beliefs Bill*.³¹⁸ However, to date the Bill has not been introduced into parliament. The SALRC is yet to produce a final report, and it seems as if the investigation has been stalled. The *Mpumalanga Witchcraft Suppression Bill*,³¹⁹ which was announced by the office of the Premier of Mpumalanga Province in 2007, is also currently on ice.³²⁰

3.2.3.2 The *Criminal Law Amendment Act* 105 of 1997

The *Criminal Law Amendment Act*³²¹ regulates aspects of minimum sentencing. It is also not directly applicable to THP's but the fact that two murder scenarios that could implicate THP's were included by means of a 2007 amendment illustrates the relevance of certain provisions of the Act to THP's.

Section 1 of the Act makes provision for a discretionary minimum sentence to life imprisonment for certain types of murders, which include the following:³²²

- (e) the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim;
or
- (f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1 (a) to (e) of the *Witchcraft Suppression Act, 1957* (Act 3 of 1957).

³¹⁶ South African Law Reform Commission *Discussion Document 139 on Project 135* 85.

³¹⁷ South African Law Reform Commission *Discussion Document 139 on Project 135* 83.

³¹⁸ South African Law Reform Commission *Discussion Document 139 on Project 135* 92.

³¹⁹ Mpumalanga Witchcraft Suppression Bill 2007.

³²⁰ According to the South African Law Reform Commission *Issue Paper 29 on Project 135* 25 it is not clear why the Mpumalanga Province sought to enact separate legislation, but a reason could be because of mounting frustrations caused by the delays in amending the national legislation.

³²¹ *Criminal Law Amendment Act* 105 of 1997.

³²² See Schedule 2, Part I (e) and (f) *Criminal Law Amendment Act* 105 of 1997.

With these amendments, government hopes to eliminate crimes related to muti murders and witch hunts.³²³

3.2.3.3 The *Human Tissue Act* 65 of 1983 and the *National Health Act* 61 of 2003

The *Human Tissue Act*³²⁴ used to prohibit the possession of human tissue; however, the Act has been repealed in its totality by the *National Health Act*.³²⁵ At least two provisions of the *National Health Act* would be relevant to THPs.

Firstly, payment in connection with the acquisition or supply of human tissue except in accordance with the provisions of the Act is prohibited.³²⁶ If any person buys or prescribes human tissue, he or she will be convicted of an offence and can receive a fine and/or imprisonment of up to five years regardless of whether he or she claims to be a THP.

Secondly, human organs obtained from a deceased person may also be used only in accordance with the Act and if a person contravenes this provision, he or she might be convicted of an offence and might be sentenced to a fine and/or imprisonment of up to five years.³²⁷

Over the years, media reports have cast THP's in a negative light by associating them with the use of human body parts in traditional medicine. Nonetheless, the majority of THP's actively aver that human body parts are not used in traditional medicine.

3.2.3.4 The *Draft Policy on the Customary Practice of Initiation* and the *Draft Customary Initiation Bill*

In 2015 the Department of Traditional Affairs indicated its intention to introduce legislation pertaining to customary initiations by publishing a *Draft Policy on the*

³²³ South African Law Reform Commission *Issue Paper 29 on Project 135 25*.

³²⁴ 65 of 1983.

³²⁵ 61 of 2003.

³²⁶ Section 60 *National Health Act*.

³²⁷ Section 61 *National Health Act*.

Customary Practice of Initiation in South Africa (the Policy).³²⁸ The Policy explained initiation to be:

... a sacred and respected customary practice used as a rite of passage to adulthood. It partakes partly of a civil and partly of a religious character and is practised in respect of both males and females. As a civil rite, it introduces initiates into the state of adulthood; as a religious rite it imposes upon them the responsibility of conforming to all the rites and ceremonies of their system of belief. The initiation rite is therefore an embodiment of ideals, values and aspirations of both the individual and the community, reflected in the transfer of certain knowledge and practices during the rite.

Over the years initiation schools have received a bad name because male initiates have died while partaking in the initiation practices.³²⁹ According to the Policy, the deaths result from the conduct in unregulated initiation schools of circumcision³³⁰ practices which are not performed in terms of existing laws.³³¹ Section 12(8) of the *Children's Act*³³² prohibits the circumcision of a male child under the age of 16 except when:

- (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or
- (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner.

In the case where the male child is older than 16, circumcision may be performed only if three requirements have been met:³³³ Firstly, the child must have given his consent in a prescribed manner. Secondly, he must have received proper

³²⁸ GN 471 in GG 38814 dated 22 May 2015.

³²⁹ Dlulane 2018 *Eyewitness News* <https://ewn.co.za/2018/12/17/initiation-death-toll-across-sa-now-at-21>.

³³⁰ In terms of s 1 of the *Children's Act* 38 of 2005 "circumcision, in relation to a female child, means the removal of the clitoris by any means", while "genital mutilation, in relation to a female child, means the partial or complete removal of any part of the genitals, and includes the circumcision of female children." S 12(3) prohibits the circumcision or genital mutilation of female children. In the case of female children, however, the contentious issue is virginity testing. S 12(4) and (5) prohibits the virginity testing of children under the age of 16 and requires the permission of the child in the case where she is older than 16.

³³¹ See Policy paras 4.1 and 4.2.

³³² 38 of 2005. The *Children's Act* must be read with the relevant provisions in the *National Health Act*, such as s 43 dealing with initiation schools and ceremonies.

³³³ Section 12(9) *Children's Act*.

counselling, and lastly, the circumcision must be done in a prescribed manner. Furthermore, every male child has the right to refuse circumcision.³³⁴

The objectives of the Policy can be summarised as follows:³³⁵

- to protect, promote and regulate initiation by providing norms and standards and a controlled environment for it to take place;
- to prevent the abuse of initiates;
- to enable traditional leadership to take responsibility for the practice of initiation within its communities;
- to ensure the accountability of all role-players;
- to arrange for the coordination, monitoring and evaluation of initiation activities in partnership with traditional leadership;
- to prevent the commercial misuse of initiation practices for private gain;
- to ensure that the initiation process contributes to the character building of the people in a constructive way; and
- to protect the customary practice of initiation within the framework of the Constitution.

The Policy was followed by the *Draft Customary Initiation Bill* (the *Initiation Bill*) that was published for comment on 14 July 2017, and the closing date for comments was 14 August 2017. Public hearings commenced in 2018, but to date the Bill has not been introduced to parliament.³³⁶ The Bill has a direct bearing on traditional surgeons, one of the categories of THPs, and it will have to be followed by them if it is eventually transformed into legislation. The main objectives of the Initiation Bill are similar to those in the Policy³³⁷ and will apply to initiation practices that involve male and female initiates, all initiation schools and all role-players involved in initiation practices.³³⁸ The envisaged role-players include government, houses of traditional leaders, traditional leaders, principals and care-givers, parents or legal

³³⁴ Section 12(10) *Children's Act*.

³³⁵ See para 5 of the Policy.

³³⁶ GN 528 in GG 40978 dated 14 July 2017. The latest version is B-2018, see <https://pmg.org.za/bill/771/>.

³³⁷ Clause 2(2) *Initiation Bill*.

³³⁸ Clause 2(1) *Initiation Bill*.

guardians, traditional surgeons, medical practitioners, the police service and the national prosecuting authority.³³⁹

Initiation schools will be required to register,³⁴⁰ and they will be allowed to perform the initiations only during school holidays.³⁴¹ They are not allowed to force or coerce anyone into attending the initiation school or to undergo initiation practices, and they must ensure that all the requirements have been adhered to.³⁴² An important aspect of the Bill is the establishment of a National Initiation Oversight Committee to monitor the implementation of the Act (when adopted),³⁴³ and also the establishment of Provincial Initiation Coordinating Committees in the provinces where a provincial house of traditional leaders has been established.³⁴⁴ The Provincial Committees will be responsible for the coordination of all the initiation schools and practices within their provinces.

The initiatives taken with regard to initiation practices are quite ambitious and would in all likelihood take considerable time, commitment and funds to realise. However, considering the impact of unregulated initiation practices in South Africa, this is probably the only option. Only time will tell if this is going to be successful in curbing the human rights violations taking place in some initiation schools.

3.2.3.5 National Health Insurance (NHI)

Another development which will most certainly also have an impact on THP's is the NHI, which has been on the agenda of government for some time. In December 2015 the Department of Health published the controversial *White Paper on National Health Insurance* (the NHI White Paper).³⁴⁵ The NHI White Paper announced the plans of government to establish the NHI which will entail a "massive reorganisation

³³⁹ See Chapter 3 *Initiation Bill*.

³⁴⁰ Clauses 15 and 26 *Initiation Bill*.

³⁴¹ Clause 27 *Initiation Bill*.

³⁴² Clause 28 *Initiation Bill* contains detailed requirements and procedures that must be followed. Also see clauses 29, 30 and 31, which deal with discipline, nourishment and the procedure to be followed if one of the initiates dies.

³⁴³ Chapter 2 Part 1 *Initiation Bill*.

³⁴⁴ Chapter 2 Part 2 *Initiation Bill*.

³⁴⁵ GN 1230 in GG 39506 of 11 December 2015.

of the current health care system".³⁴⁶ The Department explained this move as follows:³⁴⁷

NHI implementation is consistent with the Constitutional commitment for the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to health care services including reproductive health care. Progressively realising this right will contribute to a healthy population that benefits the entire nation. NHI is a policy shift that will contribute towards poverty reduction and addressing the inequalities inherited from the past.

In June 2017 the Minister of Health announced the establishment of universal health coverage in its *National Health Insurance Policy towards Universal Health Coverage* (the NHI Policy).³⁴⁸ In order to achieve the introduction of the NHI, a number of acts need to be changed. These include the THP Act 2007.³⁴⁹ The exact changes have not been announced but considering that the current legislative position of THPs has not been ironed out, this will not be an easy endeavour.

The publication of the NHI Policy was followed by the publication of the *National Health Insurance Bill* (NHI Bill) for comment in June 2018.³⁵⁰ The Bill does not say much about THP's but indicates that they "may" be appointed as members of the stakeholder advisory committee.³⁵¹

The specifics of how THP's are going to be included, if at all, have not been announced or dealt with in the existing documents. Given the fact that THP's serve a large majority of the people, they cannot be ignored.

3.3 Conclusion

The WHO has been at the forefront of the push to establish regulating legislation for THP's. There were numerous attempts to regulate THP's at an early stage, even prior to the establishment of the *Natal Code* and the *KwaZulu Code*, in the early

³⁴⁶ Para 1.1(1) NHI White Paper.

³⁴⁷ Para 1.1(3) NHI White Paper.

³⁴⁸ GN 672 in GG 40955 dated 30 June 2017.

³⁴⁹ See para 332(v) of the NHI Policy.

³⁵⁰ GN 635 in GG 41725 of 21 June 2018.

³⁵¹ See clause 27(1)(a)(v) of the NHI Bill.

1980's. Some regulating legislation and policy might be forgotten but still play a crucial role in the regulation of THP's throughout South Africa.

With the enactment of the THP Act 2004, THP's finally felt that they had received the recognition they so rightfully deserved in an the Act that seemed to cover all the bases, but the NCOP failed in one of its basic duties: to involve the public in the process of legislation. The declaration of the THP Act 2004 as unconstitutional was a huge disappointment for the THP's, for they now had to wait even longer for official, legislated recognition. The reasons for the delays by the legislator and the government in processing the Act remain unclear.

It does not matter if South Africa has legislation regulating THP's. What truly matters is if the legislation can be implemented effectively in order to promote the safe use of traditional practices, practitioners and medicines.

With the THP Act 2007 in place for more than 12 years, one would expect to see an effort to implement it efficiently for the effective promotion of the safe use of traditional health care practices and practitioners, but it seems that little has been done to implement the Act fully. At first glance it seems as if the legislature has thought everything through, but when it is examined closely the Act seems to be lacking in many respects. The THP Act 2007 was clearly designed to protect the public and does not explicitly provide for the protection of THP's. It thus provides only for the regulation of THP practice, activities and behaviour, whilst protecting the public in the process.

The manner in which the Act will be implemented is unclear the *THP Regulations* have not been enacted yet, which is also problematic. Further issues include how training for THP's will take place, who the trainers will be, where it will take place, and how it will be possible to distinguish between a *bona fide* traditional healer and a person posing as one. Lastly, the Traditional Health Practitioners Council has yet to be established.

There also seem to be other conflicting Acts, such as the *Witchcraft Suppression Act*, stalling the proper implementation of the THP Act 2007, whereas the *Criminal*

Law Amendment Act and the *National Health Act* lend additional and substantial protection to individuals and communities making use of the services of THP's. The *Draft Customary Initiation Bill* and *Draft Policy on the Customary Practice of Initiation* provide protection in further respects.

Many questions have been asked by many authors. Some have even proposed solutions where others have critiqued. The shortcomings of the THP Act will thus be discussed in the following chapter, specifically focussing on the critique and solutions given by writers, a short discussion of case law and the real-life issues of THP's in South Africa, followed by a conclusion.

Chapter 4 Critique, opinions and conclusion

4.1 Introduction

The THP Act 2007 has been subjected to a lot of criticism. Various writers and academics have criticised the THP Act of 2004 and its replacement, the THP Act 2007 and its regulations. In this chapter, the critique and opinions of various writers and organisations will be discussed in regard to the final THP Act 2007. Various instances of case law and some real-life issues of THP's in South Africa will also be discussed, in order to reach a final conclusion.

4.2 International critique

4.2.1 *Doctors for Life: Sound science within the medical profession*

Doctors for Life International is a non-governmental and non-profit organisation consisting of medical doctors, specialists, dentists, veterinary surgeons and professors.³⁵² One of the organisation's main principles, to be emphasised, is that there must be sound science within the medical profession.³⁵³

Not only the way the THP Act of 2004 was passed was a concern in the *Doctors for Life*-case. An additional issue was raised, namely that certain medicines prescribed by the "spirits" clearly do not fall within the organisation's ideas of what sound science is in the medical profession.³⁵⁴

³⁵² See <https://www.doctorsforlife.co.za/about>; Cook 2009 *Journal of the National Medical Association* 263; <https://www.givengain.com/c/dfi/about>; http://doctors-hospitals-medical-cape-town-southafrica.blaauwberg.net/south_african_medical_associations/south_african_medical_associations/doctors_for_life_international_south_africa.

³⁵³ See <https://www.doctorsforlife.co.za/about>; <https://www.givengain.com/c/dfi/about>; http://doctors-hospitals-medical-cape-town-southafrica.blaauwberg.net/south_african_medical_associations/south_african_medical_associations/doctors_for_life_international_south_africa. See Mbatha *et al* 2012 *SAMJ* 130.

³⁵⁴ Rautenbach 2008 *Emory International Law Review* 123; Doctors for Life International *Alternative Medicine* <https://www.doctorsforlife.co.za/alternative-medicine/>; Cook 2009 *Journal of the National Medical Association* 263; Rautenbach 2007 *Obiter* 528; Mbatha *et al* 2012 *SAMJ* 130.

Doctors for Life also indicated that they "are of the opinion that any form of medicine that is not based on empirical evidence is potentially (and ultimately) harmful to patients in need."³⁵⁵ According to research conducted by van Rooyen, any reasonable medical practitioner or average person on the street would label it as "dangerous", "life threatening" or even "fatal" to prescribe medicines given by possible invalidated sources to patients with mild or even serious illnesses.³⁵⁶ It is uncertain whether patients would be protected if THP's could prescribe and dispense medicines that are not proven to be scientifically safe.³⁵⁷ This would defeat the purpose of public protection, which is clearly one of the purposes of the THP Act 2007.³⁵⁸

It appears that Doctors for Life will oppose any legislation pertaining to the recognition of THP's and traditional medicines, at least until or when the latter's safety has been addressed. The organisation provides a few reasons as to the deterioration of the health care system: ³⁵⁹

- a) the survival rate of mother and child during childbirth is in the decline;
- b) avoidable complications in patients are caused; and
- c) traditional medicines have not been scientifically tested.

THP's continue prescribing traditional herbal medications in spite of the fact that they have not been scientifically tested and proven to be safe.³⁶⁰ Lastly, Doctors for Life claim that upon the registration of THP's the South African economy will be

³⁵⁵ See <https://www.doctorsforlife.co.za>.

³⁵⁶ Van Rooyen *et al* 2015 *Curationis* 4. Also see Davey 2017 *The Guardian* <https://www.theguardian.com/australia-news/2017/feb/06/herbal-medicines-can-have-dangerous-side-effects-research-reveals>.

³⁵⁷ Rautenbach 2008 *Emory International Law Review* 123; Doctors for Life International *Alternative Medicine* <https://www.doctorsforlife.co.za/alternative-medicine/>.

³⁵⁸ Section 2(c) THP Act 2007 indicates that one of the purposes of the Act is to serve and protect the interests of members of the public who use the services of traditional health practitioners.

³⁵⁹ Cook 2009 *Journal of the National Medical Association* 263; Rautenbach 2007 *Obiter* 528.

³⁶⁰ Cook 2009 *Journal of the National Medical Association* 264.

greatly affected, for employees will be able to take sick leave as requested by the "spirits".³⁶¹

Louw and Duvenhage are two scholars who are also highly critical of traditional practices. They declare that:³⁶²

The South African traditional healers' present practices are based on pre-modern diagnoses and treatments. Their unrestricted and unregulated practice activities as part of the South African medical fraternity are based on the supernatural and on witchcraft. As such, it endangers private and public health. They are not medical practitioners and are not trained in elementary medical sciences, but they offer at times harmful healthcare services.

Louw and Duvenhage are of the opinion that THPs are there only for the spiritual care of the members of the community. According to them THPs are not medical practitioners trained in medical sciences. This opinion clearly correlates with that given by Doctors for Life. If THP's are not trained in the medical sciences, they will not be able to prescribe any traditional medicines or provide other health care services. Whether these criticisms can be overcome by appropriate training and the offering of appropriate qualifications as set out in the THP Act 2007 and its regulations remains to be seen.

4.3 National critique

4.3.1 Medical certificates: the employers' uncertainty

4.3.1.1 Introduction

In the state healthcare system, a person visits a healthcare facility for a medical diagnosis. Thereafter, the patient will be informed whether they s/he is able or unable to perform his or her work duties. The health care practitioner would then issue a medical certificate³⁶³ indicating that the patient's illness or injury renders him/her incapable of completing his/her work duties. The employee presents the medical certificate to his/her employer, which will grant the employee entitled sick

³⁶¹ Cook 2009 *Journal of the National Medical Association* 263. This topic is discussed at 4.3.1.

³⁶² Louw and Duvenhage 2016 *AMJ* 486.

³⁶³ The terms "medical certificates" and "sick notes" are used interchangeably throughout this chapter.

leave, which is required in order for the employee to have his/her health restored. This is set out in Section 22 of the *Basic Conditions of Employment Act*.³⁶⁴

Employers thus rely not only on the validity of medical certificates but also on the qualifications of medical practitioners in order to diagnose a patient and establish that the said patient is unable to perform his/her work duties based on illness or injury. Employers seem to be sceptical when it comes to medical certificates issued by THP's. Their training and qualifications are unknown and a diagnosis is sometimes based on intangible forces, which could possibly be to the detriment of an employers' business. This could be misused by employees and could possibly affect the economy.³⁶⁵

This issue was the subject of a well-known case which will be discussed in the next section.

4.3.1.2 *Kievits Kroon Country Estate v Mmoledi*

*Kievits Kroon Country Estate v Mmoledi*³⁶⁶ rapidly changed the outlook when it came to the acceptance of sick notes by employers. Kievits Kroon Country Estate (Pty) Ltd, which was the appellant in this case, ran a leisure resort and therewith provided conference facilities. The respondent, Ms. Johanna Mmoledi, was in the employment of the appellant from 21 June 1999. From 1 March 2005 she held the position of *chef de partie*.³⁶⁷

The respondent approached the Executive Chef and requested that she attend a THP's training course, which would take place in the afternoons. She asked to work only morning shifts, for she did not want the course to affect her work. A meeting was arranged with the relevant parties, where the above-mentioned was addressed.

³⁶⁴ *Basic Conditions of Employment Act* 75 of 1997. Hereafter known as the BCEA. Discussed at 4.3.1.3.

³⁶⁵ See Claassen and Du Toit (date unknown) <https://labourguide.co.za/most-recent/1148-medical-certificates-what-constitutes-a-valid-medical-certificate>; Tshehla 2015 *SAMJ* 280.

³⁶⁶ *Kievits Kroon Country Estate v Mmoledi* 2014 1 SA 585 (SCA), hereinafter referred to as *Kievits Kroon*. Also see Tshehla 2015 *SAMJ* 280.

³⁶⁷ *Kievits Kroon* paras 1 and 3. See Phooko and Mnyongani 2013 *SA Merc LJ* 607; Phooko and Mnyongani 2015 *SA Merc LJ* 164.

The parties agreed that the respondent had to attend her course, which led to her schedule being changed in order to accommodate the respondent's request.³⁶⁸

As the respondent's course progressed, she approached the Executive Chef once more to request that she attend the course full-time and be absent from work for one whole month without any payment. The Executive Chef referred the matter to the human resources manager (HR Manager).³⁶⁹

The respondent did not have any leave days available, therefore she could not take leave in order to attend her course full time. The appellant agreed to give the respondent one week of absence from her work, which was clearly not enough time.³⁷⁰ The respondent proceeded to leave two letters on the HR Manager's desk and took her leave of absence.³⁷¹ The respondent was required to return to work on 6 June 2007, but failed to do so.³⁷²

The first letter received by the HR Manager indicated that the respondent was being treated by a THP, who also wrote the letters, for the premonitions of her ancestors, and that she could resume work on 8 July 2007. The second letter requested the appellant to give the respondent leave until 8 July 2007 in order for her to complete her THP's training course.³⁷³

The HR Manager informed the respondent that these documents had not done anything to change her current position and that a disciplinary hearing would follow if she did not report to work.³⁷⁴ As already stated, a disciplinary hearing did follow and several charges were put to the respondent.³⁷⁵ The chairperson at the disciplinary hearing concluded that, in addition to other compelling reasons, the

³⁶⁸ *Kievits Kroon* para 4. Also see Phooko and Mnyongani 2013 *SA Merc LJ* 607, 164;

³⁶⁹ *Kievits Kroon* para 5. See Phooko and Mnyongani 2013 *SA Merc LJ* 607, 164.

³⁷⁰ *Kievits Kroon* para 6. See Phooko and Mnyongani 2013 *SA Merc LJ* 607, 165.

³⁷¹ *Kievits Kroon* paras 7-8. See Phooko and Mnyongani 2013 *SA Merc LJ* 607, 165.

³⁷² *Kievits Kroon* para 6. See Phooko and Mnyongani 2013 *SA Merc LJ* 607, 165.

³⁷³ *Kievits Kroon* para 8. See Phooko and Mnyongani 2013 *SA Merc LJ* 608, 165.

³⁷⁴ *Kievits Kroon* paras 7 and 9. See Phooko and Mnyongani 2013 *SA Merc LJ* 608, 165.

³⁷⁵ The charges were: non-compliance with established procedures, gross insubordination, acting to the detriment of the company and being absent from work for more than three days without permission.

respondent had not produced a medical certificate in accordance with the BCEA,³⁷⁶ and she was dismissed.³⁷⁷ She was not satisfied with the decision and began with legal proceedings against her dismissal. The Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court and Labour Appeal Court all found in favour of the respondent,³⁷⁸ and the matter was finally decided in the Supreme Court of Appeal.

The Supreme Court of Appeal emphasised that the respondent would have been entitled to sick leave if she had produced a medical certificate. According to the HR Manager, the sick note given by the respondent did not constitute proof of illness. The Court did not agree and stated that the appellant did not even attempt to understand the note given by the THP and if the appellant had made an attempt to understand, the respondent's request might have been approved.³⁷⁹

The Court indicated that a subjective test should be implemented when it came to sick notes issued by THP's.³⁸⁰ An objective criterion would not be sufficient in the circumstances. Finally, the Court stood by the decision that medical certificates issued by THPs must still be accepted by employers measured to the above standard.

This viewpoint of the Court regarding the standard of medical certificates from THP's has been criticised.³⁸¹ According to Bellengere and Spurrett, THP's are not registered with a professional council and there are also no established training requirements.³⁸² There is thus no regulation of sick notes and there are no consequences if boundaries are overstepped.³⁸³ The critique seems to be unfair. In practice sick notes are rarely followed up by employers. They are generally accepted as being true accounts of the employee's medical condition. Only in circumstances

³⁷⁶ BCEA S 22.

³⁷⁷ *Kievits Kroon* paras 11-12. See Phooko and Mnyongani 2013 *SA Merc LJ* 608, 165.

³⁷⁸ *Kievits Kroon* para 1.

³⁷⁹ *Kievits Kroon* para 30. See Phooko and Mnyongani 2015 *SA Merc LJ* 170.

³⁸⁰ *Kievits Kroon* para 27.

³⁸¹ Bellengere and Spurrett 2015 *SALJ* 488-489.

³⁸² Bellengere and Spurrett 2015 *SALJ* 488.

³⁸³ Bellengere and Spurrett 2015 *SALJ* 489.

where the employer distrusts the *bona fides* of the employee will the truthfulness of the sick note be questioned. This can also be done in the case of sick notes from THP's.

4.3.1.3 *Basic Conditions of Employment Act 75 of 1997 (BCEA)*

According to the BCEA, an employee is entitled to sick leave subject to certain requirements and conditions.³⁸⁴ In order to qualify for the sick leave as indicated above, an employee must present a medical certificate to his/her employer.³⁸⁵ There are certain requirements with which a medical certificate must comply. According to section 23 of the BCEA, the medical certificate must be signed and issued by a medical practitioner or any other person who is certified to diagnose and treat patients, but who is registered at a professional council.³⁸⁶ First of all, the medical certificate must indicate that the employee cannot complete his/her daily work tasks because of illness or injury.³⁸⁷ Secondly, the medical certificate must be based on the professional opinion of a medical practitioner.³⁸⁸ This is to determine if an

³⁸⁴ Van Niekerk 2019 *PELJ* 7; Tshela 2015 *SAMJ* 280. S 22 BCEA reads "(1) In this Chapter, 'sick leave cycle' means the period of 36 months' employment with the same employer immediately following— (a) an employee's commencement of employment; or (b) the completion of that employee's prior sick leave cycle. (2) During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks. (3) Despite subsection (2), during the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked. (4) During an employee's first sick leave cycle, an employer may reduce the employee's entitlement to sick leave in terms of subsection (2) by the number of days' sick leave taken in terms of subsection (3). (5) Subject to section 23, an employer must pay an employee for a day's sick leave— (a) the wage the employee would ordinarily have received for work on that day; and (b) on the employee's usual pay day. (6) An agreement may reduce the pay to which an employee is entitled in respect of any day's absence in terms of this section if— (a) the number of days of paid sick leave is increased at least commensurately with any reduction in the daily amount of sick pay; and (b) the employee's entitlement to pay—(i) for any day's sick leave is at least 75 per cent of the wage payable to the employee for the ordinary hours the employee would have worked on that day; and (ii) for sick leave over the sick leave cycle is at least equivalent to the employee's entitlement in terms of subsection (2)."

³⁸⁵ Section 23(1) BCEA. See Van Niekerk 2019 *PELJ* 8; Tshela 2015 *SAMJ* 280; Mbatha *et al* 2012 *SAMJ* 130.

³⁸⁶ Section 23(2) BCEA; See Van Niekerk 2019 *PELJ* 9; Chenia 2013 *Without Prejudice* 18; Mbatha *et al* 2012 *SAMJ* 130.

³⁸⁷ Van Niekerk 2019 *PELJ* 9. See Bellengere and Spurrett 2015 *SALJ* 488; Claassen and Du Toit (date unknown) <https://labourguide.co.za/most-recent/1148-medical-certificates-what-constitutes-a-validmedical-certificate>.

³⁸⁸ Van Niekerk 2019 *PELJ* 9. Also see Bellengere and Spurrett 2015 *SALJ* 488; Claassen and Du Toit (date unknown) <https://labourguide.co.za/most-recent/1148-medical-certificates-what-constitutes-a-validmedical-certificate>. The medical practitioner must declare that it is his or her

employer can accurately rely on the diagnosis of a THP, which refers to the requirement that the THP in question must be registered at the applicable professions' council.³⁸⁹

In regard to the registration with an applicable professional council, the THP Act 2007 has set the requirement that a THP must be registered with the Traditional Health Practitioners Council of South Africa in order to practice.³⁹⁰ A registered THP is thus included in the BCEA, thanks to the THP Act 2007.³⁹¹ But with the Council not being fully established and not being able to register THPs, and having no formal regulated training requirements in place, the status of medical certificates issued by THP's, remains uncertain.³⁹²

4.3.1.4 THP Act 2007

As set out above, it seems that the THP Act 2007 does not set sufficient requirements for the training and qualifications of a THP in order for the practitioner to be registered.³⁹³ The training obtained by a THP in order to diagnose a patient successfully is not guaranteed, according to Van Niekerk.³⁹⁴

In terms of the THP Act 2007, a THP must be registered with the Council in order to be able to practice and issue medical certificates in terms of the BCEA, or else such a practitioner will incur criminal liability.³⁹⁵ It is currently unclear how the Council will determine if a person can be registered based on their training and qualifications in terms of the THP Act 2007.³⁹⁶

professional opinion that the employee is unable to perform his or her work duties. Simply indicating that a medical check-up took place or that the medical practitioner "saw" the patient will not suffice.

³⁸⁹ Van Niekerk 2019 *PELJ* 9. Also see Chenia 2013 *Without Prejudice* 18; Mbatha *et al* 2012 *SAMJ* 130.

³⁹⁰ Bellengere and Spurrett 2015 *SALJ* 488.

³⁹¹ Van Niekerk 2019 *PELJ* 5 & 16. Also see Tshehla 2015 *SAMJ* 279.

³⁹² Bellengere and Spurrett 2015 *SALJ* 488; Tshehla 2015 *SAMJ* 279.

³⁹³ Van Niekerk 2019 *PELJ* 12.

³⁹⁴ Van Niekerk 2019 *PELJ* 16.

³⁹⁵ Sections 21, 22 and 49 THP Act 2007.

³⁹⁶ Van Niekerk 2019 *PELJ* 18.

Section 21(5) states that an applicant will be able to register with the Council only when the Registrar is satisfied that the applicant is sufficiently qualified in order to practice as a THP.³⁹⁷ It must be added that no THPs have been registered with the Council to date. It is unknown what these qualifications are and in terms of section 22(1)³⁹⁸ the Minister of Health still needs to formulate them.³⁹⁹

A prospective THP must undergo training at an accredited training institution according to section 22 of the THP Act,⁴⁰⁰ but there are currently no accredited training institutions in South Africa to train THPs.⁴⁰¹ This clearly creates a problem, for it is uncertain how these institutions will be established in order to train THPs.⁴⁰² To add to the problem, the nature of the accredited training institution is not specified by the THP Act.⁴⁰³

The implementation of the THP Act in its current form does not provide an employer with legal certainty regarding the trustworthiness of a medical certificate issued by a THP.⁴⁰⁴ The reasons for this, as indicated by Van Niekerk, is that there are no criteria for the training and qualifications that a THP must have in order to be registered.⁴⁰⁵

It is recommended that clear and objective requirements for the training and qualifications of THP's be developed. This would provide employers greater certainty in addressing a sick note from a THP.⁴⁰⁶

³⁹⁷ Van Niekerk 2019 *PELJ* 18.

³⁹⁸ Section 22(1) THP Act 2007.

³⁹⁹ Van Niekerk 2019 *PELJ* 19. Also see 4.3.2.2.

⁴⁰⁰ Section 22 THP Act 2007. Also see Van Niekerk 2019 *PELJ* 18.

⁴⁰¹ Van Niekerk 2019 *PELJ* 19; See Street and Rautenbach <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

⁴⁰² Van Niekerk 2019 *PELJ* 19; See Street and Rautenbach <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

⁴⁰³ Van Niekerk 2019 *PELJ* 19.

⁴⁰⁴ Van Niekerk 2019 *PELJ* 21.

⁴⁰⁵ Van Niekerk 2019 *PELJ* 19-21.

⁴⁰⁶ Van Niekerk 2019 *PELJ* 21.

4.3.1.5 Conclusion

An employer may fairly dismiss an employee if he is absent from work for an unreasonable consecutive period.⁴⁰⁷ However, it is inevitable that an employer will have to accept a medical certificate issued by a THP. An employer would be entitled to reject the medical certificate of a THP only in the case where he or she is not registered, because the THP is practising illegally as a THP, which is to the contrary of the stipulations in the THP Act.⁴⁰⁸ However, until traditional health practitioners can register with the Council, sick notes issued by the practitioners will be unrecognised in terms of the BCEA.⁴⁰⁹

Van Niekerk recommends an alternative solution, that an employer must request a second or even third opinion from a registered independent THP before s/he may be entitled to sick leave.⁴¹⁰ This would also give a measure of legal certainty to an employer,⁴¹¹ but it might be seen as unequal treatment between mainstream practitioners and THPs.

4.3.2 *Specific training and qualifications of THP's: the public's uncertainty*

4.3.2.1 Introduction

The THP Act 22 of 2007 attempts to establish certain guidelines in regard to the training and education of prospective THP's.⁴¹² The Act makes provision for specific training and qualifications. The required training and education are not only to put employers at ease, but they are also to the benefit of the public, in order to know what accurate treatments and diagnosis they receive from THP's.

⁴⁰⁷ Van Niekerk 2019 *PELJ* 26. See Mbatha *et al* 2012 *SAMJ* 130. S 23(1) of the BCEA specifies that an employer does not have to pay an employee if he or she was absent from work for more than two consecutive days or on more than two occasions during an eight-week time period, and if the employee does not produce a medical certificate at the request of the employer.

⁴⁰⁸ Van Niekerk 2019 *PELJ* 26.

⁴⁰⁹ Mbatha *et al* 2012 *SAMJ* 130.

⁴¹⁰ Van Niekerk 2019 *PELJ* 27-28.

⁴¹¹ Van Niekerk 2019 *PELJ* 26-27.

⁴¹² Louw and Duvenhage 2016 *AMJ* 442; Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

4.3.2.2 Requirements and continuous education

The Act briefly states that the Minister may set minimum qualifications which must be obtained through examinations completed at an accredited training institution, educational authority or any other examining authority.⁴¹³ Rautenbach indicates:⁴¹⁴

It is envisaged that it would take a considerable amount of time to determine whether a traditional healer is qualified enough to be registered ...

Not to create any confusion, the THP Act 2007 requires that a THP can be registered after obtaining proof that the applicant obtained an ABET level one educational qualification or an equivalent,⁴¹⁵ as well as a letter indicating that the applicant completed or is busy completing training or a course provided by an accredited training institution, educational authority or traditional tutor.⁴¹⁶ No person is allowed to undergo any training if he or she is not registered as a student.⁴¹⁷

If a prospective THP student has not completed training or a course as indicated above, the fact that the student is still busy with training will be recognised but it will not be possible for him or her to register before the completion of the training or the course.⁴¹⁸ The Act also provides for continuous education and training and the criteria which must be established by the Council to determine the further education and training.⁴¹⁹ These criteria have not yet been formulated, which is another point of critique.

⁴¹³ Section 22 THP Act 2007; Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>; Gqaleni *et al* 2007 *South African Health Review* 177; Le Roux-Kemp 2010 *CILSA* 279.

⁴¹⁴ Rautenbach 2008 *Emory International Law Review* 125.

⁴¹⁵ THP Act 2007, reg sch 5. Also see Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>; Street 2016 *SAMJ* 325-326.

⁴¹⁶ THP Act 2007, reg sch 3. Also see De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2. As indicated, no accredited training institutions have been indicated or erected. Additional issues pertaining to training and registration are discussed at 3.2.2.4.4.

⁴¹⁷ Street 2016 *SAMJ* 325.

⁴¹⁸ Further training requirements are discussed at 3.2.2.4.4.

⁴¹⁹ Section 28 THP Act 2007 – "The Council may from time to time make rules which prescribe— (a) conditions relating to continuing education and training to be undergone by persons registered in terms of this Act in order to retain such registration; (b) the nature and extent of continuing education and training to be undergone by persons registered in terms of this Act;

4.3.2.3 Duration of training

As already explained, one of the aims of the THP Act 2007, is to provide for the registration and training of THP's in South Africa.⁴²⁰ Schedule 6 of the Regulations indicates the minimum duration of the training for prospective THP's.

In short, divination, herbalist and traditional birth attendant students must receive a minimum of 12 months of training, whilst a traditional surgeon must receive a minimum of 5 years of training.⁴²¹ Mokgobi indicates that training as a THP, especially a diviner, is a formal⁴²² and painstaking process.⁴²³

During the above training process, the traditional health student is required to live with his or her trainer and must be continually observed by the trainer.⁴²⁴ During this training process, students receive instruction, guidance, lessons on the interpretation of bones, the analysis of dreams, communication with the ancestors, and the treatment of a variety of illnesses.⁴²⁵

After the completion of the training, an initiation takes place in front of the community, which goes by the name of *go ja ntwase*.⁴²⁶ During this time the student undergoes a test to prove that he or she has completed the training successfully. As an example of a possible test, the trainer hides a safety pin in the area, where after the student is required to find the pin with the guidance of the spirits and/or ancestors.⁴²⁷ If the student fails the test, he or she must undergo further training.

and (c) the criteria for recognition by the Council of continuing education and training courses and of education institutions offering such courses." See discussion at 3.4.

⁴²⁰ Section 2(b) THP Act 2007.

⁴²¹ THP Act 2007, reg sch 6; Also see Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy> 53122; Rautenbach 2007 *Obiter* 523; Street 2016 *SAMJ* 325.

⁴²² De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 3.

⁴²³ Mokgobi 2014 *AJPHRD* 30.

⁴²⁴ Mokgobi 2014 *AJPHRD* 31.

⁴²⁵ Mokgobi 2014 *AJPHRD* 31.

⁴²⁶ Mokgobi 2014 *AJPHRD* 31.

⁴²⁷ Mokgobi 2014 *AJPHRD* 31.

4.3.2.4 Recognition of prior learning and exceptions

4.3.2.4.1 Grandfather clause or "open-door licensing system"

The THP Act 2007 makes provision for the recognition of prior learning and training, which is known as the grandfather clause or "open-door licensing system".⁴²⁸ If this situation applies, the applicant will be registered as a THP without complying with the other formal requirements.⁴²⁹

Section 22(2) of the THP Act 2007 reads:⁴³⁰

Any qualification contemplated in subsection (1), obtained on its own or conjointly with any other qualification, entitles a holder thereof to registration in terms of this Act if he or she has, before or in connection with or after the acquisition of the qualification in question, complied with the prescribed conditions or requirements.

This section makes it possible for the Registrar to recognise the prior learning of an applicant. This results in direct registration as indicated in section 44(2) of the THP Act 2007.⁴³¹

There are exceptions in the Act where a THP can be directly registered as indicated by Schedule 10.⁴³² THP's can be directly registered if they provide the following to the Registrar:

⁴²⁸ Louw and Duvenhage 2016 *AMJ* 445-446; S 22(2) THP Act 2007.

⁴²⁹ Louw and Duvenhage 2016 *AMJ* 446.

⁴³⁰ Section 22(2) THP Act 2007; also see Louw and Duvenhage 2016 *AMJ* 446.

⁴³¹ Louw and Duvenhage 2016 *AMJ* 446-447; S 44(2) of the THP Act 2007 reads: "No person other than a person registered in terms of this Act, and holding the necessary qualifications, is eligible for or entitled to hold any appointment to any establishment, institution, body, organisation or association, whether public or private, if such appointment involves the performance of any act which an unregistered person, in terms of this Act, may not perform for gain: Provided that nothing in this subsection precludes the training of traditional health practitioners or students under the supervision of a suitably qualified traditional health practitioner, or the employment in any hospital or similar institution of any person undergoing training with a view to registration in terms of this Act, under the supervision of a suitably qualified traditional health practitioner or other health professional."

⁴³² THP Act 2007, reg sch 10; Louw and Duvenhage 2016 *AMJ* 446. The open-door policy thus consists of the grandfather clause and completion of examinations.

- a) certified declarations by two witnesses indicating that the applicant is currently applying for the trade of THP, as set out in the different categories and that the applicant has practised, for instance, for a few years;
- b) proof of in-house training;⁴³³ and
- c) a certified declaration by a traditional tutor that he or she provided training to the applicant.⁴³⁴

The grandfather clause or "open-door licensing system" has been critiqued by many scholars. This licensing system entails that THP applicants subjectively determine the minimum qualifications in order to become a registered THP and further entails that a prospective THP that qualifies in this way can in turn attest to the training and capacity of other prospective THPs.⁴³⁵ Subjective criteria are not enough when it comes to the requirements and standards for healthcare and could be detrimental to patients and the public.

Louw and Duvenhage⁴³⁶ recommends that stricter requirements should be added, which would conclusively lead to the registration of only well-trained THP's, indicating that only 10% of THPs would meet the strict requirements and be able to register.

4.3.2.4.2 Examinations

Another route to direct registration is through an examination determined by the Registrar and conducted by an accredited training institution, educational authority or other authority.⁴³⁷ It becomes clear that a THP must first obtain a qualification

⁴³³ This is an optional requirement.

⁴³⁴ This is also an optional requirement.

⁴³⁵ Summerton 2006 *Acta Academica* 161-162; See Van Niekerk 2019 *PELJ* 20; Tshehla 2016 *SALJ* 35.

⁴³⁶ Louw and Duvenhage 2016 *AMJ* 447.

⁴³⁷ Section 22(1) THP Act 2007.

and pass an examination at an accredited training institution, educational authority or other authority.⁴³⁸

It is unclear if the individuals who assess and moderate the examinations will be objective, skilled and/or suitably qualified to complete their responsibilities.⁴³⁹ Louw indicates that the examinations must be set up by an examination board consisting of the following members:⁴⁴⁰

- a) registered medical practitioners;
- b) psychiatrists;
- c) psychologists;
- d) homeopaths;
- e) naturopaths;
- f) chiropractors;
- g) osteopaths;
- h) phyto-therapists;
- i) nurses; and
- j) pharmacists.

It is also unknown what the content of the examinations will be, if there would be a set curriculum, and if so, on what it would be based. The accredited training institution, educational authority or other examining authority would have to make

⁴³⁸ Section 22(1) THP Act 2007; Louw and Duvenhage 2016 *AMJ* 446, Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>; Gqaleni *et al* 2007 *South African Health Review* 177.

⁴³⁹ Louw and Duvenhage 2016 *AMJ* 447.

⁴⁴⁰ Louw and Duvenhage 2016 *AMJ* 448.

provision for this and might have to consider oral examinations, or many applicants might be disadvantaged.⁴⁴¹

The option of examinations seems to be the less favoured approach, because the content of the examination would, once again, be based on subjective criteria. There should be a more objective approach in order to ensure that a THP has sufficient qualifications, knowledge and education in order to be registered.

4.3.2.5 Institutions

According to the THP Act 2007, an "accredited institution" means:

An institution, approved by the Council, which certifies that a person or body has the required capacity to perform the functions within the sphere of the National Quality Framework contemplated in the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995)⁴⁴²

The Traditional Health Practitioner's Council has not commenced with the registration of THPs, and the required delivery of training and education has thus far been done by other organisations.⁴⁴³

The way in which the training will be done has not been considered clearly. For accredited training institutions, educational authorities or other authorities to create a one-year programme can take up to three years. Programme designers would have to be included, and a proper infrastructure such as facilities and staff be developed.⁴⁴⁴ Louw and Duvenhage⁴⁴⁵ indicate that the training and educational aims of the Act would take at least five years to implement completely.

With the THP Act 2007 being in force for approximately 12 years without obvious signs of anything been done regarding the training and education of THP's, the full implementation of the Act remains a dream.

⁴⁴¹ Devenish *Negotiating Healing* 88.

⁴⁴² Section 1 THP Act 2007; Street 2016 *SAMJ* 326.

⁴⁴³ Rautenbach 2008 *Emory International Law Review* 124.

⁴⁴⁴ Louw and Duvenhage 2016 *AMJ* 441.

⁴⁴⁵ Louw and Duvenhage 2016 *AMJ* 442; Street and Rautenbach 2016 <http://theconversation.com/south-africa-wants-to-regulate-traditional-healers-but-its-not-easy-53122>.

Louw and Duvenhage are of the opinion that training provided by a traditional tutor is the most apparent solution.⁴⁴⁶ The question arises if this would be an inexpensive and safe way to train prospective THP's. If THP's were to be registered on the basis of their prior learning, they would then be able to act as traditional tutors and would be able to provide adequate training to prospective THPs.⁴⁴⁷ If this could be implemented effectively, then in-house apprenticeships could be seen as a safe and cost-effective way of training and even registering THP's. However, the solution might not be as easy as that. One must receive a calling from the ancestors to become a THP and thus to be a teacher or trainer of prospective THP's.⁴⁴⁸ This could be problematic if the teacher or tutor in question does not have sufficient training, education and the required qualifications in terms of the THP Act 2007 and its regulations.

4.4 The Interim Traditional Health Practitioners Council

The first purpose of the THP Act 2007 is to establish the Interim Traditional Health Practitioners Council of South Africa.⁴⁴⁹ The Council consists of a legal expert, a member of the Health Professions Council of South Africa, a THP to represent every province, four to represent each category of practitioner, a member of the South African pharmacy council, individuals representing the Department of Health, and lastly, community representatives.⁴⁵⁰

The Council was inaugurated in 2013⁴⁵¹ and came into functional effect in 2014,⁴⁵² but no THPs have been registered yet.⁴⁵³ The reason for this is that the Council has not yet been established in such a way that it can register any practitioners, mainly

⁴⁴⁶ Louw and Duvenhage 2016 *AMJ* 441.

⁴⁴⁷ Louw and Duvenhage 2016 *AMJ* 441.

⁴⁴⁸ Mokgobi 2014 *AJPHRD* 30.

⁴⁴⁹ Section 2(a) THP Act 2007; De Lange 2017 *African Journal of Primary Health Care & Family Medicine* 2. Also see Tshehla 2015 *AJIKS* 44; Cook 2009 *Journal of the National Medical Association* 263; Le Roux-Kemp 2010 *CILSA* 279; De Roubaix 2016 *SAMJ* 160; Rautenbach 2007 *Obiter* 528

⁴⁵⁰ Street 2016 *SAMJ* 325.

⁴⁵¹ Chenia 2013 *Without Prejudice* 18. The chairperson is Mr AC Tsiane and the Registrar is Mr KP Mokwena. This information is on file with the author.

⁴⁵² Street 2016 *SAMJ* 325.

⁴⁵³ Mbatha *et al* 2012 *SAMJ* 130.

because of the need to finalise institutional arrangements, which includes capacitating the office of the Registrar.⁴⁵⁴ The infrastructure is not in place to register, train or regulate THP's effectively.⁴⁵⁵ It seems that no THP's are registered because of the shortcomings of the THP Act 2007 and the Council. Only small steps are being taken to put the Act fully into force, which shows how unimportant the full implementation, integration and registration of THP's is thought to be. It is the Council's responsibility to put the THP Act into practice, but nothing is happening. The Act has not fully been put into operation.⁴⁵⁶

The THP Act 2007 should surely provide certain benefits for THP's and the public. The enactment of the THP Act 2007 seemed to be an indication that traditional healing was accepted and deemed to be important.⁴⁵⁷ An attempt was being made to emphasise the importance by establishing the Council in order to register THP's.

If the Council were established, complaints could be lodged with it if an offence was committed against a person or patient, which would indicate that the public was protected from the possible malpractice of THP's.⁴⁵⁸ The Act could even reduce professional misconduct and the mistreatment of patients and the public.⁴⁵⁹ If the THP's were registered, they could no longer be criminally prosecuted for practising.⁴⁶⁰

However, with the Council not fully operational and even failing to determine the relevant training and education requirements,⁴⁶¹ these benefits cannot be offered to the communities and individuals who make use of THP's and their services.

⁴⁵⁴ This information is on file with the author. Van Niekerk 2019 *PELJ* 21; Fokazi 2015 <https://www.iol.co.za/news/politics/still-no-traditional-healers-registered-1841714>; Tshela 2015 *SAMJ* 279; Chenia 2013 *Without Prejudice* 18.

⁴⁵⁵ Cook 2009 *Journal of the National Medical Association* 264.

⁴⁵⁶ Devenish A *Negotiating Healing* 103; Le Roux-Kemp 2010 *CILSA* 279.

⁴⁵⁷ Tshela 2015 *AJIKS* 44.

⁴⁵⁸ Tshela 2015 *AJIKS* 48.

⁴⁵⁹ Rautenbach 2007 *Obiter* 536.

⁴⁶⁰ No criminal sanction will be imposed if the person is registered in terms of the THP Act 2007. See Tshela 2015 *AJIKS* 48.

⁴⁶¹ Bellengere and Spurrett 2015 *SALJ* 493.

4.5 Who does the THP Act 2007 truly protect?

The third, final and most important aim of the THP Act 2007 is to serve and protect the interests of members of the public who make use of the services of THP's.⁴⁶² The indirect aim of the Act is not to protect THP's but to enhance the interests of the public.⁴⁶³ The fact that the THP Act 2007 protects the public is clearly not a problem, because the public should be protected when they consult with THP's, according to Tshehla.⁴⁶⁴ However, the THP Act 2007 does not directly protect THP's; it only seems to place requirements on them.⁴⁶⁵

In Pietermaritzburg in 2018 a fake THP was seen trying to sell human body parts for as little as R4000. THP's were approached and enquired if they wanted any of these parts, where after they felt compelled to notify police officials. That area of Pietermaritzburg is known for having many THP's and when the fake THP was eventually apprehended, his vehicle was searched and the police officials discovered a human skull, a hand and many other pieces of a 17-year old boy who had gone missing in June 2017. When questioned, the seeming THP indicated to the police officials that they were human remains which he and many other healers used to heal patients. The false THP and an accomplice were given a hefty sentence after being convicted of murder.⁴⁶⁶

Lastly, in early 2018 in Pretoria a woman approached a fake THP in order to ask him to heal her recurring headaches and to bring back her ex-husband. Upon their first appointment, the THP told her about her own life and everything seemed to ring true, where after she came to believe that this healer was a *bona fide* healer. She had numerous appointments with the healer and with each appointment an amount of money was paid to the THP. The woman even proceeded to take a loan from a bank in order to pay the healer. She also had to complete an array of rituals.

⁴⁶² Section 2(c) THP Act 2007.

⁴⁶³ As discussed at 3.2.2.4.2.

⁴⁶⁴ Tshehla 2016 *SALJ* 31.

⁴⁶⁵ Tshehla 2016 *SALJ* 32.

⁴⁶⁶ Sicetsha 2018 *The South African* <https://www.thesouthafrican.com/news/fake-traditional-healers-convicted-murder-human-body-parts/>.

All these rituals and appointments led to roughly R600 000 being spent by the woman. Her headaches seem to have disappeared, but her healer is nowhere to be found.⁴⁶⁷

When healers are officially registered at the Council or even at their independent organisation, they will receive a certificate⁴⁶⁸ which a patient can ask to see at any time. This should put the patient at ease and indicate that the healer s/he is dealing with is a *bona fide* healer. It is also beneficial, for it is possible for a complaint to be lodged at the Council or an independent organisation against the THP for misconduct or any other related misbehaviour.⁴⁶⁹ This is how the THP Act 2007 aims to protect the public, via the registration of THPs in order to promote effective and safe health care. Various individuals and communities will be protected from fake THPs in this way.

As indicated above, protection is given only to the public in terms of the THP Act 2007.⁴⁷⁰ The Act makes no mention of protecting THPs or their medicines.⁴⁷¹ It seems clear that the THP Act 2007 does not provide adequate coverage for the THPs themselves.

It might be difficult for the Council to distinguish between a *bona fide* THP and a fake THP.⁴⁷² The THP Act seems to fail to protect THPs because it focusses on protecting the public and patients.

4.6 Intellectual property rights

Intellectual property rights play a big role when it comes to traditional African knowledge, but a detailed discussion of the topic falls outside the scope of this

⁴⁶⁷ Makgalemele 2018 *News24* <https://www.news24.com/SouthAfrica/News/i-was-scammed-out-of-r600-000-by-a-fake-prophet-20180420>.

⁴⁶⁸ Section 21(3) THP Act 2007.

⁴⁶⁹ Makgalemele 2018 *News24* <https://www.news24.com/SouthAfrica/News/i-was-scammed-out-of-r600-000-by-a-fake-prophet-20180420>.

⁴⁷⁰ Tshela 2015 *AJIKS* 46.

⁴⁷¹ There might be an attempt to regulate traditional medicines through a separate Act; see *Medicines and Related Substances Amendment Bill* [B6-2014]

⁴⁷² Fokazi 2015 <https://www.iol.co.za/news/politics/still-no-traditional-healers-registered-1841714>.

dissertation and only an overview will be provided. The THP Act 2007 does not deal with the intellectual property rights of indigenous knowledge.⁴⁷³ In 2009 the then Minister of Health indicated that the rights of THP's regarding intellectual property must be protected, and she went on to say that THP's must be compensated for their knowledge.⁴⁷⁴ As a result, the *Intellectual Property Laws Amendment Act*⁴⁷⁵ was implemented in 2013. The Act recognises indigenous knowledge as intellectual property.⁴⁷⁶ The *Copyright Act*,⁴⁷⁷ the *Designs Act*,⁴⁷⁸ the *Patent Act*,⁴⁷⁹ the *Performers Protection Act*⁴⁸⁰ and the *Trade Marks Act*⁴⁸¹ were all amended to accommodate the recognition of indigenous knowledge as intellectual property.⁴⁸²

The *Intellectual Property Laws Amendment Act* gives recognition to "indigenous cultural expressions or knowledge"⁴⁸³ and "indigenous work"⁴⁸⁴ to make provision for its protection. The *Intellectual Property Laws Amendment Act* also specifies which traditional works are eligible for copyright.⁴⁸⁵ The measures taken by legislators to include indigenous knowledge in intellectual property acknowledge the

⁴⁷³ Tshehla 2015 *AJIKS* 47.

⁴⁷⁴ Cook 2009 *Journal of the National Medical Association* 264.

⁴⁷⁵ *Intellectual Property Laws Amendment Act* 28 of 2013.

⁴⁷⁶ Tshehla 2015 *AJIKS* 47.

⁴⁷⁷ 89 of 1978.

⁴⁷⁸ 195 of 1993.

⁴⁷⁹ 57 of 1978.

⁴⁸⁰ 11 of 1967.

⁴⁸¹ 194 of 1993.

⁴⁸² Tshehla 2015 *AJIKS* 47.

⁴⁸³ "[I]ndigenous cultural expressions or knowledge' means any form, tangible or intangible, or a combination thereof, in which traditional culture or knowledge are embodied, passed on between generations, and tangible or intangible forms of creativity of indigenous communities, including, but not limited to- (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words, signs, names or symbols; (b) musical or sound expressions, such as songs, rhythms, or instrumental music, the sounds which are the expression of rituals; (c) expressions by action, such as dances, plays, ceremonies, rituals, expressions of spirituality or religion, sports, traditional games, puppet performances, and other performances, whether fixed or unfixed; or (d) tangible expressions, such as material expressions of art, handicrafts, architecture, or tangible spiritual forms, or expressions of sacred places."

⁴⁸⁴ "[I]ndigenous work' means a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community."

⁴⁸⁵ Section 28B *Intellectual Property Laws Amendment Act*.

fact that indigenous knowledge, including medicine and health practices based on culture, should be protected.

4.7 Conclusion

The opinions about traditional health practices in South Africa are varied. The THP Act 2007 attempts to regulate the profession but it is far from perfect. Internationally, it seems that there are mixed reactions to the formalisation of traditional health practice. For example, the WHO, with the help of a number of strategies, promotes the inclusion of THP's in various countries.⁴⁸⁶ However, other groups oppose the inclusion of THP's into the formal health system in South Africa. Thus, Doctors for Life claim that all medicines should be scientifically validated before being prescribed to a patient. Doctors for Life even went as far as to blame THPs and their practices for the deterioration of the health care system. This clearly links with the training and education received in order to become a THP. As already stated, there are no accredited training institutions, no minimum qualifications, and no objective registration requirements.

The main aim of this dissertation was to unravel the previous and current legal framework which regulates THP's in South Africa.⁴⁸⁷ The recognition of THP's is belated, but this cannot be corrected by the implementation of inadequate legislation. Given the obvious shortcomings of the Act, this could lead to serious disadvantages to traditional health care. Upon first glance, the THP Act 2007 seems to cover all the legislative essentials to satisfy the needs of both practitioners and the public, but on a deeper level, the difficulty inherent in implementing the Act seems to be its greatest shortcoming.

To add to the problem, the main regulatory body, the Council, has been established but has not been capacitated in such a manner as to be able to register any THP's. This has been greatly detrimental to THP's, the public who make use of their services, employers, and even the economy.

⁴⁸⁶ WHO *Strategy on Traditional Medicine 2014-2023* 57.

⁴⁸⁷ Discussed at 1.3. Previous and current regulating legislation is discussed at Chapter 3.

South Africa has legislation regulating the mainstream health care systems, but legitimising the system used by the majority of South Africans is being delayed.⁴⁸⁸ It seems that enforcing the THP Act 2007 rigidly would be unacceptable to many THP's, for not all of them would be able to adhere to the strict requirements;⁴⁸⁹ and even if an attempt were made to enforce the Act, Tshehla indicates that certain provisions would be unenforceable as they are impractical.⁴⁹⁰ This is definitely a source of uncertainty for many THP's and their customers. With the THP Act 2007 not fully in effect, THP's not registered and the public not protected, it is unknown for how long this legislative pause will last.

⁴⁸⁸ See Mbatha *et al* 2012 *SAMJ* 130.

⁴⁸⁹ Tshehla 2016 *SALJ* 35.

⁴⁹⁰ Tshehla 2016 *SALJ* 37.

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