# AN ASSESSMENT OF THE REGULATORY FRAMEWORK PERTAINING TO TRADITIONAL MEDICINE IN SOUTH AFRICA

**by**

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under the supervision of

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***MY MOTHER, THE ISANGOMA***

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# DEDICATION AND ACKNOWLEDGMENTS

To all who espouse healing and to all without whom this thesis would not have been feasible and consequently not seen conclusion – thank you.

## ABSTRACT

This thesis seeks to examine the practice of traditional medicine in South Africa by providing an analysis of the regulatory framework of this system of medicine, which is original to Africa and is practised from a perspective of indigenous philosophy, ideology, possibly even religion, with a specific pharmacopoeia and usage of medicines, whether from a symbolic perspective or otherwise. The Interim Traditional Health Practitioners Council of South Africa, although created by statute, is not yet legally fully operational, even though current initial legislation was introduced as far back as 2004, some 18 years ago. This legislation has as its purpose legal regulation over certain practitioners of South African traditional medicine.

The research question that is entertained is whether the regulation should be continued, strengthened even, or whether a model of self-regulation should not rather be considered. If the former position is the case, then the question is posed as to why there should not now be political will to bring about imperatively and critically the functionality of the statutory health council. This would ensure effective regulation of this healthcare profession to confirm protection of the health of the public, with other recommendations for particular aspects of this indigenous system of medicine.

The originality of the contribution to research in this field of medical law lies not only in the specific approach to the research question, an essential aim of this thesis, but also in the presentation of an amalgam of beliefs and opinions, views, conclusions and recommendations to interested parties, stakeholders and regulators in order to contribute to an enhanced understanding of traditional medicine and to promote any future legal regulation – this ranges from the philosophy of this system of indigenous medicine, from dogmata relating to the causes of disease in traditional medicine, from specific practices in this indigenous system of medicine and its treatment regimen including aspects of initiation training, male circumcision or the rights of animals, and other issues, to the range of legislative instruments currently applicable

to the practice of this indigenous system of medicine. This amalgam is intended as a single resource overview of the South African traditional medicine paradigm – currently only accessible from multiple sources – and will be both functionally and purposefully referenced with views offered or information presented as may be drawn from sources such as are currently available and accessible, even if only a brief allusion to any particular aspect is presented, for future use by any interested party. If the research question is answered to the extent that regulation is required to be continued, strengthened even, then a cardinal feature of the originality of the contribution to research in this field will be the presentation of a legal scope of practice for consideration by the regulators.

This thesis also takes into account the distinction between traditional medicine as a healing system in whichever manner this may be viewed from a biomedical medicine model, and the claim that it is either witchcraft or sorcery, or however circumscribed from this latter perspective; the focus is, however, on the practice of traditional medicine by persons who seek to use traditional medicine for honourable and legitimate means to bring about well-being and is neither in validation, denunciation, nor negation of this system of medicine, but assesses the legal regulatory perspective.

This thesis concludes that the regulation of this indigenous system of medicine is not only to be continued, but also to be strengthened, and in keeping with the cardinal feature of the originality of its contribution to research in this field, a legal scope of practice is presented for consideration by the regulators, and other specific recommendations regarding regulation are also proposed.

## DEFINITION OF TERMS

IsiZulu is the language of the Zulu people, the vast majority of whom live in the Republic of South Africa. For this thesis, isiZulu will be used to encompass all linguistic terms in subequatorial Africa relating to traditional medicine except where, for purposes of differentiation or where the term does not exist in IsiZulu, other linguistic terms are used and so assigned.

| | |
|---|---|
| *abalozi, amakhosi, amakhulu* | 'whistling great ancestors' |
| *abaphansi banathi* | 'the ancestors are with us' |
| *abaphansi basifuthalele* | 'the ancestors are facing away from us' |
| *akanabuntu* | person of base morality, lacking humaneness |
| *amabukulazinti* | stick diviners |
| *amadlozi* | the ancestors; singular *idlozi* |
| *amakhubalo* | symbolic medicine |
| *amakhambi* | herbal remedies / medicines |
| *amandawu* | water spirits |
| *amasikho* | performance of rituals |
| *amathambo* | bones used in divination |
| *bumuntu* | embodiment of personhood and quality of humaneness |
| *endleleni yomendo* | highways |
| *enhlanganweni yezindlela* | crossroads |
| *idlozi* | ancestor |
| *imikhondo* | tracks or traces, visible on the ground or invisible but can be discerned by tracking animals, causing disease |
| *imimoya* | inhaled traces or spirits, souls or dispositions of persons, causing disease |
| *imithi* | medicines |
| *imithi ebomvu* | red medicines |
| *imithi emhlophe* | white medicines |
| *imithi emnyama* | black medicines |

| | |
|---|---|
| *indiki* | foreign spirit possession |
| *ingcibi* | traditional surgeon; plural *iingcibi* (isiXhosa) |
| *inhlolo* | diagnostic instruments, including bones, dominoes and seashells |
| *insekane* | species of grass |
| *insizi* | powder produced from charred herbs, roots or animals; black medicine category |
| *intando* | medicines to create or maintain love |
| *intelezi* | liquid medicine that belongs to the white class of medicines |
| *intlombe* | ritual dance (isiXhosa) |
| *intwaso* | ceremony marking completion of the process of *ukuthwasa* |
| *inyanga* | herbalist, phytotherapist; plural *izinyanga* |
| *inyamazane* | medicine derived from wild animals; plural *izinyamazane* |
| *inyanga yomhlabelo* | *inyanga* who treats fractured bones |
| *isangoma* | diviner; plural *izangoma* |
| *isangoma esichitha amathambo* | bone thrower |
| *isangoma sekhanda* | head or ecstatic diviner, who practises divination by communing with the ancestors directly and by using no material objects |
| *isanusi* | class of holy person; plural *izanusi* |
| *isifo* | disease manifested by somatic symptoms, various forms of misfortune; state of vulnerability to misfortune and disease |
| *isiko lentambo* | neckband ceremony (isiXhosa) |
| *isithunzi* | shadow |
| *ithwasa* | initiate/neophyte; plural *amathwasa* |
| *izibulo* | divining rods |
| *izingcabo* | incisions into the skin in the practice of *ukugcaba* |
| *izinyanga zesithupha* | thumb diviners |

| | |
|---|---|
| *kufemba* | healing ritual |
| *kupahla* | manner of communication with the *amadlozi* |
| *ngiyavuma, ngiyavuma, ngiyavuma* | 'I agree, I agree, I agree' |
| *-thwasa* | verb root of *ukuthwasa*, the process of becoming a healer |
| *ubulawu* | liquid medicine used as black, red or white emetics |
| *ubuntu* | guiding principle embodying inter-dependence of humans and links with the cosmos and spiritual plane |
| *ubuthakathi* | witchcraft, sorcery |
| *ufufunyane* | form of spirit possession induced by sorcery |
| *ufuzo* | genetically inherited diseases, 'resemblance' |
| *ugobela* | teacher of the art and knowledge of *bungoma*; plural *amagobela* |
| *ukugodusa* | taking home ceremony (isiXhosa) |
| *ukudlisa* | adding noxious medicines, including Western poison, to the food of victims |
| *ukufa kwabantu* | disease of the African peoples |
| *ukugcaba* | treatment where incisions are made into the skin over joints in order to introduce medicine directly to points where the body is believed to be most at risk |
| *ukulumeka* | blood-cupping |
| *ukupengula* | divination |
| *ukuphela amanzi amnyama* | 'the churning of the black medicines' |
| *ukuphonsa amathambo* | bone throwing |
| *ukuthelelana amanzi* | 'washing of each other's hands' |
| *ukuthwala* | abduction of a young girl in marriage negotiations |
| *ukuthwasa* | process of becoming a healer |
| *ukuvumisa* | teaching of divination (isiXhosa) |

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|---|---|
| *ukuzila* | requisite behaviour when in *umnyama* |
| *ukuzilungisa* | restoration of order from disorder |
| *ukweleka ngesithunzi* | to feel or suffer the weight of someone's overpowering influence |
| *ukweqa* | 'stepping over', a process by which evil elements can enter into the body through body joints |
| *umbelethisi* | midwife, birth attendant; plural: *ababelethisi* |
| *umbhulelo* | placing of harmful medicines |
| *umeqo* | diseases contracted by stepping over something which is dangerous to health |
| *umhlahlo* | divination |
| *umkhokha* | unusual state of misfortune |
| *umkhosi ukweshwama* | Zulu festival in celebration of the universe's rites of passage |
| *umkhuhlane* | illness as a biological factor |
| *umndiki* | ancestral spirit that requires a person to undergo *ukuthwasa* |
| *umnyama* | darkness |
| *umthakathi* | witch, sorcerer; idiomatically used to denote 'power' |
| *umthandazi* | faith healer; plural *abathandazi* |
| *umuthi* | medicine, whether derived from plant, mineral or animal sources; plural *imithi* |
| *umuthi wendabuko* | traditional medicine |
| *umuthi wokubulala* | medicine for killing |
| *umuthi wokwelapha* | medicine for healing |
| *umvula uthini* | rainmaker |
| *uzalo* | lineage sorcerer |
| *ukuxhentsa / umxhentso* | ritual dance (isiXhosa) |

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# PREFACE

## ▪ INTRODUCTION

South Africa is a constitutional democracy, with the supreme instrument in law being the Constitution. Although this legislation contains a number of references to healthcare services and medical treatment, there is no explicit right to health itself, but rather other rights, which when taken as a cohort may be interpreted as the right to health, limited as any other right may be. The biomedical medicine healthcare model, which has as its primary point of departure that mind and body are separate entities, and that any dysfunction may be addressed as a discrete act of treatment in healthcare, is overwhelmingly the most dominant system of healthcare used in South Africa and is the conventional or mainstream system of health. Other systems of medicine, either complementary to and in conjunction with the conventional biomedical medicine model, or indeed systems of medicine alternative to or juxtaposed against the conventional medicine model, view any state of health from a holistic perspective, seeing body and mind as inextricably linked and where treatment of the whole person is required, both from spiritual, mental and physical perspectives.

## ▪ STATUTORY HEALTH COUNCILS IN SOUTH AFRICA

There are currently six statutory health councils in South Africa and, of these, two have legal mandates to regulate complementary or alternative systems of medicine. The Allied Health Professions Council of South Africa regulates complementary or alternative health systems of medicine almost exclusively imported from cultural paradigms originating outside of South Africa.[1] The author of this thesis has been the Registrar of this statutory health council for more than thirteen years, and draws on his experience in, and contribution to, the regulation of health in this sphere, also on

[1] The Allied Health Professions Council of South Africa is a statutory health body established in terms of the Allied Health Professions Act, 63 of 1982 in order to control all allied or complementary health professions, which include Aromatherapy, Ayurveda, Chinese Medicine and Acupuncture, Chiropractic, Homeopathy, Naturopathy, Osteopathy, Phytotherapy, Reflexology, Therapeutic Aromatherapy, Therapeutic Massage Therapy, Therapeutic Reflexology and Unani-Tibb; www.ahpcsa.co.za, accessed 13 October 2022.

his interaction with regulators, towards furthering research into the sphere of traditional health in South Africa.

The Traditional Health Practitioners Act, Act 22 of 2007 ("the Act"), provides for the establishment of an Interim Traditional Health Practitioners Council of South Africa ("the Interim Council"). This legislation provides for a legal regulatory mandate over certain practitioners of South African traditional medicine, a system of medicine original to Africa and practised from a perspective of indigenous philosophy, ideology, possibly even religion, and with a specific pharmacopoeia and usage of medicines from a symbolic perspective or otherwise. This system of traditional health is actively extant in South Africa with a significant number of practitioners and adherents, but this statutory health council is not yet legally fully operational, however.

- **RESEARCH QUESTION**

Against the background that this statutory health council is not yet legally fully operational, this thesis seeks to draw conclusions and make recommendations concerning future legal regulation of this healthcare profession against existing legislative precepts. In particular, the reasons behind the lack of full operationality of the relevant statutory health council given that the original enabling legislation was passed some 18 years ago will be examined, also to determine whether regulation remains essential, or not. A conclusion that self-regulation of traditional medicine may rather be preferable, and that the existing legislation should be repealed, as the case may be, will be part of the deliberations around the research question. Investigation into self-regulation, if such exists, will also be considered.

- **ORIGINAL CONTRIBUTION TO RESEARCH INTO SOUTH AFRICAN TRADITIONAL MEDICINE**

As an adjunct to the essentiality of the research question, this thesis, seen as an original contribution in this field of research, seeks to provide any interested person, or researcher, with a single resource overview of the South African traditional medicine paradigm – currently only accessible from multiple sources. This thesis will be both functionally and purposefully referenced with views offered or information presented as may be drawn from sources such as are currently available and accessible, even if

only a brief allusion to any particular aspect is presented, for future use by any interested party. To this end then, an amalgam of beliefs and opinions, views, conclusions and recommendations will thus be presented in this thesis to interested parties, stakeholders and regulators in order to contribute to an enhanced understanding of traditional medicine and to examine the question of future legal regulation, or not, as the case may be.

- **CARDINAL FEATURE OF THIS ORIGINAL RESEARCH**

If the conclusion reached in consideration of the research question is that regulation is essential, in order to protect the health of the public, dismissing self-regulation, then a cardinal feature of this original contribution to research around traditional medicine will also be proposed changes to the extant legislative precepts, including the presentation of a legal scope of practice recommending either prescribing, or proscribing, as the case may be, the armamentaria, or range of clinical practices, medicines and equipment, used within this system of medicine, currently not a feature of extant regulation.

- **TRADITIONAL MEDICINE, WITCHCRAFT OR SORCERY**

The distinction between traditional medicine as a healing system and its antithesis, either witchcraft or sorcery, or however circumscribed, has not necessarily been understood or appreciated in South Africa; traditional medicine, seemingly patent, labours under a stigma that it is witchcraft, possibly because it is widely believed simultaneously also to employ practices said to be embedded in the metaphysical, occult, or orphic realms. The focus on the practice of traditional medicine by persons who seek to use traditional medicine for honourable and legitimate means to bring about well-being is another facet of the original contribution to research, and is considered in this thesis, not in validation, denunciation, or negation of this system of medicine, but from a legal regulatory perspective. For contextualisation, where appropriate, allusion to the practice of witchcraft is referenced or considered.

- **SCOPE OF THE RESEARCH**

The amalgam of beliefs and opinions, views, conclusions and recommendations to be presented is multi-dimensional and ranges from the philosophy of this system of indigenous medicine, from dogmata relating to the causes of disease in traditional medicine, from specific practices in this indigenous system of medicine and its treatment regimen including aspects of initiation training, male circumcision or the rights of animals, and other issues, to the range of legislative instruments currently applicable to the practice of this indigenous system of medicine. The originality of the contribution to research lies in the multi-dimensional approach to the subject matter of this thesis.

As indicated, this thesis seeks neither to validate, denounce or refute traditional medicine and is primarily legal in commitment, but cannot be of any application, however, unless it is also contextualised in the society in which it is practised and aspects of practices – whether seemingly ritualised, classified in terms of culture, religion, faith, mythology, magic or witchcraft, and without entertaining any debate about the exact systemic classification of such concepts – are introduced only to contextualise the societal or cultural framework within which traditional medicine is practised and used, as are some appropriate aspects of anthropology or sociology.

- **THESIS DEMARCATION PARAMETERS: SECTIONS A TO E**

Section A offers views and information for societal or cultural contextualisation and introductory purposes to the system of traditional medicine, and as a prologue to the regulatory legislative history, by examining:

- traditional medicine as a construct: significance of traditional knowledge systems and definitions;
- the 'philosophy of the drum': *bungoma* and *ngoma*, together with concepts of 'exposed being' and the 'augmented self';[2]
- the role of the ancestors and elders;

[2] RJ Thornton *Healing the exposed being: A South African ngoma tradition* (2017) 1, 3, 24.

- the relevant societal *Weltanschauung*, or the worldview of self;
- the distinction between traditional medicine and sorcery or witchcraft;
- various categories of persons practising traditional medicine, regulated or otherwise;
- causes of illness from the perspective of traditional medicine;
- the initiate or neophyte, the *ithwasa*, and the process of becoming a divining healer – an *isangoma*;
- empirical and non-empirical sources of healing power and the treatment of disease, including the use of human body parts, published research by the author of this thesis;[3] and
- other concepts in the context of traditional medicine, such as 'medical pluralism', 'medical parallelism' or apotropaic magic;

so as to contextualise Section B: the enabling legislation, statistics, clinical practices or acts specially pertaining to the profession, medicines, regulatory legislative history and certain practices within traditional medicine, by offering information or views as to:

- the extant legislation, including enacted categories of traditional health practitioners in South African law and the acts specially pertaining to the profession of traditional medicine, akin to clinical practices or healthcare services;
- the practices within initiation, only as far as they fall within the ambit of traditional medicine, in particular the rite of passage marking acceptance from boyhood into manhood after undergoing circumcision, but also in the case of womanhood;
- the ritual slaughtering of animals[4] under the practice of traditional medicine and in the initiation process of becoming a healer;
- the trafficking of human beings and female genital mutilation practices under the construct of traditional medicine;

[3] L Mullinder 'A comparative study of the criminalisation of the violation of a corpse in context of traditional medicine in subequatorial Africa, including consideration of customary law' published MPhil thesis, University of Pretoria, 2017.

[4] *Stephanus Smit v King Goodwill Zwelithini Kabhekuzulu* [2009] ZAKZPHC 75.

- the armamentarium used in traditional medicine, namely the medicines, equipment and techniques used, with specific reference to medicines, whether of plant, animal, or mineral origins or other and within any pharmacopoeia, or materia medica, recorded or otherwise;

with a view to appraising, in Section C:

- the South African legislation, not only within its constitutional framework, but also with regard to its seemingly occidental legal approach to the regulation of a healthcare profession which may only partly, possibly not at all, resort within an occidental healthcare paradigm, including the South African legislative categories of registration and the suitability of these registration categories;
- legislation relating to male circumcision, female genital mutilation and female circumcision and any other female initiation practices;
- the applicability of any cultural defence in South African law;
- the rights of animals in law viewed against their ritual use in traditional medicine;
- traditional medicine within universal health coverage as envisaged under government's national health insurance policy;
- the pharmacopoeia or materia medica usage, whether proscribed in terms of extant legislation or requiring proscription in terms of deleterious effects on the biodiversity or being deleterious to the health of the public;
- the debate about the true ownership of traditional medicine;
- any extraterritorial regulation of traditional medicine;
- the question of informed consent in cases of divination as a diagnostic tool; and
- potential conflicts between traditional birth attendants in the context of conventional nursing;

in order to provide reference points for engagement with stakeholders in Section D, after which, taking into consideration this single resource overview, then to set out conclusions and make recommendations in Section E concerning future legal regulation of this healthcare profession, the essential aim of this research.

If regulation is found to require to be continued or strengthened even, then the submission of a legal scope of practice, a cardinal feature of this original contribution

in research, will be made; if not, a recommendation that self-regulation is preferable may be the case and that the legislation should then be repealed, as the case may be.

- **POSSIBLE RESEARCH CHALLENGES**

The critique in anthropology, in particular the call for the redress of colonial perspectives and the ostensible insouciance on the part of African anthropologists resisting engagement in considering interaction between humans, ancestors and non-human agents, is noted.[5]

The possible reluctance on the part of stakeholders to engage with the author of this thesis in the discussion of traditional medicine for the purposes of this thesis, given that some practices are said to occupy metaphysical, occult or orphic realms, is recognised.

[5] FB Nyamnjoh 'Blinded by sight: Divining the future of anthropology in Africa' (2012) 2(3) *Africa Spectrum* 63.

# SECTION A:

# INTRODUCTION, SOCIETAL AND CULTURAL CONTEXTUALISATION OF TRADITIONAL MEDICINE AS A COMPLEMENTARY OR ALTERNATIVE SYSTEM OF MEDICINE IN SOUTH AFRICA

# CHAPTER 1
# THE CONSTRUCT OF TRADITIONAL MEDICINE: ORAL AND WRITTEN SOURCES, HEALING AND HEALING PRACTICES

## 1.1 INTRODUCTION

This thesis is primarily legal in commitment, but aspects of traditional knowledge systems – whether in an oral form or in any other creative transmission – must necessarily be considered in this research. If the research question finds that traditional medicine should continue to be regulated, the essential aim and fundamental research question of this thesis, a cardinal feature within this original contribution to research, will then be the presentation of a legal scope of practice for practitioners of this system of medicine for consideration by the regulators. In considering the research question against this original contribution in research by means of this thesis, the significance of any oral or written sources, healing and healing practices relating to medicine as indigenous knowledge systems, or not, must be considered – such must be considered as may be appropriate to the legal circumstance and for possible inclusion, or not, into any legal scopes of practice – this is true particularly regarding the acts, or clinical practices, specially pertaining to the profession, also in the case of the armamentaria of traditional health practitioners. This chapter serves to offer a brief overview of the significance of oral or written sources, together with concepts relating to healing and healing practices, pertinent to traditional medicine, as an introductory contextualisation to the analysis of the regulatory framework pertaining to traditional medicine in South Africa.

## 1.2 VALUE OF WRITTEN AND ORAL SOURCES

Mesopotamian cuneiform texts,[6] Egyptian papyri,[7] the didactic poetry of Avicenna[8] and a native peyote button song, the *Sacred Datura-Hawkmoth Song*[9] of the O'odham

[6] EK Teall 'Medicine and doctoring in ancient Mesopotamia' (2014) 3(1) *Grand Valley Journal of History* Article 2, 1.

[7] N Lemonnier *et al* 'Traditional knowledge-based medicine: A review of history, principles, and relevance in the present context of P4 systems medicine' (2017) 2(7) *Progress in Preventive Medicine* 11.

[8] M Nimrouzi *et al* 'Avicenna's medical didactic poem: Urjuzehtebbi' (2015) 13(2) *AMHA* 45-56.

[9] *Datura stramonium*; exact species of *Sphingidae* unidentified: http://nitro.biosci.arizona.edu/zeeb/butterflies/sphynx.html, accessed 11 January 2021.

peoples, indigenous Uto-Aztecan tribes in Arizona (United States of America) and Sonora (Mexico)[10] reflect a meagre selection, arbitrarily so, of written records illustrating traditional knowledge systems relating to medical expertise chronicled by various authors in the past.

According to Moncada, Western culture values the *written text form to sustain culture and to maintain a historical record of the community and to inform society*,[11] with oral sources, whether transcribed or not, in the main being regarded as susceptible to inaccuracy, partiality, discrepancy and contradiction. Indigenous societies, conversely, regard the oral and creative transmission of knowledge – whether in the form of stories, songs, weavings, carvings or dance – as singularly consequential and significant and such traditional knowledge systems:

> *… include a level of interpretation that recounts a more interconnected, contextualized, holistic experience in a variety of forms, including proverbs, songs, myths, poems, prayers, and dramatic performances. A large part of this interconnected dynamic is the embodied knowledge of the speaker or artist coming to the community with focused purpose, in response to a particular need. This transmission of knowledge plays a crucial part in keeping culture alive*.[12]

## 1.3 THE ROLE OF SONG

Song is often considered the most ancient of art forms, as explained by Moncada:

> *Housed in the realm of oral traditions, Native song carries within its forms and structures, more than harmonic sound and lyrical signatures; they are in fact home to the oldest collective knowledge of the people. Within their rhythms and poems, Native song is a bundle of knowledge that remembers the origins and histories of the people, the natural ecological systems of the land, ancient celestial codes, agricultural sciences, sacred geometry, and the nature and origins of creation. Within each song, a bundle of knowledge exists that simultaneously holds within its systems the physical, mental and spiritual identity of the people.*[13]

[10] S Moncada 'Cultivating creation: Exploring traditional ecological knowledge of native song' published Master of Arts thesis, Dominican University of California, 2018 12.

[11] n 10 above, 10.

[12] n 10 above, 12 - 13.

[13] n 10 above, 22.

The *Sacred Datura-Hawkmoth Song* is an example of the creative transmission of knowledge, and according to Nabhan, oral traditions concerning this plant may be valuable for modern medicine:

> … *given that modern medical practitioners have* [only comparatively] *recently begun to prescribe small doses of alkaloid extracts from dutura* (sic) *to their patients… Psychiatrists, I suspect, could learn much about the effects of potent plant drugs like atropine and scopolamine simply by more deeply reflecting upon oral traditions regarding datura still extant among Native Americans*.[14]

The active ingredients of this plant have indeed been included in the pharmacopoeia for conventional medicine and, in its composite whole, in the complementary medicine materia medica for homeopathy.[15]

## 1.4 *DATURA STRAMONIUM*: AN ILLUSTRATION

The following botanical illustration is of *Datura stramonium:* [16]

[14] As cited in Moncada (n 10 above) 34: GP Nabhan *Cross-pollinations: The marriage of science and poetry* (2004) 34.

[15] F Vermeulen *Concordant Materia Medica* (2000) 1476.

[16] https://upload.wikimedia.org/wikipedia/commons/a/af/Datura_stramonium_-_K%C3%B6hler%E2%80%93s_Medizinal-Pflanzen-051.jpg, accessed 11 January 2021.

## 1.5 SPIRIT OF RECOGNITION OF THE MEDICINE TRADITION: THE SACRED DATURA-HAWKMOTH SONG

In the spirit of recognition of the medicine tradition of the O'odham peoples, an excerpt of a translation of the *Sacred Datura-Hawkmoth Song*, as shared by Nabhan, is included in this thesis, for no other reason than pure interest, and it reads as follows:

*Stopping for a while in the white of dawn,*
*Stopping for a while in the white of dawn,*
*Then rising to move through the valley,*
*Then rising to move through the valley,*
*Remembering when the green of the evening fell away,*
*When the green of the evening fell away:*
*Sacred datura leaves, sacred datura leaves,*
*Eating you, I dizzily staggered, drunkenly crawled,*
*Sacred datura blossoms, sacred datura blossoms,*
*Drinking your nectar, I dizzily, drunkenly flew away …*[17]

## 1.6 WORLD HEALTH ORGANISATION: RECOGNITION OF TRADITIONAL MEDICINE

The World Health Organisation, having debated traditional medicine significantly between 1969 and 2014,[18] recognises its long history and defines traditional medicine as:

> *… 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.*[19]

[17] As cited in Moncada (n 10 above) 35: n 16 above, 39.

[18] See specific section in the Bibliography exclusively citing World Health Organisation documentation references; accessed 29 October 2017.

[19] World Health Organisation *Traditional medicines strategy* (2013) 15, accessed at https://apps.who.int/iris/bitstream/handle/10665/92455/9789241506090_eng.pdf on 18 April 2022.

## 1.7 AFRICAN TRADITIONAL MEDICINE: A DEFINITION

Ogungbile explains that African medicine is:

> *… the health practice involving the application of indigenous resources, spiritual and material, in providing mental, psychological, social, and physical well-being and wholeness to a human being and his or her environment. It addresses the well-being of the individual and the community, the fertility of the soil, and animal production*.[20]

## 1.8 EXPANDING THE CONCEPT OF AFRICAN TRADITIONAL MEDICINE

Ogungbile expands the concept of African medicine further by indicating that indigenous resources include plant material usage, such as roots, leaves and bark, together with animal resources of various kinds and minerals; spiritual resources involve supplication and entreaty to spiritual beings by the use of words and expressions or inducement symbols to urge intercession by these beings.[21] The practice of medicine itself, according to Ogungbile, involves:

> *… the triad practice of explanation, prognostication, and control … of disease or illness. The African conception of wholeness and well-being goes beyond a simplistic perception of the soundness of body and mind and the stability of mental and physical conditions only; it also expresses a harmonious relationship with spiritual and physical environments. Africans conceive of disease and illness, in an holistic manner, as having a deep spiritual and metaphysical nature and causation.*
>
> *Traditional medical practices therefore include nonempirical and empirical means to heal human beings from spiritual, psychological, social, physical, and political dislocations, and to restore cosmic balance. The different peoples of Africa, in varieties of culturally constructed ways, express their notion and understanding of the means through which disease and illness are communicated, diagnosed and treated. All these are closely linked to and connected with mythic narratives and ritual practices, the dimensions through which the peoples offer explanations for the causes of disease, prognosticating into the possible cure and control, and removal or prevention of disease in some ways different from Western medical practice*.[22]

[20] DO Ogungbile 'Medicine' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 413.

[21] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 413.

[22] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 413.

This same author avers that the African *Weltanschauung* is encased in mythology relating to spiritual and social facets, namely vertical and horizontal planes in the intricate human interaction in life; the two main agents of disease or illness are the spiritual and social. Spiritual causative agents include the array of deities, such as any supreme being or other lesser deities and ancestors, among other, regarded as mainly benevolent or malevolent. Social causative agents, by contrast, are principally human beings and, by virtue of social interface and relationships, can cause disharmony and disturbance – even cosmic imbalance.[23]

## 1.9 HEALING AND HEALING PRACTICES

In discussing healing and healing practices, Ogungbile considers healing as encompassing a balance in the psychological, social and physical aspects of life, within a concordant and undisturbed environment and by the application of various diagnostic and healing techniques as may be determined by the cause and nature of the disease, and its duration and episodic nature as experienced by the patient in the community. Healing practices, as in modern medicine, encompass diagnosis, explanation, control and treatment of disease, but in African medicine ritual practices are used to return human beings and the environment to a state of normalcy – aiming to prevent malevolence by soliciting benevolence. Sources of healing power encompass both empirical and non-empirical sources, the former being mainly biotic elements and the latter being the invocation of the healing powers drawn from deities and ancestors and other persons believed to have been bestowed by spirituality.[24] Methods used in African traditional medicine, according to this same author, would be according to a comprehensive approach, including:

- psychotherapy: the use of symbolic elements, actions and words to induce calmness, and physical and spiritual upliftment;
- 'somatherapy': the application of physical measures such as incision, chaining or the tying of consecrated thread and chains on wrists, necks and waists or the use of other ritual elements also used in the community;

[23] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 414.

[24] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 415.

- 'metaphysicotherapy': the invocation of healing powers by consultation with deities or the ancestors using incantations, spells and other means to induce order from chaos; and
- hydrotherapy: the use of water for healing.[25]

## 1.10 DESCRIPTIVE ANTHROPOLOGY: TRADITIONAL MEDICINE IN SOUTH AFRICA AS AN INDIGENOUS KNOWLEDGE SYSTEM

Thornton views traditional medicine as a 'discipline', seeing such as a *regulated and institutionalised cultivation and evaluation of healing in use*, but does not see the knowledge attained and its use in practices as something which may easily be described as systematic. This author believes, therefore, that it is not an indigenous knowledge system,[26] quantifying this further by stating that each person practises *in a way almost unique to that person and each context, each teacher, each ecology and pharmacopoeia of organic and mineral substances is local,*[27] but however appropriate such a debate may be to the profession of descriptive anthropology, the difference of opinion is noted.

## 1.11 THE SOUTH AFRICAN REGULATORY FRAMEWORK

The Traditional Health Practitioners Act[28] provides for regulation of traditional medicine in South Africa and these will be expounded subsequently in this thesis in various concepts, but the views by Manda regarding the use of the word 'traditional' are noted – he decries comment regarding the use of this word where *the premise is that the quality of reason is pre-scientific, illogical and therefore not rational*, seeing this as a limited approach:

> *The problem with this definition is that it takes a narrow approach to understanding the context of healing, by assuming that all traditional forms of healing attribute illness and disease to*

[25] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 415.

[26] n 2 above, 17.

[27] n 2 above, 17.

[28] Act 22 of 2007, promulgated in Government Gazette No 30660 on 10 January 2008.

*supernatural causes. It fails to recognize that traditional types of healing do also seek to uncover and heal the natural causes of illness.*[29]

## 1.12 CONCLUSION

This chapter serves as a brief introduction to the construct of traditional medicine taking into consideration oral and written sources, and healing or healing practices, for contextualisation of the questions and topics. If the essentiality of the research question is the conclusion that regulation of this profession is to be continued, strengthened even, as opposed to being dismissed, these will see further consideration in this thesis towards achieving a cardinal feature within the original contribution to any future legal consideration of traditional medicine in South Africa by the presentation of a legal scope of practice for practitioners of this system of medicine for consideration by the regulators.

Axiomatically, however, an urgent call is made for any oral knowledge relating to traditional medicine, in whatever form, to be recorded before it is lost.

[29] DL Manda 'The importance of the African ethic of *ubuntu* and traditional African healing systems for Black South African women's health in the context of HIV and AIDS' published Doctor of Philosophy thesis, University of KwaZulu-Natal, 2007 122.

# CHAPTER 2
# 'THE PHILOSOPHY OF THE DRUM': *BUNGOMA* AND *NGOMA*, THE 'EXPOSED BEING' AND THE 'AUGMENTED SELF'

## 2.1 INTRODUCTION

The importance of enduring reverential connection with the ancestors, recognising its importance and significance in societal, religious and medical contexts in Africa is trite and cannot be understated. For the purposes of this thesis, which examines the practice of traditional medicine and law, this chapter offers a brief reference to the importance of the use of drumming within the practice of traditional medicine, believed to be a means of communication directly with the ancestors for the acquisition of knowledge to practise traditional medicine and for use in accompanying rituals to redress causations of illness. In the medical context, disharmony with the ancestors is recognised as a cause of illness and this will be examined subsequently in this thesis, together with other causes of illness recognised in traditional medicine; an alternative anthropological view regarding a different perspective concerning healing is presented for inclusivity of research and possible interest to readers.

## 2.2 *BUNGOMA*: THE PHILOSOPHY OF THE DRUM

Thornton, who does not view traditional medicine as an indigenous knowledge system, as has been mentioned above, believes that the word *bungoma* may encompass, generally, the knowledge and practice of a traditional healer, explaining that the *bu-* prefix indicates a general attribute, substance or manner of *-ngoma*, this linguistic root being explained as:

> *… the root -ngoma, refers broadly to 'drum', 'song', 'music' and 'dance' or, rather, to the social institutions and practices that include all these methods as modes of knowledge practice, that is, the ways in which the knowledge is acquired, assessed, validated, legitimated and used.*[30]

[30] n 2 above, 8.

The *isa*- prefix indicates the person practises *ngoma* and a practitioner of *bungoma* is called an *isangoma*,[31] or as they termed in the current legislation *diviner*,[32] which will be addressed subsequently in this thesis; the plural form of *isangoma* is *izangoma*.

Thornton cites Janzen as holding the following opinion:

> *… the use of drums (ngoma) in healing rituals that involve specific dance styles and songs in which the drums are considered to be the 'voice' of the ancestral shades or spirits.*[33]

Thornton also expands his discussion about persons practising *ngoma* in southern Africa, Kenya, Mali, the Democratic Republic of Congo and in the African diaspora in western India among the Sidi,[34] citing other authors that *bungoma* is what might be termed:

> … the philosophy of the drum, or the embodied knowledge both symbolised and enacted through drumming and dance … The connection between drums and drumming, song and dancing is not merely 'entertainment' – although it may also serve this purpose – but reflects the kind of poetic construction of language, music, knowledge and, above all, altered consciousness.[35]

*Bungoma*, as espoused by Thornton, is *an autonomous system of thought on its own terms*,[36] but states that he does not view the practices and systems of the *izangoma* as a misdirected equivalent of biomedicine, nor as an incomplete science, or a quasi-

[31] Thornton (n 2 above) 8 – 9. This view confirms the earlier view of Vusamazulu Credo Mutwa that the drum is used in traditional medicine, in particular by the *isangoma*: VC Mutwa & S Larsen (eds) *Zulu shaman: Dreams, prophecies, and mysteries* (2003) 211.

[32] Section 1, Traditional Health Practitioners Act, Act 22 of 2007.

[33] As cited by Thornton (n 2 above) 8: JM Janzen *Ngoma: Discourses of healing in central and southern Africa, Comparative studies of health systems and medical care* (1992) 2.

[34] n 2 above, 10.

[35] As cited by Thornton (n 2 above) 11: JM Janzen & S Feierman (eds) *The social basis of health and healing in Africa* (1992); JM Janzen 'Doing ngoma: A dominant trope in African religion and healing' (1991) 21 Journal of Religion in Africa 290 - 308; JM Janzen *Ngoma: Discourses of healing in central and southern Africa, Comparative studies of health systems and medical care* (1992); W van Binsbergen 'Becoming a sangoma: Religious anthropological fieldwork in Francistown, Botswana' (1991) 21(4) *Journal of Religion in Africa* 309 - 344; and R van Dijk, R Reis & M Spierenburg (eds) *The quest for fruition throughout Ngoma: Political aspects of healing in southern Africa* (2000).

[36] n 2 above, 21.

religion, but rather as a contemporary practice that also offers 'healing', since these practitioners:

> *… compete with and partially integrate what they glean from other healing practices in their environment, including the biomedical. Indeed, they are empiricists in a fairly radical sense in that they explore and test their own perceptions of the prophecies and efficacy of treatments and modify their practice accordingly. They practice what I call 'magical empiricism'*.[37]

As addressed above, Ogungbile sees healing as leading to equilibrium in somatic, psychological and social spheres and, importantly, within a concordant and undisturbed environment; sources of healing power, soliciting benevolence to thwart malevolence, include psychotherapy, 'somatherapy', 'metaphysicotherapy' and hydrotherapy.[38]

## 2.3 CAUSATION OF ILLNESS: 'EXPOSED BEING' AND THE 'AUGMENTED SELF'

While Ogungbile[39] addresses drums and drumming, *bungoma* itself is not pertinently addressed in the way it is elucidated by Thornton, who posits that the anthropological concepts of the 'exposed being' and the 'augmented self' should rather be recognised from the usual conceptualisation in traditional medicine of the causation of disease. This author offers the view that when dealing with traditional medicine, he believes that the obligations, duties and responsibilities of such practitioners to their patients are ethically sound, also embodying one of the tenets of the Hippocratic oath, namely *primum non nocere*, or 'first do no harm', and sees the role of such practitioners as occupying a radically different position from other healing crafts in their interaction with persons seeking their healing aid and succour. Thornton believes that that people are not able to ensure preservation of own life fully – as reasoned above, one exists as an 'exposed being' – and this state of inadequacy requires augmentation. This augmentation is through certain practices and the use of appropriate material or spiritual sources to avoid *inevitable exposure to other people and resources of evil*. Healing then, according to this author, *is aimed to achieve the augmented self as a*

[37] n 2 above, 22.

[38] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 415.

[39] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 415.

*healed person*,[40] and *the patient becomes an augmented self through 'strengthening' and 'protection'*.[41]

The augmentation or manner of reinforcing, fortifying or supporting an 'exposed being' would then be, according to Thornton, to enable this person:

> … to withstand the influence of the many forces around that person. This involves a literal augmentation of the person with 'charms' and 'amulets', but also a 'cleansing' of the person through vomiting, enemas and blood-letting to clear out other dangerous, causal agents that had come to reside inside the body.[42]

Thornton presents the philosophy, citing the writings of other authors, that no person dies: persons are killed, and death is unnatural, with causation due to infiltration and permeation of the protective resources of the person. This view is not entertained in any further detail in his oeuvre, however: causation, according to this author, is then attributable more as 'relational', and not so much as social, since:

> *… it is other specific persons, including persons who are no longer living as well as 'person-like' objects and forces, that can do harm. These persons act or have causal effect, not because of social roles or position – for example class, seniority, race or gender – but because they have a specific relationship with the 'victim' or target. Some of these relations between persons, tangible and intangible, are evil, and evil is real. Evil is directly experienced – we could say empirically experienced – by the fact of mortality and morbidity.*
>
> *It is also not correct to call the target of evil a victim. The sufferer is not the victim of deliberate intentional harm – although this might be the case where sorcery is specifically used, but is simply exposed to harm of this sort as all people are. This state of being I call the 'exposed being', and healers attempt to heal by protecting their clients from this existential condition of exposure. But all protection, all muti, ritual, amulets or spells work only temporarily, and usually only conditionally. Eventually, the person is exposed again … and again. Ultimately, it is this condition of exposure that kills or leads to other misfortune.*[43]

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[40] n 2 above, 24.

[41] n 2 above, 41.

[42] n 2 above, 55.

[43] n 2 above, 23 and as cited: HA Callaway *The religious system of the Amazulu in their own words* (1868); WHI Bleek *Reynard the fox in South Africa, or, Hottentot fables and tales* (1864); WHI Bleek *A brief account of Bushman-*

## 2.4 CONCLUSION

The practice of traditional medicine is integral to *bungoma*, the philosophy of the drum, in which drums are considered believed to be a means of direct communication with the ancestors for the acquisition of knowledge to practise traditional medicine and for use in accompanying rituals to redress causes of illness.

*folklore and other texts* (1875); WHI Bleek, L Lloyd & DF Bleek *The mantis and his friends: Bushman folklore* (1923); and WHI Bleek, L Lloyd & GM Theal *Specimens of Bushman folklore* (1911).

# CHAPTER 3
# TRADITIONAL MEDICINE: ANCESTORS AND THE ELDERS

## 3.1 INTRODUCTION

As has been alluded to previously and which will be presented more pertinently in this thesis subsequently, the role of ancestors in the state of health of any person in the construct of traditional medicine is paramount: welfare of any descendant is dependent on complete harmony with, and due reverence towards, the ancestors and is also the case towards living persons who occupy important and prominent positions in society, known as the elders. In examining traditional medicine and the law, it is manifest that the roles of both the ancestors and elders be recognised and a brief background to their roles, whether as divinities or guardians of moral behaviour, or other, is presented in this chapter.

## 3.2 THE ANCESTORS

According to Manda, the living-dead, so described since they are persons who are kept alive in the memories of kith and kin and the community, play an important and indispensable role in African culture and are known as the ancestors or *amadlozi*. This expression, the living-dead, infers a connection between those departed and those remaining – an enduring bond.[44]

The deceased person is, according to Mbiti, as cited by Manda, therefore in a *state of personal immortality*, which is explained as:

> … [being] *externalized in the physical continuation of the individual through procreation, so that the children bear the traits of their parents or progenitors. From the point of view of the survivors, personal immortality is expressed in acts like respecting the departed, giving bits of food to them, pouring out libation and carrying out instructions given by them either while they lived or when they appear.*

[44] n 29 above, 22.

> *The acts of pouring libation (of beer, milk or water), or giving portions of food to the living-dead, are symbols of communion, fellowship and remembrance.*[45] *They are the mystical ties that bind the living-dead to their surviving relatives*.[46]

According to Asante, it is not axiomatic that every person is accorded the status of an ancestor: conditions and circumstances require that an exemplary life had to have been lived, devotion had to have been shown to own ancestors, respect had to have been accorded the elders, and the ancestor had to have raised children. The state of death of the person is equally significant and may not have been through suicide, accident, or other forms of violence – battlefield heroic deaths excluded. If a person had suffered from various pathologies, such as epilepsy, leprosy or mental illness, these would also preclude a deceased person becoming an ancestor.[47]

Ancestors were then the elders: persons who had traversed the mortal plane and had coped with the trials and tribulations in their respective communities in an exemplary and befitting moral manner to be recognised as ancestors. They then, in their states of personal immortality, assist the living in matters such as legal proceedings, nuptials, where mediation is required in contentious matters, and in healthcare.[48]

Offerings are made to bind the living-dead to relations on the physical plane and, according to Asante:

> *People have believed for a long time that the ritualized propitiation and invocation of ancestors could influence the fate of the living. This is a belief and practice that has been brought to a complex and elaborate level by thousands of years of African thinking*.[49]

To achieve order and harmony in society, the role of the ancestors is paramount – the ancestors require consultation since they are the most intimate of the divinities and the keepers of morality. Avoidance of immoral choices requires following the moral paths traversed by the ancestors; ancestor reverence must be within the family

[45] Manda describes such acts as performing rituals or the performance of *amasikho*; n 29 above, 23.

[46] As cited by Manda (n 29 above) 22 - 23: Mbiti, JS *African religions and philosophies* (1970) 25.

[47] MK Asante 'Ancestors' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 45.

[48] MK Asante 'Ancestors' Asante & Mazama (n 47 above) 47.

[49] MK Asante 'Ancestors' Asante & Mazama (n 47 above) 47.

structure and may however be traversed beyond the immediate family given that all family groups in the ethnic structure revere the same ancestors. Although the line of descent is usually matrilinear, it may also be patrilinear, and displays of reverence may differ according to different aspects of consultation needs.[50]

The living-dead, the ancestors, are then those persons on the spiritual plane who must be propitiated and invoked according to the circumstance, but Asante indicates that the forces of nature habitually embody ancestor activity:

> *… they may be the powers behind the storms, rain, rivers, seas, lakes, hills, and rocks. They are not just the rocks or water, but the spiritual powers capable of manifesting anywhere … The natural world, the world of trees, rocks, rivers and so forth, has a direct connection to the spiritual world by way of moral geography*.[51]

This author recognises six general prerogatives of the ancestors: controlling the lineage of the community; controlling the metaphysical and social order; protecting agricultural rites to keep the land fertile; sustaining unity and harmony; reinforcing group cohesion; and maintaining the harmony between the spiritual and physical planes.[52]

### 3.3 THE ELDERS

Implicit in this term is that individuals are such because of mature age and are therefore closest to the living-dead, but especially given that they occupy an important and prominent position in the family or community. They are seen as sources, curators, custodians and wardens of morality, defenders of moral values and wisdom reflecting past moral behaviour, and in societies where the oral tradition predominates, wisdom may be communicated by storytelling, fables, folklore or proverbs. Advice by the elders, who are addressed in the same manner as ancestors, is not easily

[50] MK Asante 'Ancestors' Asante & Mazama (n 47 above) 47.

[51] MK Asante 'Ancestors' Asante & Mazama (n 47 above) 48 - 49.

[52] MK Asante 'Ancestors and harmonious life' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 97.

dismissed and in times of *strife, disease, and distress or during ceremonial occasions, the elders will be called upon for advice and most importantly, their participation*.[53]

## 3.4 CONCLUSION

Ancestors are viewed as the most intimate of the divinities and keepers of morality primarily maintaining harmony between the physical and spiritual planes; withdrawal of protection by them is seen as inducing susceptibility to illness and misfortune and is a cause of illness requiring redress within the practice of the construct of traditional medicine.

[53] Manda (n 29 above) 21 - 22.

# CHAPTER 4
# THE CONCEPT OF A HUMAN BEING IN AFRICAN CULTURE: *UBUNTU* AS *WELTANSCHAUUNG* IN TRADITIONAL MEDICINE

## 4.1 INTRODUCTION

This chapter serves to offer some elucidation about the doctrine or canon of *ubuntu*, its role as a guiding principle in society and with particular mention, albeit brief, as to how this doctrine influences the practice of traditional medicine specifically with regard to disease and its causation, also as to the obligations it places on immediately contiguous family members, the society or the community. In cases of terminal illness, *ubuntu* is also viewed as an obligation on living relatives to initiate the dying into the spiritual plane of the ancestors by proving courage, peace and dignity in the easing of burdens flowing from such illness.

## 4.2 *UBUNTU* AS A GUIDING PRINCIPLE IN AFRICAN SOCIETY

According to Nkulu-N'sengha, *ubuntu* is a southern African Nguni linguistic variant of *bumuntu*, the embodiment of personhood and quality of humaneness, itself being the substance of an *umuntu* – a person who embodies moral character, true humanity and humaneness, persons being termed *amabantu*; persons who are not of African descent are accorded different monikers. By contrast, *kintu*, a term used by the Luba, one of the largest ethnic groups in the Democratic Republic of Congo,[54] reflects those persons who are of base morality, who personify stupidity and who do not deserve respect,[55] with the southern African variant being *akanabuntu*.[56]

Chuwa sees *ubuntu*, a Nguni word,[57] as a guiding principle shared by most persons in sub-Saharan Africa, embodying the inter-dependence of humans and links with the cosmos and spiritual plane, providing insights about dealings within communities and the world – stating that:

[54] M Nkulu-N'sengha 'Baluba' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 97.

[55] M Nkulu-N'sengha 'Bumuntu' in MK Asante & A Mazama (n 54 above) 97.

[56] Manda (n 29 above) 37.

[57] L Chuwa 'Interpreting the culture of ubuntu: The contribution of a representative indigenous African ethics to global bioethics' published Doctor of Philosophy thesis, Duquesne University, 2012 19.

> *The importance of relatedness to humanity is summarized by the two maxims of Ubuntu. The first is: a human being is human because of other human beings. The second maxim is an elaboration of the first. It goes; a human being is human because of the otherness of other human beings.*[58]

These two *ubuntu* maxims, according to Arthur *et al*, are said to be:

> *Motho ke motho ka batho ba bangwe* and *umuntu ngumuntu ngabantu.*[59]

and u*buntu* is best encapsulated, according to Manda,[60] by Mbiti's renowned combining of these two maxims into:

> *I am, because we are; and since we are, therefore I am*.[61]

or, according to Manda, likewise citing Mbiti, similarly expressed as:

> *I am because we are, and we are because I am.*[62]

## 4.3 OBLIGATIONS FLOWING FROM *UBUNTU*

According to Chuwa, citing other authors, any person suffering from an illness or from a disability is regarded as an obligation not only by the immediately contiguous family members, but is also the responsibility of the society or the community. It is an obligation to that person until that person recovers or dies. This obligation flows from being human, the company of humans, empathy within situations of misfortune and the spirit of commonality and harmony in the immediate contiguous society. This obligation also has the purpose of initiation, initiation into the world of the living-dead,

[58] n 57 above, iv.

[59] D Arthur *et al* 'An analysis of the influence of ubuntu principle on the South African peace building process' (2015) 3(2) *Journal of Global Peace and Conflict* 70, citing: MB Ramose *African philosophy through ubuntu* (1999), IN Goduka 'Indigenous/African philosophies: Legitimizing spirituality centred wisdoms within academy' & P Higgs, NCG Vakalisa, TV Mda, & NA Assie-Lumumba (eds) *African voices in education* (2000).

[60] Manda (n 29 above) v.

[61] As cited by C Banda 'Ubuntu as human flourishing? An African traditional religious analysis of ubuntu and its challenge to Christian anthropology' (2020) 5 *Stellenbosch Theological Journal* 209: JS Mbiti *African religions and philosophy* 2ed (1990) 106.

[62] n 29 above, v.

or, as discussed above, into the spiritual plane of the ancestors, by providing courage, peace and dignity to ease physical burdens and to mitigate emotional or psychological distress. These attributes are part of a practical learning experience for members of society given the lack of formal instruction, but for which guidance may also be found in the relevant society's philosophy as expounded in riddles, proverbs and myths, stories and legends and songs and in caring for the ill. Society members experience the joy of philanthropy, benevolence and charity, learning to live for others, through others.[63]

Manda expresses the view that *ubuntu* is:

> *… the idea that one's self-worth, one's identity and one's feeling of belonging is cultivated through one's interaction with others. This is done to give meaning to a person's life and affirm their existence, by making them feel and know that they are a part of a group, a part of a community or a part of a whole. Hence, because ubuntu is related to the notion of belongingness and affirming another person's existence, our discourse and our healthcare practices ought to centre on how healthcare practitioners can assist in restoring the self-esteem and self-worth of the patients who are under their care.*[64]

## 4.4 *UBUNTU* AND TRADITIONAL MEDICINE

Healthcare practitioners, according to Manda, then need to consider the cultural, religious and ethical convictions of patients, particularly in Africa where views on life, death, health and illness are socially embedded and culturally conditioned. Belief in the ancestors and the understanding that an individual exists and operates in a web of relationships with others is important for healthcare practitioners in Africa, particularly where, for the African patient, physical manifestations of illness presuppose spiritual causation.[65]

According to Murove, as cited by Manda:

> *A healthcare practice that is purely scientific in its conceptualization and treatment of disease would inevitably fail to embrace the spiritual dimension of human sickness. Within the African*

[63] n 57 above, 22.

[64] n 29 above, 185.

[65] n 29 above, 187.

*traditional context, such a healthcare practice is construed as an exercise in dehumanization. With its strong emphasis on the idea of the dignity of the human body, African bioethics view western medical practices as problematic, because of the way in which the body is treated, in such a way that renders the person insentient. In the African cultural context, where a human being is viewed holistically, a healthcare practice that places emphasis on merely repairing human organs is inadequate because it cannot give a comprehensive view of disease and causation.*[66]

## 4.5 CONCLUSION

The question of *ubuntu* in South African law, as a general tenet, is not the subject of this thesis, but should be considered in any review of any legislation that may exist in the regulation of traditional medicine, or in the development of any future legal precepts, unless it would be inappropriate to do so legally.

[66] As cited by Manda (n 29 above) 188: M Murove 'African bioethics: An explanatory discourse' [2005] 18(1) *Journal for the Study of Religion* 16 - 36.

# CHAPTER 5
# TRADITIONAL MEDICINE: WITCHCRAFT OR SORCERY

## 5.1 INTRODUCTION

The concept of witchcraft or sorcery is not the subject of this thesis, but requires consideration for contextualisation within the communities in which traditional medicine is practised, and the concept of witchcraft or sorcery as a cause of illness in traditional medicine will be addressed subsequently. This chapter offers introductory views on matters relating to witchcraft as may be relevant to the practice of traditional medicine, in particular medicines, as well as offering a brief overview of the types of sorcerers and a distinction made, seemingly, between witches and sorcerers for clarification purposes. Legislation relating to witchcraft is also addressed briefly for the sake of inclusivity of research and pertinent to the overriding theme of this thesis, namely the practice of traditional medicine for healing; the distinction between witchcraft and traditional medicine is also clarified.

## 5.2 CLARIFICATION BETWEEN TRADITIONAL MEDICINE AND WITCHCRAFT

While traditional medicine is known as *umuthi wendabuko* in isiZulu, witchcraft or sorcery, by contrast, is termed *ubuthakathi*, with a witch or sorcerer, a gender-neutral noun in isiZulu, being termed *umthakathi*; the correct version in English in the masculine would be ‘wizard’.

## 5.3 TRADITIONAL MEDICINE ARMAMENTARIUM: MEDICINES TO CAUSE HARM, MEDICINES FOR USE IN HEALING

The armamentarium used in traditional medicine, namely the medicines, equipment and techniques used, but with specific reference to medicines, whether of plant, animal, or mineral origins or other and within any pharmacopoeia or materia medica, recorded or otherwise, requires clarification: the word ‘medicine’ is generally taken to mean a substance that is used to restore health and the Zulu term *umuthi,* (plural: *imithi*), with the variant *muthi* or *muti* being used generally, with a literal meaning of ‘tree’ or ‘shrub’, is also a synonym for ‘medicine’.

*Umuthi* has a wider connotation, however, in the sense that *it applies to noxious as well as curative substances*:

> *Umuthi wokwelapha is medicine for healing and umuthi wokubulala is medicine for killing, but while some imithi are always used for healing and others for causing harm, still others can either heal or harm depending on the motive for which they are used… some imithi are believed to be potent in themselves, and … no ritual or symbolic language is used in their administration, while others are symbolic and accompanied by special rites.*[67]

## 5.4 SOUTH AFRICAN WITCHCRAFT LEGISLATION

The topic of witchcraft or sorcery has already received some consideration in a previously published thesis by the author of this particular thesis.[68] Parts of this published research are incorporated into this thesis below for contextualisation, with minor emendations.

Pearson,[69] in a historical review of witchcraft in early twentieth century then-Transvaal, notes that the topic of witchcraft has attracted much contemporary scholarship and cites Niehaus as stating that debate in South Africa has *focused almost exclusively on witchcraft and the law*.[70] The practice of witchcraft, currently governed legislatively by the Witchcraft Suppression Act,[71] is based on various legal precepts prior to the apartheid era.[72] Further consideration was also given to witchcraft by the Ralushai

[67] M Ngubane *Body and mind in Zulu medicine: An ethnography of health and disease in Nyuswa-Zulu thought and practice* (1977) 22.

[68] Mullinder (n 3 above) 5.

[69] J Pearson 'Witchcraft management in the early twentieth century Transvaal' published Master's in History thesis, University of the Witwatersrand, 2015 6.

[70] I Niehaus 'Witchcraft as subtext: Deep knowledge and the South African public sphere' (2010) 36(1) *Social Dynamics* 66.

[71] Act 3 of 1957, as amended by the Witchcraft Suppression Amendment Act 50 of 1970 and the Abolition of Corporal Punishment Act 33 of 1997. The operation of this Act was also made uniform across the former homelands by the Justice Laws Rationalisation Act 18 of 1996.

[72] The Native Territories' Penal Code 24 of 1886; Act 2 of 1895 (Cape of Good Hope); Act 24 of 1896 (Cape of Good Hope); Law 19 of 1891 (Natal); Ordinance 26 of 1904 (Transvaal); Proclamation II of 1887 (Zululand).

Commission,[73] whose terms of reference were to investigate the causes of witchcraft violence as well as ritual murders in the Northern Province.

The Mpumalanga Witchcraft Suppression Bill[74] is another instance of attempted regulation in law. Commenting in 2007, Tebbe maintains that the 1957 legislative instrument governing witchcraft is *… an apartheid-era statute based on earlier colonial models that … outlaws a wide variety of occult-related practices, including accusing someone of witchcraft and practising traditional medicine*.[75]

Legislation enacted in 2007, the same year as the published comment by Tebbe, which will be discussed below in this thesis, provides for the regulation of the practising of traditional medicine in terms of the Act.[76]

The report 'The Review of the Witchcraft Suppression Act 3 of 1957' issued by the South Law Reform Commission refers to the unreferenced views by Dr Dale Wallace, a scholar of comparative religions, regarding this legislation as having:

> *… its origins in colonial administration and administrators who were concerned about beliefs and superstition. Emphasis is made that the aim of the Act was to suppress the belief in witchcraft*. [77]

Grobler believes that:

> *The legal culture that presently dominates criminal law was shaped by colonialism and apartheid. When analysing the legal responses in criminal cases, and specifically witchcraft-related crimes, how society dealt with these cases historically has shaped current legal thinking.*[78]

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[73] NV Ralushai 'Report of the Commission of Inquiry into witchcraft violence and ritual murder in the Northern Province of the Republic of South Africa: To His Excellency the Honourable Member of the Executive Council for Safety and Security, Northern Province, Advocate Seth Nthai' South Africa 1996.

[74] 2007.

[75] N Tebbe 'Witchcraft and statecraft: Liberal democracy in Africa' (2007) 96 *Georgetown Law Journal* 187.

[76] Act 22 of 2007.

[77] South African Law Commission 'The review of the Witchcraft Suppression Act 3 of 1957' Project 135 South Africa 2014 4.

[78] C Grobler 'An analysis of the cultural defence in South African criminal law' published LLM thesis, University of Pretoria, 2014 8.

## 5.5 THE DISTINCTION BETWEEN WITCHCRAFT AND TRADITIONAL MEDICINE

The question of witchcraft will no doubt be further considered by researchers in future, possibly by regulators also, but for the purposes of this thesis, the distinction drawn by Ashforth in a discussion about the legal position of witchcraft violence in South Africa is cardinal:

> *The distinction between healing and its antithesis, witchcraft, is an essentially moral one, based on interpretations of the motives of persons deploying muthi and the ends to which these forces are directed. Witches seeking to cause harm work with muthi as poison; healers seeking well-being work with muthi as medicine. Though directed towards health and well-being – a general condition of bodily health, spiritual ease and social harmony … – the muthi of healers also brings death. When the healer sets out to cure a person afflicted by witchcraft, he or she will typically promise that their muthi will return the evil forces deployed by the witch to their source, thereby killing the witch. Such violence, however, is legitimate for it is executed in the name of defense. Witches, by definition, are engaged in illegitimate use of the powers of muthi.*[79]

## 5.6 CONCLUSION

This thesis is concerned with the healing paradigm – as cited above by Ashforth: *healers seeking well-being work with muthi as medicine* – and will not address witchcraft except by way of differentiation or possible contextualisation as may be appropriate to the circumstance, or indeed then within the context of the healing of a person who may believe that a witchcraft affliction has been brought upon them.

[79] A Ashforth *Witchcraft violence and democracy in South Africa* (2005) 134.

# CHAPTER 6
# CATEGORIES OF PERSONS PRACTISING TRADITIONAL MEDICINE

## 6.1 INTRODUCTION

The Traditional Health Practitioners Act[80] provides for six registrable categories for the practice or training in traditional health in South Africa: *diviner*, *herbalist*, *student*, *traditional birth attendant*, *traditional surgeon* and *traditional tutor*. These categories of persons within the South African medicine construct will see expanded consideration subsequently in this thesis, in various appropriate contexts, also in terms of the prevalence of consultation as based on available statistics.

At this juncture within this thesis, it is considered appropriate to present information which endeavours to provide both concurring, also contrary, views leading to a more nuanced overview of the classes of persons practising within the construct of traditional medicine, including not only the six registrable South African categories, but some other, together with an fuller exposition of pertinent information relating to the various professions.

## 6.2 OVERLAPPING OF FUNCTIONS OR PRACTICES IN TRADITIONAL MEDICINE

Ogungbile avers that classification of specific categories of traditional medicine practitioners, either male or female, may prove to be inexact given that functions overlap according to the definition of disease in Africa; disease or illness encompasses personal, and also communal harm or affliction. This author however classifies persons practising traditional medicine in one of four categories: persons who are herbalists; persons who practise traditional medicine by divination; healing as practised by persons belonging to the priest and priestess class; and those persons who are known as a 'rainmaker'. In all cases, this author indicates that these persons may be designated as mediums given that they serve as intercessors and intermediaries between the physical and spiritual planes.[81]

[80] Act 22 of 2007.

[81] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 416.

## 6.3 CLARIFICATION OF POSSIBLE DIFFERENCES WITHIN *BUNGOMA*

Thornton believes that while the 'philosophy of the drum' is an underlying motif within and throughout *bungoma*, there are different disciplines within *bungoma* that may be divided into six or so categories, this author acknowledges that various differences may influence the manner in which these disciplines are exercised because of the singular features of individual practices, the style of teaching of the disciplines, together with the differences in local ecologies with respect to *imithi* – whether plant, animal or mineral.[82]

These disciplines according to Thornton are:

- divination for that class of persons for whom healing is by divination principally, namely the *izangoma*, with divination being known as *ukupengula*;[83]
- *the knowledge of medicinal substances and their relation to local ecologies and landscapes*, together with the knowledge of the *amadlozi* and *kupahla*, the means by which to communicate with them;[84]
- knowledge of 'foreign' and water spirits, and *kufemba*, a healing ritual conducted by interceding with these spirits;[85]
- the *experience and knowledge of ngoma, 'deep' embodied knowledge expressed through singing, dancing, drumming and the 'trance' or 'enchantment' of the dances*;[86]

[82] n 2 above, 11.

[83] As cited by Thornton (n 2 above) 11: D Cumes *Africa in my bones: A surgeon's odyssey into the spirit world of African healing* (2004); WD Hammond-Tooke 'The aetiology of spirit in southern Africa' (1986) 45 African Studies 157 - 170; WD Hammond-Tooke Rituals and medicines: Indigenous healing in South Africa (1989); R Werbner Divination's grasp: African encounters with the almost said (2015).

[84] n 2 above, 11.

[85] n 2 above, 11.

[86] As cited by Thornton (n 2 above) 11: JM Janzen *Ngoma: Discourses of healing in central and southern Africa, comparative studies of health systems and medical care* (1992); H Ngubane *Body and mind in Zulu medicine: An ethnography of health and disease in Nyuswa-Zulu thought and practice* (1977).

and, in the transfer of the knowledge of healing:

- *the teaching relationship between the ugobela,* the teacher of the arts and knowledge of *bungoma*, the neophyte, *ithwasa,* the initiation school, *mpandze,* and the systems of transmission of knowledge.[87]

## 6.4 CLASSES OF PERSONS PRACTISING TRADITIONAL MEDICINE

Some eight classes of persons are considered and are as follows:

### 6.4.1 *INYANGA* OR THE HERBALIST

Ngubane avers that while the preparation of particular *amakhambi* or herbal medicines might generally be known, certain medicines can only be prepared by an *inyanga* or an *isangoma*. The former, according to Ngubane, is a male person who, after being apprenticed, practises as an *inyanga*.[88] The term *inyanga means 'a moon person' because the moon plays a big magic*[89] and an *inyanga* may inherit the profession from relatives.[90]

In contrast to other literature, Ngubane sees specialisation within the class of *inyanga*, with such specialisation not being confined, however, to any particular gender and where skills may be a family prerogative. The specialist is said to be permitted to pass on the skill to only one member of the family, or lineage segment, in the succeeding generation – thus limiting the specialisation knowledge to only a few persons. Ngubane cites examples of specialised skills, stating that these are only some examples. These include *izinyanga* who prepare snake-bite antidotes, dental medicines, and treat fractures, also known as 'bone-setting' (*inyanga yomhlabelo*), and traditional medicine midwives who deal with difficult labours or breech births.[91] This latter category will be addressed subsequently, but a traditional midwife is known as *umbelethisi*, with traditional midwives known as *ababelethisi*.

[87] n 2 above, 12.

[88] n 67 above, 101 - 102.

[89] VC Mutwa & S Larsen (ed) *Zulu shaman: Dreams, prophecies, and mysteries* (2003) 211.

[90] Mutwa (n 89 above) xii.

[91] n 67 above, 105 - 106.

The assumption is made that an *inyanga* is equivalent to a phytotherapist, that is a person who uses the curative properties of plants – but in this case in a traditional manner, as opposed to other phytotherapists who may use curative properties of plants according to different curative models.

### 6.4.2 *INYANGA* ASSISTANT

This is a person who may act as an assistant to an *inyanga* in identifying the locality of the *imithi and* gathering such.[92]

### 6.4.3 *ISANGOMA* OR THE DIVINER

According to Ngubane, an *isangoma* or a diviner is usually a woman and, in addition to a widespread and thorough knowledge of the various *imithi*, she is said to be chosen by her ancestors and, after initiation, receives the power of clairvoyance. Ngubane indicates that an initiate will receive instruction from a practising diviner, but that certain *imithi or medicines will be revealed to her by her own ancestors,* adding a lineage nuance to that neophyte's pharmacopoeia after transition to a practising diviner.[93] Mutwa, distinguishing between an *isangoma* and an *inyanga*, comments as follows: *But an isangoma must receive a "call" from the spirits*.[94]

Ngubane avers that there is no possession of the body in divination by any ancestor – *they "sit" on her shoulders and whisper into her ears*. Ngubane clarifies the practice of divination or *ukupengula*, asserting further that there are three main techniques – the first technique is that used by an *isangoma sekhanda*, the 'head diviner' or 'ecstatic diviner', who practises divination by communing with the ancestors directly and uses no material objects. Ngubane states that persons who consult her are expected to engage with her in this process by indicating either concordance with the diviner's message or rejection of that message. This may be done by the loud or soft clapping of hands, but some diviners seek spoken concordance such as 'I agree, I agree, I

[92] Personal discussion with the Registrar of the Interim Traditional Health Practitioners Council, 7 November 2017.

[93] n 67 above, 102.

[94] n 89 above, xii.

agree': *ngiyavuma, ngiyavuma, ngiyavuma*, the degree of enthusiasm indicating either concordance with or rejection of the message.[95]

In a publication originally issued some four decades prior to Ngubane and seemingly offering a more nuanced elucidation of this technique, Krige, referring to a study first published in 1936,[96] and citing Callaway,[97] refers to *izinyanga zesithupha* (rather than to *izangoma zesithupha* since *izinyanga* do not divine*)* – the thumb diviners, with concordance being denied with the striking of the ground gently by *izibulo* or divining rods, but with concordance being given, however, by violent striking of these rods and also by asserting spoken agreement, but particularly by pointing at the diviner *in a peculiar way with the thumb*. Krige also mentions *amabukulazinti*, who divine *by means of three or more pieces of stick a foot long, which jump about to indicate the answers*.[98]

Ngubane offers the view that the second technique is that of 'bone throwing' and a 'head' or 'ecstatic' diviner may also employ this method of divination, being termed then a 'bone thrower' or *isangoma esichitha amathambo*. To induce an elevated mood, powdered *imithi* is inhaled leading to sneezing or yawning. Ngubane states that no special atmosphere is created by this *isangoma*, possibly implying that in the previously mentioned category and following category this may be the case, and clarifying further that this technique may be learnt as an art and then practised by an *inyanga* – the difference being that for him this is a learned technique whereas in the case of an *isangoma* it is revealed to her by the ancestors.[99]

The third technique, posited by Ngubane as being ventriloquism possibly, is said by this author to be the absolute of the divination techniques, being that:

> *… of the "whistling great ancestors" (abalozi, amakhosi, amakhulu). The ancestral spirits in this case communicate directly with the clients by whistling out words which are meaningful to the*

[95] n 67 above, 102.

[96] EJ Krige *The social system of the Zulus* (1962) 300.

[97] As cited by Krige (n 96 above) 300: H Callaway 'Divination and analogous phenomena among natives of Natal' (1872) (1) *The Journal of the Anthropological Institute of Great Britain and Ireland* 163 - 185.

[98] n 96 above, 300.

[99] n 67 above, 102.

> *listener. The whistling sound … comes directly from the rafters of the thatched roof, particularly at the upper part of the rondavel hut opposite the doorway. The diviner in the meantime sits almost in the centre of the hut facing towards its upper part, i.e. with her back to the doorway. If the clients are unable to understand some of the whistled words she interprets them. The clients are free to ask questions of the whistling spirits (abalozi), and the spirits reply. The clients never provide clues. A diviner possessed by such ancestors is said to have great ancestors (amakhosi amakhulu).*[100]

### 6.4.4 *ISANUSI* OR THE PRIEST OR PRIESTESS

Vusamazulu Credo Mutwa, who passed away in 2020, and who is respected as having been one of the most authoritative and revered practitioners of traditional health in South Africa, believed that an *isangoma is a class of holy person, of which there are many, and is a drum person, a clairvoyant, one who uses the drum to arouse the spirits* – meaning the class of persons who practise traditional medicine using the art of divination. An *inyanga* is, however, also *the name for a shaman, a witch doctor, a moon person* – meaning a person known as a herbalist.[101] An *isanusi*, in differentiation between an *inyanga* and an *isangoma*, lies at a plane higher than both, and is a person *who causes things to ascend, the uplifter, or the pilot of that which ascends* – meaning a person who is either a priest or priestess.[102] An *isanusi* is thus at lies at a higher plane than either an *inyanga* or an *isangoma* and, having formerly been an *isangoma*, is now within the priest or priestess caste, one of the four categories suggested by Ogungbile above.[103]

Nobles and Nobles aver that Mutwa was a *high isanusi*, the highest of the *isanusi*, having been held in high regard and deep respect as someone who was possessed of the ancient secrets of protection and healing, and having served his community in all aspects of life.[104]

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[100] n 67 above, 103.

[101] VD Nobles & WW Nobles 'Mutwa, Credo Vusamazulu' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 436.

[102] Mutwa (n 89 above) 211.

[103] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 416.

[104] VD Nobles & WW Nobles 'Mutwa, Credo Vusamazulu' Asante & Mazama (n 101 above) 437.

### 6.4.5 *UMBELETHISI* OR THE TRADITIONAL BIRTH ATTENDANT

Mokgobi refers to traditional birth attendants who are usually older woman that through experiential training – witnessing and assisting in many births throughout their adult lives – have attained equivalency to the profession of midwifery. Mokgobi indicates that this skill may be transferred from one generation to another, but is doubtful that such a profession in traditional health will remain extant for much longer since most women now seemingly prefer to give birth in formalised healthcare establishments, rather than at home.[105]

Truter sets out the requirements to become an *umbelethisi*: being a mother of at least two babies so as to appreciate both the joys and agonies of childbirth, and 15 to 20 years of apprenticeship before assuming the title. This author indicates that traditional birth attendants do not charge for services but accept donations in the form of gifts and may also be invited as guests of honour at the naming of the child.[106]

### 6.4.6 *INGCIBI* OR THE TRADITIONAL SURGEON

Mokgobi refers to traditional surgeons, *iingcibi* in isiXhosa, as persons who are qualified and able *to perform circumcision of boys* and being recognised by the village chiefs to do so competently: *their practice and expertise as surgeons can also encompass the practices and expertise of other types of traditional healers*.[107]

### 6.4.7 *UMVULA UTHINI* OR THE RAINMAKER

As indicated above, Ogungbile indicates that these persons may be designated as mediums given that they serve as intercessors and intermediaries between the physical and spiritual planes.[108]

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[105] MG Mokgobi 'Understanding traditional African healing' (2014) 20 (Suppl 2) *African Journal for Physical Health Education, Recreation, and Dance* 25.

[106] I Truter 'African traditional healers: Cultural and religious beliefs intertwined in a holistic way' (2007) 74(8) *South African Pharmaceutical Journal* 58.

[107] n 105 above 24 - 34.

[108] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 416.

In South Africa:

> *The Rain Queen … is believed to have the mystical power to control rain. In a community where agriculture and cattle rearing play a critical role in the sustenance of its members, as it is with the Lovedu people, the importance attached to the falling of rain comes as no surprise. Furthermore, rain, generally speaking, is linked in African life and religion to the fundamental notions of fertility and life transmission. Through a spiritual control of rain, the Queen is therefore assumed to have control over the welfare of her society.*[109]

Masalanabo Modjadji was due to have been crowned Queen Modjadji VII, the "Rain Queen", on attaining adulthood in 2023 – the succession is matrilineal, and no male may inherit the throne.[110] According to an online media report, however, Prince Lekulela Modjadji, son of the late Queen Makobo Modjadji, will however now be appointed king and will be inaugurated in October 2022. His sister, Masalanabo Modjadji, who would have been queen, will now enjoy the status of 'great-aunt'.[111]

### 6.4.8 *UMTHANDAZI* OR THE FAITH HEALER

Thornton mentions traditional medicine as comprising three classes only: the *inyanga*, the *isangoma* and the *amaprofeti*, *who practice faith healing in terms of one or other form of African syncretic Christianity*,[112] and does not consider the other classes mentioned previously. For this thesis, however, faith healing should be considered in terms of religion rather than the practice of medicine. It is considered sufficient to note that there is debate, particularly about Paul of Tarsus's first letter to the Christians of Corinth about whether this passage authorises traditional healing by spirits, given that the *izangoma* are said to speak in the tongues of the *amadlozi*.

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[109] A Mazama 'Rain Queen' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 562.

[110] 'All hail the "Rain Queen" of South Africa'*:* https://www.downtoearth.org.in/news/young/all-hail-the-rain-queen-of-south-africa-71209, accessed 1 February 2021.

[111] 'Prince Lekukela Modjadji ascends to Balobedu royal family throne – instead of his sister Masalanabo': https://www.news24.com/news24/southafrica/news/prince-lekukela-modjadji-ascends-to-balobedu-royal-family-throne-instead-of-his-sister-masalanabo-20210509, accessed 10 May 2021.

[112] n 2 above, 5; syncretic Christianity occurs when substitution of the basic elements of Christianity is replaced by host culture religious aspects and constituents.

Thornton avers *that in many cases prophets are izangoma and izangoma are prophets*, although often in different contexts.[113]

## 6.5 CONCLUSION

If the essentiality of the research question is the conclusion that regulation of this profession is to be continued, strengthened even, then the information presented above will see further consideration subsequently in this thesis with a view to making recommendations for consideration by the regulator in any future regulation of the traditional medicine construct in South Africa. These recommendations might be either with regard to changing the number of categories as currently regulated, practices or techniques used within those categories, or with regard to the education and training.

[113] n 2 above, 167.

# CHAPTER 7
# TRADITIONAL MEDICINE: CAUSES OF ILLNESS

## 7.1 INTRODUCTION

Conventional medicine diagnoses are based on the biomedical model where mind and body are considered separate and distinct entities, this being in direct contrast to causes of illness in traditional medicine with traditional medicine being more akin to the approach taken in other complementary and alternative systems of health.

Ngubane, in what is regarded by the author of this thesis as having compiled a seminal work about traditional medicine, albeit from a specific reference point relating to the Nyuswa region of KwaZulu-Natal, discusses in some detail the causes of illness from different perspectives, the treatment of disease, colour symbolism, and notions of evil spirit possession in traditional medicine from this particular Zulu perspective.[114]

This author also refers to the causation of disease focused on Zulu cosmology with diseases in this group being referred to as *ukufa kwabantu* or 'disease of the African peoples' – not because the diseases or the symptomatology are necessarily associated with African peoples only, but because the interpretation is bound up in the way health and disease are viewed in Africa.[115]

This chapter offers information relating to the causes of illness in traditional medicine.

## 7.2 CAUSES OF ILLNESS ACCORDING TO TRADITIONAL MEDICINE

Reflection on these concepts, for contextualisation in this thesis, follows below.

### 7.2.1 CAUSES OF ILLNESS: BIOLOGICAL FACTORS

According to Ngubane, there are the illnesses broadly referred to as *umkhuhlane* or illnesses that simply arise, such as mild viral illnesses to more serious outbreaks of

[114] n 67 above, 22 - 140.

[115] Ngubane (n 67 above) 24.

disease, whether bacterial or viral, and which are more serious in persons who may be more susceptible in terms of age and morbidity – with other such illnesses including developed morbidity in various organs or structures, such as ulcers or decaying teeth. These illnesses also include usual childhood ailments, such as measles or mumps and may also be seasonal afflictions, such as outbreaks of diarrhoea or hay fever. Susceptibility within a family is also classified as *umkhuhlane*: epilepsy, asthma or chronic bronchitis or skin conditions; and *imbecility and strands of madness are sometimes believed to run in families. Such diseases are referred to as ufuzo (resemblance)*.[116]

### 7.2.2 CAUSES OF ILLNESS: ECOLOGY

Ngubane sees the ecosystem within which any person lives as potentially causing illness, such then constituting another level in addition to causality in terms of biological factors.

Zulu belief, Ngubane states, holds that there is a particular relationship between persons and their respective environments, and that plant and animal life also influence those environments. Different regions therefore require different adjustments by the inhabitants and travel to another region may be a factor in the causality of illness. Also, the Zulu idea of *imikhondo* – tracks or traces, visible on the ground or invisible, but able to be detected by tracking animals – can cause disease. *Imimoya* – inhaled traces or spirits, souls or dispositions of persons can also cause disease – and are seen as significant in the causality of illness. *Uhabula imimoya* means inhaling *imimoya*, whereas *weqa imikhondo* refers to stepping over *imikhondo*. *Imimoya* may, however, also mean *spirits, air, wind, soul, as well as an amicable disposition of persons*, according to Ngubane, and it is therefore convenient, according to her, to use *imikhondo* for all tracks, whether in the air or on the ground. This belief translates into the causality of illness: infants, who are as yet unable to walk, for example, are susceptible to tracks and become ill and must then be treated with particular *imithi*. Adults may also be carriers of these *imikhondo* – passing them on to their children.[117]

[116] n 67 above, 23.

[117] n 67 above, 24 - 25..

Unlike biological factors where symptomatology indicates the causality of illness, deleterious influences on health are identified by the nature of causation, namely ecology, rather than mere symptomatology, but treatment involves not only *imithi*, but also correcting and removing the illness source. Ngubane notes the irony of removing the illness source – the ecology of the locus may be compromised further given that the belief exists that certain types of disease may be removed from a patient and discarded elsewhere, encompassing then definite discarded material substances – these discarded substances may remain in the atmosphere or remain in a specific locus, then afflicting another person with this disease.[118]

A popular place for disposing of such dangerous material substances is said to be at cross-roads[119] (*enhlanganweni yezindlela*) and on the highways (*endleleni yomendo*), given that travellers frequent such places. The intention behind disposal in such *loci* is that these substances would then be carried away from the geographical *locus*. Also, pollution by persons of evil intent, who, by using undesirable tracks or discarded material substances to contaminate *loci* causing persons to contract a disease by stepping over dangerous tracks, is known as *umeqo*.[120]

Another concept relating to the causality of illness is that of *ukweleka ngesithunzi* or, as described by Ngubane, 'to feel or suffer the weight of someone's overpowering influence'. For this reason, specific *imithi* may be needed to strengthen the individual, but also the collective to protect the entire community. Where affliction is present individually or communally, order may then need to be reinstated from disorder, known as *ukuzilungisa*.[121]

According to Ngubane, infants and incomers are vulnerable to the ecology of the geographical *locus*, but the homestead and inmates also require strengthening once

[118] n 67 above, 26.

[119] Cross-roads seemingly enjoy some notoriety, also in Russia: D Smith *Rasputin* (2017) 14: *The origins of the name are obscure. If it indeed started with an ancestor who was a rasputnik, then Rasputin's family was far from unusual, given how many people in Siberia bore the name. But there are other more likely sources. Rasputa or rasput'e mean crossroads and long ago these places were seen as the haunt of evil spirits and, perhaps, the name was given to persons believed to be in contact with such forces.*

[120] n 67 above, 26.

[121] n 67 above, 27.

a year and in the spring season; the bereaved, newly delivered mothers and menstruating woman are considered polluted and are likewise seen as being vulnerable to the ecology of the geographical locus.[122]

Street *et al* conducted a study to determine the prevalence of the use of mercury among traditional health practitioners. Mercury is a naturally occurring metal which exists in elemental, inorganic and organic forms, being, however, a toxic and tenacious pollutant is and deleterious to human health. While only two traditional health practitioners from a sample of 198 reported using mercury in the performance of rituals of protection on houses, the use of this metal in the ritual is, ironically, toxic to the ecology of the locus.[123] The use of mercury in other traditional medicine practices is addressed subsequently.

### 7.2.3 CAUSES OF ILLNESS: WITCHCRAFT OR SORCERY

As indicated previously, witchcraft or sorcery is termed *ubuthakathi*, with a witch or sorcerer being a gender-neutral noun in isiZulu: *umthakathi*. Nevertheless, for future researchers to consider, Ngubane posits that *women are not witches*, but rather become polluted from time to time – the concept of pollution as a cause of illness is addressed later in this chapter, and this author posits that there is:

> … no conventional concept of witchcraft among the Zulu, because the person who harms another always do so intentionally and has conscious control of his actions … Zulu women in their state of pollution endanger men, cattle and crops. In other words, while sorcery on a comprehensive scale can be regarded as a man's thing, pollution is essentially a woman's thing. The significant feature, however, in the opposition is that while a man is in control of his action as a sorcerer, a woman is not in control of the situations which make her impure. This is consistent with the notion that men have control of power and authority and women do not.[124]

According to Ngubane, three types of sorcerers may be distinguished: a night sorcerer, a day sorcerer, and a lineage sorcerer.

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[122] n 67 above, 28 - 29.

[123] RA Street *et al* 'Metallic mercury use by South African traditional health practitioners: Perceptions and practices' (2015) 14 *Environmental Health* 72.

[124] n 67 above, 153 - 155.

A night sorcerer, always a man, is said to have been fashioned with a heart of evil and harms people for no obvious cause, keeps baboons as familiars, and when perpetrating evil rides naked on these baboons, facing backwards. Activities of a night sorcerer include digging up corpses, resurrecting them and turning them into dwarves, and using them to till the fields for his own success and advantage over others. Other attributes are meanness and jealousy, and the chief technique of this sorcerer is to scatter medicines along the pathways to harm persons. It is, however, said that he cannot fly, change shape, vanish or perform similar feats usually associated with the powers of wizards and for this reason he is viewed as a sorcerer rather than as a wizard.

The distinction between a witch or wizard and a sorcerer, offered by Ngubane, citing Hunter, is that persons who engage in sexual intercourse with familiars are witches or wizards, and those that do not are termed sorcerers.[125]

A day sorcerer, by contrast, is someone who chooses to act against someone else in cases of personal animosity and is regarded as a sorcerer by the persons against whom the acts are perpetrated – rather than by the community itself. The addition of noxious medicines, including Western poison, to the food of the person targeted is, in the main, this sorcerer's method of action. Other techniques may also be used, such as those used by the night sorcerer to place harmful substances where they are likely to cause harm to the person targeted, or the theft of parts of a sacrificial beast which would have the effect of quashing the sanctity and purpose of the sacrifice.[126]

The third category is the lineage sorcerer, namely descendants of the common grandfather who share sacrifices and have ritual and social obligations among themselves. These persons are precluded from practising the types of sorcery mentioned above since the ancestors would disapprove of such. Quarrelling, for example, among members of this group must be rectified by the performance of the ritual known as *ukuthelelana amanzi* or the 'washing of each other's hands', which is then accompanied by the sharing of a slaughtered goat at a sacrificial meal. Ngubane

[125] As cited by Ngubane (n 67 above) 34: M Hunter *Reaction to conquest* (1961).

[126] n 67 above, 34.

states that the ancestors may be persuaded to favour a particular person, a man, and to abandon other lineage members, but this is sorcery of a special kind and can only be practised by a man against another man of the same societal status, such as between heads of homesteads; 'the churning of the black medicines' (*ukuphela amanz z'amnyama*), in connection with the treatment of disease, is the appropriate ritual. The object of this practice would be to deprive a person of the same societal status and his descendants from access to protection, exposing such persons to misfortune. The resultant exposure can be partially inherited, and the succeeding patrilineal generation may also then be deprived of the protection of the grandfather's generation of ancestors.[127]

Ngubane reiterates that night sorcery and lineage sorcery are impossible for women, but men may practise all three forms, including that generally attributable to women, since:

> *… men are generally expected to use sorcery techniques in their position as homestead heads to harm other homestead heads and their dependants, whereas women practice sorcery to harm the particular people they are in conflict with. In other words sorcery operates along structural lines.*
>
> *This indigenous sociological interpretation indicates that Zulu are aware of a relationship between sorcery and the nature of the structure of the society, the roles that people play, and the religious beliefs which operate.*[128]

The purpose of this thesis is not to examine the concepts of sorcery or witchcraft from any particular perspective. Rather, it is to look to the acts pertaining to the profession of traditional medicine used to bring about healing to those persons whose belief encompasses sorcery or witchcraft as a cause of illness, and to evaluate these against that which may be permitted or not permitted in terms of legislation.

[127] n 67 above, 36.

[128] n 67 above, 44; Ngubane implies that day sorcery is possible for women, seemingly then in contrast to her view that *women are not witches* – referenced under n 124 above.

### 7.2.4 CAUSES OF ILLNESS: THE ANCESTORS

Ngubane states that ancestors:

> *… are said to be primarily concerned with the welfare of the descendants. When good things of life are realized people say "The ancestors are with us" (Abaphansi banathi). When misfortunes happen they say, "The ancestors of facing away from us" (Abaphansi basifuthalele), for the ancestors are believed to withdraw the protection and gifts of good fortune from erring descendants. Without their protection the descendant's* (sic) *become vulnerable to all sorts of misfortune and disease.*[129]

As indicated above, Asante recognises six general prerogatives of the ancestors: controlling the lineage of the community; controlling the metaphysical and social order; protecting agricultural rites to keep the land fertile; sustaining unity and harmony; reinforcing group cohesion; and maintaining the harmony between the spiritual and physical planes.[130]

Ngubane outlines various circumstances in which the ancestors, both patrilineal or matrilineal, need to be respected by descendants performing relevant rites, such as in the death of a family member[131] or marriage ceremonies, for example, and these rites, when not undertaken, may result in ancestor withdrawal of protection. Without such protection, persons are exposed to danger and ancestors are not responsible for misfortune which may fall upon these persons since without protection persons are vulnerable to sorcery, environmental dangers and other accidents.[132]

### 7.2.5 CAUSES OF ILLNESS: POLLUTION

In terms of Zulu belief, according to Ngubane, both birth and death are viewed as a continuum – a continuum akin to a state from which humankind originates at birth to that state into which humankind transcends at death. There exists, however, according

[129] n 67 above, 51.

[130] MK Asante 'Ancestors and harmonious life' Asante & Mazama (n 52 above) 97.

[131] A dead person is believed initially to be a shadow or *isithunz*i until a sacrificial rite is performed after a period of mourning; the sacrifice *integrates him with the body of the ancestors and also brings him back home as an idlozi* or ancestor: n 67 above, 50.

[132] n 67 above, 55.

to this author, an intersection or overlap, namely a marginal state between life and death. This is between the state of life on the physical plane and the spiritual plane of the deities, spirits and the ancestors, and is termed *umnyama* – the literal meaning of which is 'darkness'. When used metaphorically to symbolise death, the term may be translated as 'pollution': *Pollution, then is viewed as a marginal state between life and death*.[133]

According to this author, situations of *umnyama*, in various degrees of severity, are to be found in newly delivered mothers, nursing mothers, their infants, and in persons the day after sexual intercourse, for both men and women, since sexual intercourse pollutes not only because of the act itself, but also because of seminal emissions. These instances are linked to reproduction and pollution accrues to the person engaging in acts of reproduction. Menstruating women are also considered polluted and unmarried women, according to Ngubane, who are organised into age groups, are also susceptible should one member of the group fall pregnant before marriage. This is seen as *a bad precedent which mystically endangers age-mates*. Pregnancy is considered to be appropriate only after marriage and even though it is considered polluting within marriage, it is viewed as being of another dimension if it occurs before marriage. Not all cases of pollution are transferable to third persons and may only be applicable to the two main protagonists, such as those who engage in sexual intercourse or between mother and child only, or, if transferable, then only in a lesser degree as mentioned subsequently.[134]

Death itself is another instance of pollution, intensified in comparison with other pollution-causing instances since it emanates from the corpse itself. Ngubane maintains that the chief mourners in such cases must always be married women. All bereaved persons are polluted, with such pollution being contagious, but the degree of pollution is less than that of chief mourners. Persons who either handle the corpse or who take part in interment in any way are considered more polluted than the persons attending the ceremonies associated with the burial of the deceased. In discussing the causes of death, Ngubane posits that:

[133] n 67 above, 77 - 78.

[134] n 67 above, 78 - 80.

> *The cause of death is also an important factor in assessing the degrees of pollution. For instance, a catastrophic death has a special degree of intensity in that its pollution is said to cling to the bereaved in such a manner as to cause further disasters and calamities. Unfortunate happenings, such as death owing to an accident or because of an incurable disease, are regarded as an unusual misfortune expressed as umkhokha. The bereaved in these circumstances have to take precautions to ward off not only umnyama that arises from death, but also the special kind of umnyama that is umkhokha.*[135]

Depending on the degree of the pollution, Ngubane avers that the behaviour pattern to be observed when in a state of *umnyama* is known as *ukuzila*:

> *It entails withdrawal from social life, abstinence from all pleasurable experiences, avoidance of quarrelling and fighting and avoidance of wearing any finery. People are expected to speak in low tones and only when necessary. They also either fast or eat only small quantities of sloppy food. Since umnyama is graded according to its intensity, the extent of ukuzila is dependent on the intensity of the particular phase of umnyama. Because polluted people are said to be accident prone and vulnerable to all sorts of misfortune, they avoid all risky and dangerous undertakings, …*[136]

In cases of pollution in *umkhokha*, Ngubane avers that where people die in car accidents, by drowning, by lightning strikes, from incurable diseases or through murder, for example, the bodies are never brought into the homes and are buried without ceremony; in such cases weeping and mourning are restrained. The taking of life not only pollutes the person killed, but the killer as well, and in a special way, irrespective of whether the murder was committed in self-defence, accidentally, or in cold blood – the taking of human life causes pollution. While any form of pollution requires a change in behaviour, the dispensing of medicine, so-called 'black' medicine, which will be discussed subsequently in this thesis, may also be used in cases of bereavement. Ngubane indicates that the behaviour required from persons affected by pollution, also known as sanctions, flows from psychological concepts and neuroses are prevented by diverting the focus from the afflicting situation to that of having to undergo complex ritual behaviour.[137]

[135] n 67 above, 81.

[136] n 67 above, 81.

[137] n 67 above, 82.

### 7.2.6 CAUSES OF ILLNESS: EVIL SPIRIT POSSESSION

As indicated previously, categories of persons practising traditional health in South Africa and categories of persons recognised in South African law who may practise traditional health are considered later in this thesis. A distinction must however be drawn between any person who is possessed of a spirit of an ancestor who returns to the earthly plane and supports an *isangoma* in divining, termed in the current legislation a *diviner*[138] and other persons, not having been afforded the obligatory death rituals, who are possessed of spirits and are disallowed transition from this earthly plane into the corpus of the ancestors on the spiritual plane – these persons possessed of such spirits bear the capacity to afflict persons at large, according to Ngubane.[139]

Persons possessed of a spirit not having been afforded the rituals of allowing transition onto the spiritual plane are said to afflicted by *indiki* possession and this, according to Ngubane, finds its origins in the African industrial development:

> *An indiki is believed to be the spirit of a deceased person, a spirit that was never given the necessary sacrifice of integration with the body of other spirits. The people from countries farther north who come to work in the mines of South Africa often die at the place of work, and their families, not knowing of their death, perform none of the rituals necessary to place them in their proper position in the spirit world. Such spirits wander about in desperation and become a menace to the local people, taking possession of them and causing illness. Indiki is therefore a male spirit (usually only one) who enters a person and resides in the chest. The patient then becomes deranged and manifests this by crying in a deep bellowing voice and speaking in a foreign tongue, usually identified as one of the languages spoken by people in the north.*[140]

*Ufufunyane* is another form of possession, but is introduced by sorcery, rather than by mere chance as in *indiki* possession, although chance cannot be ruled out. The practice of capturing of the spirits and controlling them through sorcery is known as *umbhulelo*. This is induced by the placement of harmful *imithi*, such as soil from graves and ants from the graveyard of any deceased person, of whatever race or creed.

[138] Section 1, Traditional Health Practitioners Act, Act 22 of 2007.

[139] n 67 above, 142.

[140] n 67 above, 143.

Persons so possessed by *ufufunyane* present with mental derangement, hysteria, copious weeping and running amok, among other presenting features – thus akin to a psychogenic disorder.[141]

Ngubane avers that the various forms of possession should always be distinguished in order to understand their exact natures and to decide on the appropriate treatment. Another form of possession, termed by Ngubane to be as *experienced by the faithful during worship in the Zionist or Pentecostal sects*, is not viewed as being as incessant to the same degree, as in *indiki* or *ufufunyane*.[142]

### 7.2.7 CAUSES OF ILLNESS: *THWASA*, THE CALLING TO HEAL AND BECOME AN *ISANGOMA*

Bührmann sees *thwasa* as a cause of illness and although having a literal meaning of *the emergence of something new*, is believed to be a vocational call by the ancestors to enter the healing paradigm to become an *isangoma*: *… an emotional disturbance of greater or lesser degree, which is, however, always accompanied by physical symptoms …* is the clinical picture.[143]

Thornton refers to unnamed *izangoma* who describe this period of illness as being in or under water, and the emergence is as if from deep water, with the process being *to develop or uplift one's spirit or soul so as to become fully aware of one's own spiritual power*.[144]

Bührmann indicates that persons so affected are said to show symptoms of withdrawal from society, irritability, restlessness, violence, to display aimless wandering, hear voices, among other things, but are also affected by excessive dreaming, with the dreams being said to be distressing and disquieting and interfering with sleep.[145] This

[141] Ngubane (n 67 above) 144.

[142] n 67 above, 146.

[143] MV Bührmann *Living in two worlds: Communication between a white healer and her black counterparts* (1986) 36.

[144] n 2 above, 74, 76.

[145] n 143 above, 36 - 37.

clinical picture is, in the main, confirmed by various authors, including Mokgethi,[146] Heeney,[147] Lockley,[148] and Schuster Campbell,[149] with Mokgethi describing *thwasa* as *indicating the presence of an ancestral gift*.[150]

## 7.3 CONCLUSION

The purpose of this thesis is not to validate or denounce the causes of illness as understood in the traditional medicine paradigm from any particular perspective, but rather to acknowledge the context within which the healing acts or clinical practices pertaining to the various professions are used to bring about healing to those persons whose belief encompasses the causes of illness as set out above – these must then be evaluated against that which may be permitted or not permitted in terms of legislation.

[146] LE Mokgethi 'Defining ukuthwasa as a pedagogy: An autoethnographic exploration into the knowledge acquisition process of ukuthwasa at a training school (lefehlo) in Soweto, Johannesburg' published Master of Arts thesis, University of the Witwatersrand, 2018 21, 38 - 45.

[147] B Heeney *Bushman shaman* (2005) 97.

[148] J Lockley *Leopard warrior: A journey into the African teachings of ancestry, instinct, and dreams* (2017) xv.

[149] S Schuster Campbell *Called to heal* (1998) 78.

[150] n 146 above, 4.

# CHAPTER 8
# *UKUTHWASA*: THE PROCESS OF TRANSITION TO AN *ISANGOMA* – THE TEACHING RELATIONSHIP BETWEEN *UGOBELA* AND *ITHWASA*

## 8.1 INTRODUCTION

*Ukuthwasa*, the calling to heal or to become an *isangoma* is recognised in the traditional medicine paradigm as a cause of illness and, as set out in the immediately preceding chapter, the clinical picture is an emotional disturbance accompanied by physical symptomatology.

Since both students, *amathwasa*, and any tutor, an *ugobela*, are registrable categories, the process of education and training to become an *isangoma* is indisputably then one which requires consideration from a perspective of competency to enter the profession. The information offered in this chapter presents a perspective of the process of becoming an *isangoma* and the transmission of knowledge, clearly fundamental to the process.

## 8.2 *UKUTHWASA*: PHASES OF SEPARATION, TRANSITION AND INCORPORATION

Bührmann indicates that a diagnosis of *thwasa* requires consultation with several *izangoma* for either confirmation or negation of this calling – the training or *ukuthwasa* of the neophyte, or *ithwasa*, is very demanding, of long duration, with the future life of an *isangoma* being seen as both onerous and taxing and the responsibility of serving the community and the ancestors being exacting.[151] Thornton, as indicated previously, in discussing the participants in this process of *ukuthwasa*, alludes to *the teaching relationship between the gobela,* the teacher of the arts and knowledge of *bungoma,* the *ithwasa,* the initiation school, *mpandze,* and the systems of transmission of knowledge, as being intrinsic to the process.[152]

[151] n 143 above, 37.

[152] n 2 above, 12.

As cited by Mokgethi, Lambrecht[153] sees *ukuthwasa* as comprising three stages: separation, transition and incorporation. Mokgethi, however, sees the stage of separation as dual-phased: the first phase is characterised by confusion and withdrawal from society, whereas the second phase occurs after the neophyte has received clarity that the illness experienced was *thwasa* and then the neophyte enters and commences *ukuthwasa*.[154] The transition stage meets Ogungbile's description of the training process as being formal or informal training of different and of varying duration in order to become empowered to the 'second sight' so as to enable the gift of clairvoyance and precognition, and thus to be able to deal with all spiritual forces – visible or invisible.[155] The stage of incorporation *is signified by a graduation ceremony known as intwaso*.[156]

Regard has been given to Bührmann for trying to use a systematic approach to clarify *ukuthwasa*, which is based on her experience among the Xhosa, if only for the sake of brevity at this juncture in this thesis.

Mokgethi's thesis[157] is, however, unequivocally endorsed for further attention and review in elaboration of *ukuthwasa* by interested parties.

## 8.3 *UKUTHWASA*: THE PROCESS

The sequence of events within *ukuthwasa*, as set out by Bührmann, with a brief description of each, is as follows:[158]

### 8.3.1 PURIFICATION PROCEDURES

Purification procedures, such as ritualised bathing, among others, are undertaken both prior to commencing with *ukuthwasa* and frequently during the process itself.

[153] As cited by Mokgethi (n 146 above) 38: I Lambrecht *Sangoma trance states* (2014).

[154] n 146 above, 38.

[155] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 416.

[156] Mokgethi (n 146 above) 38.

[157] n 146 above, 52 - 78.

[158] n 143 above, 39 - 40.

### 8.3.2 ACCEPTANCE INTO THE *UGOBELA* HOUSEHOLD

The *ithwasa* is accepted into the life and activities of the household of the *ugobela*, being treated as if a member of the family with duties and responsibilities to the household during the training process.

### 8.3.3 TRAINING IN THE USE OF SYMBOLIC MEDICINE: *UBULAWU*

Bührmann avers that at some point during this particular stage of *ukuthwasa,* the *ithwasa* will have moved beyond the *thwasa* condition and will now not only be part of the preparation for rituals and ceremonies but will also commence with acquiring the knowledge of the use of *ubulawu.*[159] *Ubulawu* are ritual black, red or white emetic *imithi*,[160] and amplification ensues in subsequent discussion about the use of symbolic medicine in the treatment of disease.

### 8.3.4 DREAM DISCUSSION AND INTERPRETATION

Any dreams experienced by the *ithwasa* must be discussed with the *ugobela* as a significant part of experiential learning in *ukuthwasa* – for later application within the traditional medicine healing paradigm.

### 8.3.5 *UKUVUMISA* OR THE TEACHING OF DIVINATION

Mokgethi posits that observing the way the *ugobela* receives a patient and uses *inhlolo*, described as *instruments used during divination*, which include bones, dominoes or seashells, among others, is cardinal for the *ithwasa* in this part of *ukuthwasa*.[161]

[159] n 143 above, 43.

[160] n 67 above, 109.

[161] n 146 above, 77.

### 8.3.6 *INTLOMBE* AND *XHENTSA*

These are described by Bührmann as ritual healing dances, which are integral to all ceremonies and sacrifices.[162]

### 8.3.7 THE RIVER CEREMONIES

According to Mokgethi:

> *Rivers are believed to be sacred spaces because of the spirits that reside in the rivers. Believed to be the home of the precious amandawu spirits, the rivers are the ultimate cleansing rituals and space whereby the initiate can reconnect with their ancestors and constantly recharge their spirit.*[163]

The first river ceremony, which takes place at the home of the *ithwasa*, involves the ritual offering of items such as *ubulawu*, beads, sorghum seeds, pumpkin, calabash pips and tobacco into the pool of water, in a special order. The water movement is appraised for rejection or approval and acceptance of the *ithwasa* by the *amandawu*, or water spirits, according to Bührmann. This ceremony is then concluded at the homestead of the *ithwasa* but does not involve animal sacrifice.[164]

The second river ceremony is preceded by solitary confinement of the *ithwasa* and, while not stated, presumably at the homestead of the neophyte. At dawn on the third day after having entered solitary confinement, the neophyte emerges with head and face covered, drinks *ubulawu* to induce vomiting, and is then fed *a specially prepared porridge, to which the bark of a tree growing near the river is added*. At this stage the *river party* is conducting its own activities, according to Bührmann. This author then indicates that if the *river party* returns to the homestead with a favourable report, the usual pattern for a river ceremony is then followed.[165]

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[162] n 143 above, 56.

[163] n 146 above, 58.

[164] n 143 above, 72.

[165] n 143 above, 74.

### 8.3.8 *ISIKO LENTAMBO* OR THE NECKBAND CEREMONY

After an animal has been sacrificed on behalf of an *ithwasa*, parts of that sacrificed animal are used in the making of a necklace, which is then ceremonially tied around the neck of the neophyte. This is the first time during *ukuthwasa* that an animal is sacrificed, and the meat is ritually incorporated into *ukuthwasa*, according to Bührmann. The aim, according to this author, is to strengthen *communication and communion with the ancestors and thus derive strength and power from them*.[166]

### 8.3.9 *GODUSA* OR THE TAKING HOME CEREMONY: *INTWASO*

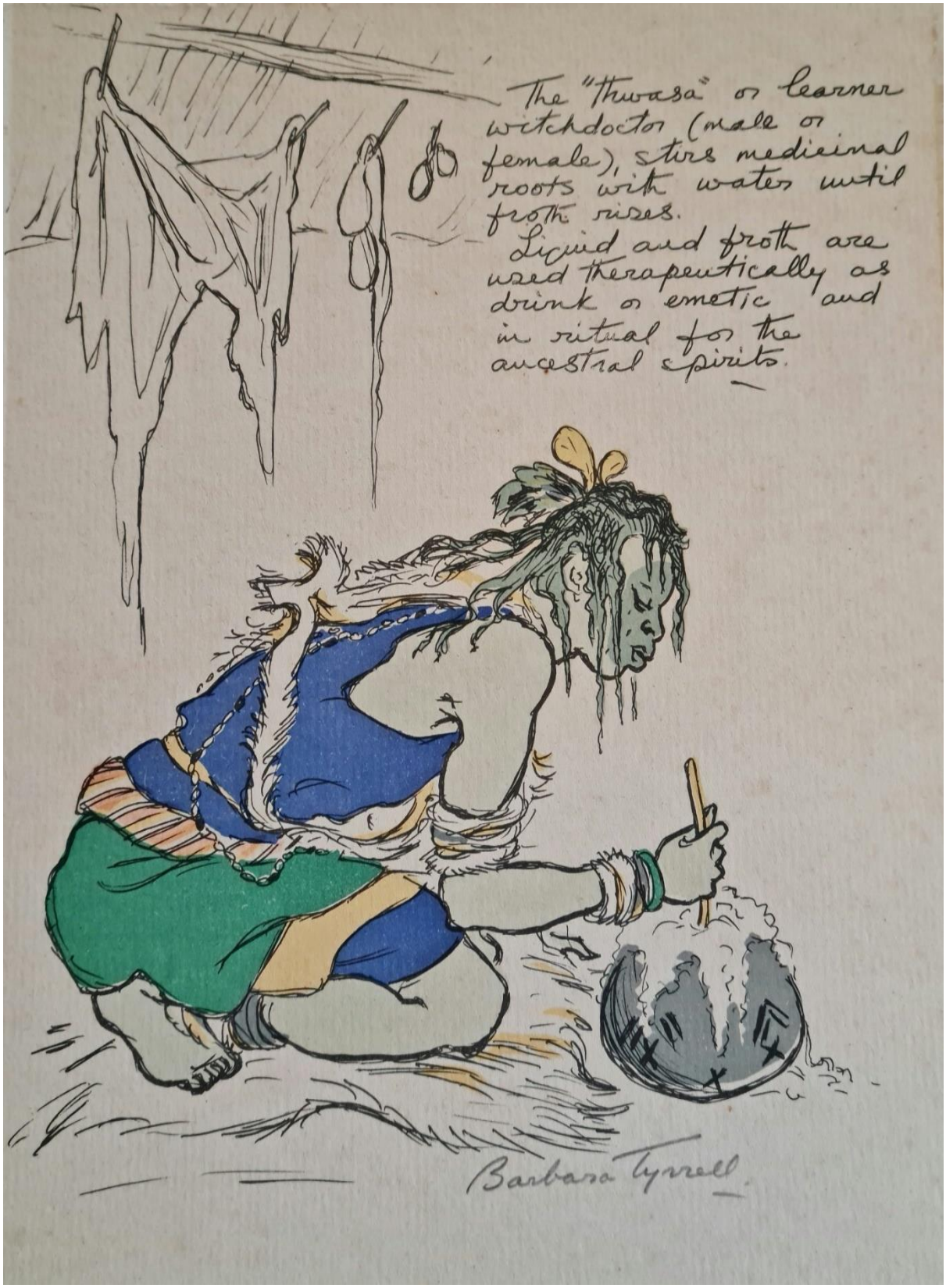
This is the final ceremony during *ukuthwasa* and is conducted over some four days, during which time the *ithwasa* becomes an independent *isangoma* and the *ithwasa* is, at the conclusion of the ceremony, presented as a qualified and responsible healer to the homestead by the *ugobela*. According to Bührmann, the main events involve two parts: *... the separation of the animals* (to divide, disconnect and separate the ancestors of the *ugobela* from those of the new healer with the aim of achieving equality between two healers, terminating the teaching relationship) and *the sacrificial and induction ceremonies*, which involve ritual healing dancing; presentation of an assegai to the new healer by the former *ugobela*; sacrifice and roasting of the animal; the draping of a white blanket over the shoulders of the new healer; and gifting of regalia, among other things.[167]

## 8.4 CONCLUSION

Aspects such as animal sacrifice and the use of symbolic medicine are discussed later in this thesis against various applicable legislative precepts; the master-discipline model, or the teaching relationship between an *ugobela* and *ithwasa* must be considered against the possibility of the non-attainment of a national standard and therefore possibly leading to the dilution of required standards of competency to enter the profession as may be required or envisaged by the regulator.

[166] n 143 above, 74.

[167] n 143 above, 86 - 94.




***THE "THWASA" OR LEARNER WITCHDOCTOR***
**BARBARA TYRELL, UNDATED PRINT ON PAPER, 29,5 cm X 21,4 cm**
**REPRODUCED WITH PERMISSION OF THE OWNER**

# CHAPTER 9
# TRADITIONAL MEDICINE: SOURCES OF HEALING POWER AND TREATMENT OF DISEASE

## 9.1 INTRODUCTION

In considering treatment of clinical manifestations in any system of medicine, due regard must be given to the manner or approach to treatment – treatment in any system of medicine, whether conventional or complementary or alternative, will rely on sources of healing power as may be accepted within that system of medicine, concomitantly then also to treat disease within the understanding of the particular system of medicine construct. The sources of healing power in traditional medicine encompass both the non-empirical, but also empirical sources. This chapter offers information of these concepts, but also seeks to inform as to the manner in which somatic conditions are treated, together with information relating to the use of symbolic medicine. As indicated previously, this thesis is concerned with the healing paradigm – the use of body parts in the treatment of disease, seen to resort under the practice of witchcraft rather than within the practice of traditional medicine for the good, is then a subject which must necessarily also be considered. As a comprehensive approach to the thesis then, previous published research on this matter by the author of this thesis is also then offered in this chapter which, together with the other topics, will inescapably contribute to the cardinal feature within the original contribution to research if the essentiality of the research question is the conclusion that regulation of this profession is to be continued, since these topics will certainly inform consideration of the development of legal regulations for traditional medicine.

## 9.2 NON-EMPIRICAL AND EMPIRICAL SOURCES OF HEALING POWER

Sources of healing power encompass both empirical and non-empirical sources according to Ogungbile, as introduced previously:

> *The nonempirical involves the tapping of the power, by therapeutic specialists, from the Supreme Being, lesser deities, ancestral spirits, and living individuals who are believed to have been endowed by spiritual beings. Also, certain statements, expressions, and invocations that embody spiritual references are strong and potential sources of enhancing and enforcing healing.*

> *The empirical sources include biotic elements including animals, plants, and water which enhance healing and wholeness. Other material elements including natural phenomena and objects that are spiritually strengthened by ritual activities are potential sources of medicinal efficacy. In both cases, the sources claim to have been revealed to the forebears of medical practice who continued to pass them on to generations after them in a conscious manner, through training of the offspring or those divinely chosen, or in an unconscious way through normal daily uses.*[168]

## 9.3 TRADITIONAL MEDICINE ARMAMENTARIUM: MEDICINES TO CAUSE HARM, MEDICINES FOR USE IN HEALING

Medicines or *imithi* used in the traditional medicine paradigm, whether sourced from plant, animal or mineral matter, have also seen elucidation previously. It is, however, worth noting again that there is a wider connotation in the sense that *it applies to noxious as well as curative substances*:

> *Umuthi wokwelapha is medicine for healing and umuthi wokubulala is medicine for killing, but while some imithi are always used for healing and others for causing harm, still others can either heal or harm depending on the motive for which they are used … some imithi are believed to be potent in themselves, and … no ritual or symbolic language is used in their administration, while others are symbolic and accompanied by special rites.*[169]

The Zulu word 'disease', *isifo*, also has a wider connotation than a mere derangement of health and may have several nuanced applications: … [from] *disease that is manifested by somatic symptoms, to various forms of misfortune, and also to a state of vulnerability to misfortune and disease*.[170]

Ashforth, encompassing both healing and witchcraft, expands the term *umuthi* further:

> *The term* [is] … *usually translated into English as either "medicine" or "poison", with the anodyne "herbs" used in ambiguous instances, muthi refers to substances fabricated by an expert hand, substances designed by persons possessing secret knowledge to achieve either positive ends of healing, involving cleansing, strengthening, and protecting persons from evil forces, or*

[168] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 413.

[169] n 67 above, 22.

[170] n 67 above, 22.

*negative ends of witchcraft, bringing illness, misfortune, and death to others, or illicit wealth and power to the witch*.[171]

Questions about *imithi* used in traditional medicine whether plant, animal, mineral or other, whether proscribed or requiring proscription in terms of deleterious effects on biodiversity or being deleterious to the health of the public, or for any other reason, are examined later in this this thesis, particularly against the current regulation of complementary and traditional medicines,[172] previously unscheduled.

Further consideration will be also given in this thesis to examining whether any *imithi* are actually prescribed or administered according to the principles of any traditional

[171] n 79 above, 133.

[172] Complementary medicines are now subject to registration, although 'call-up' notices have yet to be issued: Medicines and Related Substances Act 101 of 1965, General Regulations No 859, promulgated in the Government Gazette No 41604 on 25 August 2017: Schedules: Annexure 1: Regulation 33: Complementary Medicine: Discipline-specific Traditional Claims: 33.8: Other herbal. Any medicine containing a glycoside or alkaloid, or purporting to contain such, automatically resorts under a minimum of Schedule 2 Medicines. Recent litigation relating to these regulations served as an agenda item at the second ordinary meeting of the Allied Health Professions Council of South Africa on 22 October 2020, with councillors noting the court order made in the case of *The Alliance of Natural Health Products in South Africa v Minister of Health and South African Health Products Regulatory Authority* ('the SAHPRA'), Case Number 11203/2018, as follows:

1. *The parties' respective applications for condonation are granted.*
2. *The definition of 'medicine' in section 1 of the Medicines and Related Substances Act, No. 101 of 1965 is declared to apply only to substances that are used or purport to be suitable for use or are manufactured or sold for use in the diagnosis, treatment, mitigation, modification or prevention of maladies, in order to achieve a medicinal or therapeutic purpose, in human beings and animals.*
3. *The General Regulations promulgated on 25 August 2017 under General Notice 859 in Government* [Gazette] *41064 are declared unlawful to the extent that they apply to 'complementary medicines' and 'health supplements' that are not 'medicines' or 'Scheduled substances' as defined in section 1 of the Medicines and Related Substances Act No 101 of 1965.*
4. *The declaration of invalidity is suspended for a period of twelve (12) months to allow the South African Health Products Regulatory Authority an opportunity to correct the defect.*
5. *The first and second respondents are ordered, jointly and severally, to pay the applicant the costs of this application, such costs to include costs of two counsel.*

Councillors noted the views of Dr Craig Wright, the then AHPCSA councillor for Phytotherapy and a member of the SAHPRA Complementary Medicines Committee, that this judgment is viewed to have changed the definition of 'medicine' as provided for in the Medicines and Related Substances Act (101/1965) and that the SAHPRA had applied for leave to appeal.

medicine pharmacopoeia or materia medica, whether in written form or otherwise, or according to other principles such as the sacred nature of the *imithi* being influenced by the location in which they are found, or any other mystical belief.

## 9.4 TREATMENT OF DISEASE: SOMATIC CONDITIONS

Mhame *et al* advance the following view:

> *In African traditional medicine, the curative, training, promotive and rehabilitative services are referred to as clinical practices. These traditional health care services are provided through tradition and culture prescribed under a particular philosophy …*[173]

Bankole holds that in traditional African societies disease is closely linked to spirituality and is termed by her as: *the mind-body-spirit connection*, disease being explained not only through natural circumstances, but always being related to the supernatural realm; in cases of disease, the remedy is the restoration of balance to *the mind-body-spirit connection*.[174]

The treatment of disease may encompass various approaches within the categories of practitioners of traditional medicine as described previously: treatment of the individual or the collective; treatment with or without accompanying rituals; treatment with or without *imithi*; and treatment by consulting the *amadlozi* through the clairvoyance of an *isangoma* in any one of the categories, including through the throwing of the bones, *ukuphonsa amathambo*.

Ngubane indicates that in the treatment of somatic symptomatology, any herbal medicines containing healing properties or *amakhambi* are administered without ritual.[175] *Imithi* are used to treat biological factors in natural causes of illnesses and:

> *… are believed to be potent and effective in themselves. They are therefore not ritualized. There is a readiness to experiment, to try new medicines, or to discard some for better ones. There is also a general belief that the understanding of this type of natural illness is common to most*

[173] PP Mhame *et al* 'Clinical practices of African traditional medicine' (2010) *African Health Monitor* 13.

[174] KO Bankole 'Disease' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 206.

[175] n 67 above, 109.

> *people, including people from outside Africa. For this reason there is a readiness to use curing techniques and medicine of Western type*.[176]

Ngubane cites various ways in which disease, without ritual, may be treated – where persons contract a disease by stepping over dangerous tracks known as *umeqo*, discussed previously, and where the joints of the human body are believed to be the most defenceless parts through which evil may enter the body. Incisions can be made into the skin over the joints to introduce *imithi* directly at the place of most risk to the person.[177] These incisions are known as *ukugcaba,* and this practice is elucidated later in this thesis.

Bloodletting may also be used to relieve pain and blood-cupping can be used in cases of headaches. In cases of oedema in pregnant woman, a technique of 'blood-dripping' may be undertaken in the last trimester of pregnancy. The pregnant woman lies prone on a riverbank:

> *… and a specialist who has insekane grass around her index finger, rolls the finger around in the woman's vagina. Since the grass has sharp edges it cuts the skin, which bleeds. If the haemorrhage does not stop, the woman is dipped into cold water in the river. The shock of the cold water is said to stop the bleeding. This treatment is intended to reduce the danger of stillbirth or premature birth.*[178]

Other treatment methods, according to Ngubane, include:

- the application of an unripe fruit of the bitter apple tree, *umthuma* or *Solanum aculeastrum*, halved, onto an area infected by tinea corporis or ringworm;
- the insertion into a decayed tooth of paste made from *ubuhlungwana* or *Wadelia natalensis* for toothache;
- the plastering of herbal pastes over open wounds or ulcers;
- the sniffing of powdered herbs to induce sneezing or to cure headaches;
- the application of powdered herbs directly onto the tongue, as is generally the instance in cases of snakebite (*ubuhlungu benyonka* or *izibiba*);

[176] Ngubane (n 67 above) 23.

[177] n 67 above, 25.

[178] n 67 above, 109.

- the application of dry powder onto a sore or ulcer, as in the case of a particular fever believed to erode anal tissue *and produce a gaping aperture*;
- the scarification of painful parts, such as sprains, and the application of powdered medicines into those scarified parts;
- the sipping of a decoction of herbs in small doses, such as in the case of coughs;
- the sipping of a compounded decoction of herbal medicines in cases of asthma or heart disease, intended to function as an expectorant and to soothe the chest;
- the prescription of herbal purgatives to be taken orally in cases of disorders of the gut, followed, depending on the case, by binding medicines such as the leaves of *umvuthwamini* or *Plectronia ventosa;*
- the administration of enemas in cases of abdominal pain, but also in cases of menstrual pain;
- the administration of a purgative enema in cases of infertility in women, but also the introduction of medicine directly into the womb, in the belief that this introduces cleansing;
- the insertion of liquid herbal medicine *per rectum*;
- the administration of emetic medicines in cases of chest illnesses, particularly, but also where harmful substances in the food, in the case of sorcery, have been ingested;
- the taking of steam baths to induce perspiration and to reduce fever; and
- the inhalation of steam from a boiling herbal decoction.[179]

The augmentation or manner of reinforcing, fortifying or supporting an 'exposed being', equating to the treatment of disease, but not differentiating between somatic and other forms of disease, would then be, according to Thornton, to enable this person:

> … to withstand the influence of the many forces around that person. This involves a literal augmentation of the person with 'charms' and 'amulets', but also a 'cleansing' of the person through vomiting, enemas and blood-letting to clear out other, dangerous, causal agents that had come to reside inside the body.[180]

[179] n 67 above, 106 - 108.

[180] n 2 above, 55.

## 9.5 TREATMENT OF DISEASE: THE USE OF SYMBOLIC MEDICINE

As opposed to medicines prescribed or administered for somatic conditions, certain medicines in traditional medicine are administered in a ritual context according to their symbolic significance. According to Ngubane, these *imithi* are used principally, either as a prophylaxis or to redress causes of illness. They are typically herbal, known as *amakhubalo*, in the main comprising dried bark and roots. These *imithi* may also contain matter derived from a wild animal, known as *inyamazane* (literal meaning: deer/buck), the plural being *izinyamazane*, such as fat, skin or feathers, believed then to protect against the effects of dangerous wild animal tracks.[181]

Ngubane states that these *imithi* may be classified in terms of three colours:

- black medicines (*imithi emnyama*);
- red medicines (*imithi ebomvu*); and
- white medicines (*imithi emhlophe*),[182]

and that *the symbolism is related on the one hand to the cosmic order of day and night, and on the other to the bodily functions of eating and defecating*,[183] essentially white versus black and red. Red represents dusk or dawn, without which there can be no day or night, but also represents blood.[184]

An added corollary to the symbolism of these three colours is the colour ‘green/blue’ (*luhlaza*). The isiZulu ideophone *cwe* (as in *cwebezelayo*, meaning glossy/shiny), which illustrates ‘blue/green’, emphasises the clarity and pureness of the colour according to Ngubane. ‘Green/blue’ is therefore identified with white symbolism, with water (*amanzi aluhlaza*) and the sky. Clear and pure water is thus always equated with white in the symbolism of colours and the sky being seen as ‘blue/green’ is therefore also symbolised as white. In inclement weather where the sky is overcast or

[181] n 67 above, 109.

[182] n 67 above, 109.

[183] n 67 above, 114.

[184] n 67 above, 115.

dreary certain treatments may not be performed.[185] Linguistically, Ngubane clarifies the colours: *black (-mnyama) is associated with darkness (umnyama), and red (bomvu) is associated with the red ochre (ibomvu);* white and green/blue are the two colours which have no correlation with substantives.[186]

Black, red or white medicines are differentiated further into liquids or powders:

> a. *Ubulawu, liquid medicine used as black, red, or white emetics. Emetics that have no colour significance are never termed ubulawu.*
> b. *Insizi, powder produced from charred herbs, roots or animal medicine. It always belongs to the black class of medicines.*
> c. *Intelezi, liquid medicine that belongs to the white class of medicines. It is said to possess the special quality of rendering the evil effects of sorcery ineffective. For instance, if sprinkled on a spot where a sorcerer is believed to have buried or placed harmful substances it nullifies the power to harm in such substances. The intelezi type of medicine differs from other white medicine in that it is never taken internally. It is either used to wash with or to sprinkle with. Most people plant species of this type at home in order to ward off evils of all kinds.*[187]

Ngubane stresses that the use of these medicines is black, followed by red, followed by white, serially and in that order only, and rigidly and never reversed:

> *Black and red are said to be equivocal, in that they stand for both goodness and badness; white represents only that what is good. Because black and red share certain attributes one of them may be omitted, in which case we have either black followed by white or red followed by white. The important fact to note is that whenever black or red is used it must be followed by white, whereas white can be used alone without being preceded by either of the others.*[188]

According to Ngubane, treatment with such symbolic medicines is to create balance – balance between a person and the environment: black and red *imithi* expel noxious elements from the body, but also strengthen it against any future assault. This does not mean, however, that the body is protected after the administration of black and red

[185] n 67 above, 118.

[186] n 67 above, 119.

[187] n 67 above, 109 - 110.

[188] n 67 above, 113.

*imithi* – white *imithi* must then be taken to allow benevolence to return. Black *imithi* represent:

> *… excretion, death and darkness – all of which is anti-social, the antithesis of society – the white symbols represent life, eating and light, which all epitomise society and provide the canopy of social action.*
>
> *The goodness contained in the black medicines is symbolised by the white froth that comes up when it is beaten. The white froth is not used, however, but it is brought out as an indication of the equivocal nature of blackness. By contrast, with white medicine the froth is smeared on the face and the arms to emphasise the goodness of these medicines. That the treatment represents a transformation that is a process – progressing from the darkness of night to the goodness of daylight – is indicated by the fact that after treatment with black medicines in the wilderness people do not look back. They leave behind what is bad and proceed to the future that is good.*
>
> *There is in addition another set of symbolic meanings that operates within the colour symbolism. This is related to the notions of heat and cold. Illness is associated with heat. Black (and red) medicines, which represent illness, are always heated: they may be boiled, burned into cinders to form black powdery medicines, administered as smoke arising from burning them, or heated in a container into which people dip and then suck their fingers.*[189]

The symbolic significance finds its resonance in the belief that the onset of illness may be characterised as shifting from a white spectrum, through a red spectrum and into darkness, where full illness is apparent. This is explained as shifting from daylight, through twilight and into the darkness of night. It is believed that persons who wish to use sorcery will employ *imithi* that represent the forces of the dark. Healing then encompasses the use of medicines to move a person from the spectrum of darkness, through the red spectrum, and into the light.

The above discussion serves only as a perfunctory overview of an extremely complex belief within the practice of traditional medicine and for contextualising the administration or prescription of *imithi* in the context of symbolism with a view to considering how this may affect any legal scope of practice.

[189] n 67 above, 120.

## 9.6 TREATMENT OF DISEASE: THE USE OF BODY PARTS IN TRADITIONAL MEDICINE

This topic has already been considered in a previously published thesis by the author of this thesis: *A comparative study of the criminalisation of the violation of a corpse in context of traditional medicine in subequatorial Africa, including consideration of customary law*. The discussion of the use of body parts in traditional medicine in that research is incorporated, mostly, into this thesis at this point, with minor emendations. This is appropriate to the research at hand and helps develop legal scopes of practice. The published thesis indicates that the thesis was limited to a discussion of the use of body parts used in traditional medicine but harvested from a corpse, and did not expound on harvesting body parts from live victims, or where victims were killed to harvest body parts in the crime of murder. As will be seen sequentially below, the limited case-law provides scant detail relating to the crime of violating a corpse to use body parts in traditional medicine. Accordingly, the published thesis is discussed below until the end of this section of this thesis.[190]

### 9.6.1 VIEWS OF AUTHORS

According to Carstens, belief systems relating to the use of human *imithi* hold that body parts used as *imithi* serve specific objectives and this author cites several body parts used for specific objectives:[191]

- vitality is enhanced by drinking the blood of a victim;
- any important business venture will succeed or be given foresight by using a victim's eye;
- listening to the views of an owner will be enhanced by using a victim's ear;
- the breast of a victim ensures reliance by customers on a business owner and may also be used to ensure fertility;
- the vagina of a young girl is used to ensure productivity and wealth for a business venture;

[190] Mullinder (n 3 above) 36.

[191] PA Carstens 'The cultural defence in criminal law: South African Perspectives' (2003) *National Criminal Justice Reference Service* 1.

- testicles enhance sexual prowess and sexual performance;
- a human skull, if built into the foundation of a new building, ensures successful commercial activity; and
- the hands of victims or parts of hands serve to attract clients and victims may also be hypnotised by using these body parts.

According to Behrens, whose article does not differentiate between witchcraft and traditional healing, but confines itself to views of practices by traditional healers, the traditional healer then prepares such body parts, together with other ingredients, such as plants, herbs or animal plants. These are then cooked, and are provided to the person seeking *umuthi*, with instructions for use. This process leads to the creation of human *umuthi*. [192]

### 9.6.2 GAUTENG TRADITIONAL HEALERS VIEWS

In personal discussions with two traditional healers in November 2016, neither of whom wished to be identified, both denied the use of body parts in traditional healing, ascribing their use to the practice of witchcraft. This particular matter will be addressed further subsequently in this thesis in the section dealing with stakeholder engagement.

### 9.6.3 CASE LAW

In the *Kunene and Mazibuko* case,[193] body parts were removed for medicinal reasons from a drowned body, but the context, whether by traditional healer or others, and the specific purpose for the removal of the body parts, was not mentioned by Christison and Hoctor.[194] Reasons for the removal of body parts in the cases of *Sephuma*,[195]

[192] C Behrens 'Challenges in investigating and preventing "muti"-related offences in South Africa' (2013) 26(1) *Acta Criminologia: Southern African Journal of Criminology* 7.

[193] 1918 JS § 321 (NNHC).

[194] A Christison & S Hoctor 'Criminalisation of the violation of a grave and the violation of a dead body' (2007) 28(1) *Obiter* 23.

[195] 1948 3 SA 982 (T). This case concerned primarily the violation of a grave; no judgment was made as to the violation of a corpse. The judgement passed was that it was sufficient with the desecration of a grave for criminal liability to follow.

*Coetzee*,[196] *W*,[197] *Shabalala and Others*,[198] *Chimboza*,[199] *Shabalala*,[200] *Mishkek*,[201] *Gadiwe*[202] and *Gaoaolelwe*[203] do not explicitly link the removal of the body parts from the corpses to use in traditional medicine or witchcraft.

In the case of *Mapholi en Andere*,[204] the evidence presented in the trial court was found to be unreliable by the appeal court judge and the convictions and sentences were set aside.

In the case of *Munyai and Others*,[205] the use of body parts related to the belief that the buried body parts would ensure a successful business venture.

The cases of *Sibande*,[206] *Modisafife*,[207] *Masemene*,[208] *Malaza*[209] and *Alam*[210] do, however, link the act of the removal of body parts to the order by an *isangoma*.

The *Mogaramedi* case is, however, particularly disturbing and pertinent. The facts indicated that the appellant had been practising as an *isangoma* for a decade and required the body part, in this case the genital organ of a deceased close female relative, as part of his final initiation as a traditional healer. Acting Judge Dosio commented in this case as follows:

> *[24] The appellant's religious beliefs and convictions cannot supersede the deceased's right to life. Although everyone has a right to practice their belief, as soon as this belief leads to an action*

[196] 1993 2 SACR 191 (T).
[197] 1976 1 SA 1 (A).
[198] 1991 ZASCA 97.
[199] 2015 ZAWCHC 47; para 14, together with fn 1 thereto.
[200] 2015 ZAGPJHC 262.
[201] 1972 3 SA 131 (R).
[202] 2007 BWHC 8.
[203] 2007 BWHC 200; 2004 BWHC 10.
[204] 1985 ZASCA 46.
[205] 1993 1 SACR 252 (A).
[206] 1975 1 SA 966 (RA).
[207] 1980 3 SA 860 (A).
[208] 1984 ZASCA 63.
[209] 1990 1 SACR 375 (A).
[210] 2006 2 SACR 613 (Ck).

*which falls within the bounds of illegality, for instance a murder to obtain body parts, then in terms of section 31(2) of the Bill of Rights it can no longer be condoned or protected merely because it is based on a religious or cultural belief. Cultural and religious beliefs must respect life and must be practiced in line with the Bill of Rights. If one allows such factors as in this present case to be regarded as substantial and compelling it will open the floodgates for many other accused found guilty of killing innocent victims and dismembering their bodies, for muti purposes, to seek lesser sentences than those prescribed.*

*…*

*[31] … This belief to kill another human being for muti related purposes goes against the very core of our constitution. Due to the appellant's deep-rooted belief that it is a necessity to kill a human being to complete his initiation as a Sangoma there is a strong probability that the appellant may in future give the same advice to another prospective Sangoma initiate. … Deterrent and retributive objects of punishment have to play a dominant role in such a case.*

*…*

*[35] Bearing in mind the strong cultural belief surrounding traditional healers and the fact that muti killings are unlikely to stop in the future, it is the task of this court to deter the killing of innocent people for such purposes. The community must be protected. The aspect of general deterrence is important to restore the trust the community have in the justice system. To regard such killings as substantial and compelling circumstances would send out the wrong message to the community. The prevalence of such cases in South Africa is high.*[xviii] [211] *The continuation of such killings will create more instability in the communities where such practices arrive. A strong message must be sent out that such conduct will not be condoned in a civilised society. Where such killings arise they must be punished with the full strength of the law.* [212]

Only in three cases were the accused convicted of violating a corpse, and in the other cases the accused were convicted of murder, confirming the view by Carstens above that no proper legal distinction is made and perpetrators are charged with the crime of murder.[213] Behrens indicates that: *Most traditional healers do not condone the use of human muti*,[214] which was also cited in this case by Acting Judge Dosio.

[211] As cited by D Dosio AJ: DN Swart 'Human trafficking and the exploitation of women and children in a southern and South African context' (2012) 13(1) *Child Abuse Research in South Africa* 62 - 73.

[212] 2015 ZAGPPHC; 2015 1SACR 427 (GP).

[213] n 191 above, 13.

[214] n 192 above, 9.

## 9.7 CONCLUSION

Any treatment of clinical manifestations in any system of medicine, as may be derived from whatever source, must necessarily be viewed against the protection of the health of the public, the primary mandate of any statutory health council, and also the direct responsibilities of the national and provincial departments of health, together with any medicines regulatory authority. Salient aspects relating to the treatment of clinical manifestations will see consideration subsequently in this thesis with a view to informing consideration of the development of legal regulations for traditional medicine – this being the case if the essentiality of the research question is the conclusion that regulation of this profession is to be continued, strengthened even, and then to develop the cardinal feature of this thesis within its original research contribution intention, namely a proposed legal scope of practice.

# CHAPTER 10
# TRADITIONAL MEDICINE AS 'MEDICAL PLURALISM' OR 'MEDICAL PARALLELISM'

## 10.1 INTRODUCTION

This topic is introduced for the sake of completeness in consideration of the subject of this thesis and serves to indicate to any interested party that different disciplines, in this case anthropology, may view questions of medicine differently.

## 10.2 TERMINOLOGY IN ANTHROPOLOGY: TRADITIONAL MEDICINE AS MEDICAL PLURALISM?

Thornton avers that *traditional medicine is neither 'traditional' nor strictly 'healing'* and states that the terminology 'medical pluralism' is intensely ingrained in medical anthropology but believes that it should be discarded in view of the political debate, particularly during the apartheid era, relating to 'pluralism'. This author favours the term 'medical parallelism' as encompassing *the paradoxes that arise from competing and contradictory notions of healing, health and the nature of the individual, and exists primarily in South African small towns* – and is taken to mean *the interaction of multiple systems of medicine, with many therapeutic interventions being available ...*[215] For this thesis, this point of view is noted – in view of the general notion that persons who consult traditional healers also consult conventional medical practitioners, referenced previously under comment by Ngubane.[216]

## 10.3 CONCLUSION

The view of the author of this thesis is that conflation of medical systems is the case, rather than the adoption of any one system 'parallel' to another, with 'pluralism' then being appropriately more accurate descriptively, noting that the term is politically tainted – in medical terminology then 'complementary' or 'alternative' as descriptive terms might be more appropriate; this matter is not believed to be of any consequence in achieving the essentiality of the research question, however.

[215] n 2 above, 35 - 36.

[216] n 67 above, 23.

# CHAPTER 11
# TRADITIONAL MEDICINE AS APOTROPAIC MAGIC

## 11.1 INTRODUCTION

Apotropaic magic may be defined as including … *all magical gestures, amulets, substances and rites that are designed to protect rather than to cure. It is prophylactic rather than therapeutic*.[217] As with the subject of the immediately preceding chapter, this topic is introduced for the sake of completeness in consideration of the subject of this thesis and serves to indicate to any interested party that different disciplines, in this case anthropology, may view questions of medicine differently.

## 11.2 APOTROPAIC MAGIC

Thornton avers that apotropaism is of greater significance in traditional medicine than in any other therapeutic process, with the outcome of any visit to a traditional healer *more likely to be an attempt to protect against harm than therapy*,[218] stating further that the main goal of the *isangoma* would be to protect patients as 'exposed beings' and an extensive variety of material items are used for this purpose:

> *These guarantee the wholeness, and therefore the health, of the patient. This is what I have called apotropaic magic, that is, the technology of a material logic protection that wards off untoward influence, or even reflects it back whence it came.*[219]

## 11.3 CONCLUSION

For this thesis, this point of view is noted, but considering the differentiation made by Ngubane between the treatment of somatic conditions and other,[220] the view of the author of this thesis is that traditional medicine cannot be categorised in such simple terms; this matter is not believed to be of any consequence in achieving the essentiality of the research question, however, namely whether regulation of this profession is to be continued, or not.

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[217] Thornton (n 2 above) 40.

[218] n 2 above, 217.

[219] Thornton (n 2 above) 288.

[220] n 67 above, 23.

# SECTION B:

# SOUTH AFRICAN TRADITIONAL MEDICINE: ENABLING LEGISLATION, STATISTICS, ACTS SPECIALLY PERTAINING TO THE PROFESSION AND MEDICINES

# CHAPTER 1
# SOUTH AFRICAN TRADITIONAL MEDICINE: LEGISLATION: 1985 – 2019

## 1.1 INTRODUCTION

The views and information presented in the previous section serve as background to the system of traditional medicine for societal or cultural contextualisation and for introductory purposes, specifically also as a prologue to the regulatory legislative pathway. This chapter offers a timeline on the pathway history from legislation originating in 1887 to the present era, illustrating in particular the disjunctive nature of the promulgation of relatively recent legislation over a period of some 18 years, commencing in 2004, with regulators still being unable, seemingly, to constitute an Interim Council which is legally fully operational.

## 1.2 1985: THE KWAZULU ACT ON THE CODE OF ZULU LAW[221]

Bennett and Pillay believe that the colonial Natal Code of Zulu Law[222] and the 1985 KwaZulu Act on the Code of Zulu Law, the latter having been amended by the Amakhosi and Iziphakanyiswa Act,[223] are codifications of Zulu customary law, but hold that they are incongruous elements in South Africa's new constitutional order.[224]

McQuoid-Mason and Dada indicate that the KwaZulu Act regulates certain aspects of traditional health in KwaZulu-Natal until the Act,[225] addressed subsequently in this chapter, becomes legally fully operational.[226]

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[221] Act 16 of 1985.

[222] Draft version of the Code promulgated under Proclamation 2 of 1887 for Zululand, subsequently by the Natal Code of Native Law, Law 19 of 1891; subsequently promulgated as a single law for Zululand and Natal in terms of the Native Administration Act, Act 38 of 1927 [subsequently renamed the Bantu Administration Act, 1927 and the Black Administration Act, 1927]; subsequently amended by Proclamation R151 of 1987, as promulgated in Regulation Gazette 4136 on 9 October 1987.

[223] Act 9 of 1990.

[224] TW Bennett & A Pillay 'The Natal and KwaZulu codes: The case for repeal' (2003) 19 *South African Journal on Human Rights* 217.

[225] Act 22 of 2007.

[226] D McQuoid-Mason & M Dada *A - Z of medical law* (2011) 448, 422.

Rautenbach provides salient detail on the KwaZulu Act:

> *Sections 83 - 90 of this Act provide for the registration of traditional healers (medicine men or women, herbalists and midwives) and make it a criminal offence for anyone to practise as such without a valid licence. It is also a criminal offence if any person fails to comply with the provisions dealing with traditional healers.*[227]

McQuoid-Mason and Dada expand on these legislative precepts, as follows:

- Persons skilled in healing, herbalists and midwives may, if licensed under section 83(1), practise for gain, referring to similar provisions in the 1891 Code[228] where such practice included surgery and medical treatment,[229] including the use of a stethoscope.[230]
- Until 1932, persons other than Zulus could be treated for remuneration,[231] but an amendment to the Natal Code of Zulu Law in that year provided that persons practising traditional health *may not offer or hire their services to or prescribe for or offer any operation upon a person other than a native*. [232]
- Section 88(1) prohibits the use of the title of *doctor* or *chemist*, or any other designation provided for in the Health Professions Act.[233]
- Section 125(2) provides that only traditional medicines may be prescribed or sold and only to a *bona fide* patient in terms of section 88(2) after personal attendance.
- Specific advertising is outlawed (section 88(4)) and a fee may be charged for services rendered (section 85(1)), but only by a licensed person (section 85(3)).[234]

[227] C Rautenbach 'Review on a new legislative framework for traditional healers in South Africa' (2007) *Obiter* 522.

[228] n 222 above.

[229] As cited by McQuoid-Mason & Dada (n 226 above) 448: *Mosongelwa v Mpilipili* 1919 NHC 84.

[230] As cited by McQuoid-Mason & Dada (n 226 above) 448: *Ngaka Ndhlovu v R* 1942 NPD 397.

[231] As cited by McQuoid-Mason & Dada (n 226 above) 448: *M Radebe v Van der Merwe* (1905) 26 NLR 179.

[232] As cited by McQuoid-Mason & Dada (n 226 above) 448: The amendment to the 1891 Code by Union Proclamation, 1932 (Proclamation 168 of 1932).

[233] Act 56 of 1974.

[234] n 226 above, 448 - 449.

The Allied Health Professions Act recognises the Code of Zulu Law[235] by providing as follows:

> *41. Interpretation of laws in respect of certain medicine men and herbalists*
> *The provisions of this Act and the Health Professions Act, 1974 (Act 56 of 1974), shall not be construed as derogating from the right which a herbalist contemplated in the Code of Zulu Law may have to practise his or her profession.* [236]

Bennett and Pillay believe that these legislative precepts are unlikely to survive constitutional scrutiny and should be repealed.[237]

## 1.3 2004: THE TRADITIONAL HEALTH PRACTITIONERS ACT[238]

According to Moagi, prior to the promulgation of this legislation, debate about the Bill commenced in 1998, with the parliamentary portfolio committee subsequently having submitted the Bill to Parliament for consideration in 2003 – with parliamentary debate having commenced in 2004.[239]

Le Roux-Kemp indicates that assent to this legislation was given in February 2005, with February 2006 being the date of commencement of operation of certain provisions. The constitutionality of this legislation was then challenged legally by Doctors for Life because there had been a lack of sufficient or reasonable levels of participation at provincial level. This legislative precept was subsequently invalidated by the Constitutional Court, [240] but the invalidity was suspended for a period of 18 months for the legislation to be re-enacted according to constitutional principles. Re-enactment occurred in 2007, with assent granted in January 2008,[241] with no discernible difference to the 2004 legislation.

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[235] Act 16 of 1985.

[236] Section 41, Act 63 of 1982.

[237] n 224 above, 217.

[238] Act 35 of 2004.

[239] L Moagi 'Transformation of the South African health care system with regard to African traditional healers: The social effects of inclusion and regulation' (2009) 4(4) *International NGO Journal* 119.

[240] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

[241] A le Roux-Kemp 'A legal perspective on African traditional medicine in South Africa' 2010 43(3) *The Comparative and International Law Journal of Southern Africa* 276.

### 1.4 2007: THE TRADITIONAL HEALTH PRACTITIONERS ACT[242]

The purpose of this legislation, set out in section 2, is to establish an interim statutory health council ('the Interim Council'), and also:

> *... to provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; to provide for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners profession; and to provide for matters connected therewith.*

Section 52 provides that this legislation would come into operation on a date as determined by the president of the Republic of South Africa by proclamation, as indicated subsequently.

### 1.5 2008: COMMENCEMENT OF CERTAIN SECTIONS OF THE TRADITIONAL HEALTH PRACTITIONERS ACT, 2007[243]

This proclamation brought into operation section 7 (*Constitution of Council*); section 10 (*Chairperson and vice-chairperson*); section 11(3) (*A special meeting of the Council*); section 12 (*Quorum and procedure at meeting*); section 13 (*executive committee of Council*); section 14 (*Other committees of Council*); section 15 (*Remuneration of members of Council and committees*); section 47 (*Regulations*); section 48 (*Rules*); and section 50 (*Payment of annual fees*).

### 1.6 2008: REGULATION RELATING TO THE APPOINTMENT BY THE MINISTER AS MEMBERS OF THE INTERIM TRADITIONAL HEALTH PRACTITIONERS COUNCIL OF SOUTH AFRICA[244]

This regulation provided for the process of appointing members of the Interim Council, as provided for in section 7 of the Act:[245]

> *7. The Council consists of a maximum of 22 members, appointed by the Minister in the prescribed manner, of whom—*

[242] Act 22 of 2007.

[243] Proclamation No 17 of 30 April 2008, as promulgated in Government Gazette No 31020 on 30 April 2008.

[244] Government Notice No R 542 of 16 May 2008, promulgated in Government Gazette No 31071 on 16 May 2008.

[245] Act 22 of 2007.

*(a) one must be a traditional health practitioner appointed as the chairperson of the Council by the Minister;*
*(b) one is the vice-chairperson of the Council and is elected by the members of the Council from amongst their number;*
*(c) nine must be traditional health practitioners, one from each province, of whom each must have been in practice for not less than five years;*
*(d) one must be an employee in the service of the Department of Health;*
*(e) one must be appointed on account of his or her knowledge of the law;*
*(f) one must be a medical practitioner who is a member of the Health Professions Council of South Africa;*
*(g) one must be a pharmacist who is a member of the South African Pharmacy Council;*
*(h) three must be community representatives; and*
*(i) one must be a representative from each category of traditional health practitioners defined in this Act.*

## 1.7 2008: DRAFT POLICY ON AFRICAN TRADITIONAL MEDICINE FOR SOUTH AFRICA[246]

The then-Minister of Health, Dr Tshabalala-Msimang, invited substantiated comments on this draft policy for the incorporation of African traditional medicine into the healthcare system of the Republic of South Africa. She stated that this was in furtherance of the right to healthcare services as enshrined in the Bill of Rights of the Constitution of the Republic of South Africa, 1996[247] ('the Constitution'), indicating further in the foreword:

> *The draft policy makes an important epoch in the history of African Traditional Medicine in our country. It symbolises the respect and recognition of the African Traditional Medicine by Government for sustaining healthcare in the urban and rural areas for a number of years, in spite of its oppression and marginalisation during the era of colonialism and apartheid.*

[246] General Notice No 906 of 2008, promulgated in Government Gazette No 31271 on 25 July 2008. According to Mr Bruce Mbedzi, Chairperson of the Expert Working Group on Traditional Medicine, an advisory body to the National Department of Health, and replying to a question during an initial virtual meeting on 13 September 2021 for the members of the group, including the author of this thesis, who was a member of this committee in an *ex officio* capacity from 2021 to 2022, this policy will see finalisation and adoption presently.
[247] Act 108 of 1996.

*The draft policy on African Traditional Medicine comes at a time when the public health care system is in a dire need to reflect the diverse health disciplines which the citizen utilize for the health care needs in South Africa.*

*This draft policy will within the context of the Alma Ata* (sic) *Declaration on Primary Health Care strengthen the capacity of healthcare personnel, health services and communities to ensure it provides a transformational process for formal recognition of the African Traditional Medicine system to acknowledgement* (sic) *our heritage as a country and to address issues of (a) African Traditional Medicine and the users of African Traditional Medicine, (b) protecting African Traditional Medicine Knowledge, and (c) strengthening the National Health System.*

*Government is committed to institutionalizing African Traditional Medicine in the healthcare system.*[248]

## 1.8 2011: REGULATION RELATING TO THE APPOINTMENT OF MEMBERS OF THE INTERIM TRADITIONAL HEALTH PRACTITIONERS COUNCIL OF SOUTH AFRICA[249]

This regulation provided for the process of appointing members of the Interim Council as provided for in section 7 of the Act,[250] in the same manner as the regulation promulgated on 16 May 2008, as set out above.

## 1.9 2014: COMMENCEMENT OF CERTAIN SECTIONS OF THE TRADITIONAL HEALTH PRACTITIONERS ACT, 2007[251]

This proclamation brought into operation section 4 (*Establishment of the Interim Traditional Health Practitioners Council*); section 5 (*Objects of Council*); section 6 (*Constitution of Council*); section 6 (*Functions of Council*); section 8 (*Vacation of office and filling of vacancies*); section 9 (*Disqualification as member of Council*); section 16 (*Funds of Council*); section 17 (*Accounting officer*); sections 18 to 28 (*Chapter 3: Registrar, Staff of Registrar and Registration Procedures*); sections 29 to 41 (*Chapter 4: Disciplinary Inquiries and Investigations by Council*); sections 42 to 46 (*Fees charged by registered persons*; *False representations, false entries in register and*

[248] General Notice (n 244 above), Foreword.

[249] Government Notice No R 685 of 22 August 2011, promulgated in Government Gazette No 34546 on the same date.

[250] Act 22 of 2007.

[251] Proclamation No 29 of 30 April 2014, as promulgated in Government Gazette No 37600 on 2 May 2014.

*impersonation*; *Limitations in respect of unregistered persons*; *Investigation of matters relating to teaching or training of certain classes of persons*; and *Exemptions*); section 49 (*Offences*); and section 51 (*Transitional arrangements*).

## 1.10 TRADITIONAL HEALTH PRACTITIONERS REGULATIONS 2015[252]

These regulations, in particular regulations 2 to 11, provide for the:

> *… registration of traditional health practitioners*; *categories of persons requiring education and training*; *registration of students*; *minimum standards of education*; *duration of the educational programme*; *the minimum age and status of general education*; *the registration by the Council of persons undertaking educational courses or undertaking training*; *the registration of students of a traditional health practice, including the recording of particulars relating to their training and proof of the performance of the requirements thereof*; *the circumstances under which any applicant for the registration of any category or speciality may be exempted from any such requirements*;

and

> *… the procedure to dispose of an application for fees charged by the practitioner*.

## 1.11 2016: EXTENSION OF COMMENT PERIOD FOR THE TRADITIONAL HEALTH PRACTITIONERS REGULATIONS, 2015[253]

This government notice extended the comment period for the 2015 regulations promulgated on 3 November 2015, as set out in the immediately preceding paragraph above, until 4 April 2016.

[252] Government Notice No R 1052 of 3 November 2015, promulgated in Government Gazette No 39358 on 3 November 2015.

[253] Government Notice No 171 of 12 February 2016, promulgated in Government Gazette No 39685 on 12 February 2016.

## 1.12 2018: COMMENCEMENT OF CERTAIN SECTIONS OF THE TRADITIONAL HEALTH PRACTITIONERS ACT, 2007[254]

This proclamation brought into operation section 1 (*Definitions*); section 2 (*Purpose of the Act*); section 3 (*Application of the Act*); and sections 11(1) and 11(2) (*Meetings of the Interim Traditional Health Practitioners Council*). The latter provisions require the Interim Council Registrar to convene meetings of the Interim Council in consultation with the Chairperson, at least twice annually.

The following definitions, among others, were brought into operation:

> ***"traditional health practice"*** *means 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 No. 53 of 1974), the Health Professions Act, 1974 (Act No. 56 of 1974), the Nursing Act, 1974 (Act No. 50 of 1974), the Allied Health Professions Act, 1982 (Act No. 63 of 1982), or the Dental Technicians Act, 1979 (Act No. 19 of 1979), and any other activity not based on traditional philosophy;*
>
> ***"traditional medicine"*** *means 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;*
>
> ***"traditional philosophy"*** *means 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;*

[254] Proclamation No 29 of 22 September 2018, as promulgated in the Government Gazette No 41945 on 28 September 2018.

The above legislation and future possible regulation, additional to these legislative precepts, will be addressed later in this thesis.

## 1.13 2019: NOTICE OF NOMINATIONS: NOMINATION OF MEMBERS OF THE INTERIM TRADITIONAL HEALTH PRACTITIONERS COUNCIL OF SOUTH AFRICA[255]

This National Department of Health notice called for the nominations of candidates to be appointed by the Minister of Health for a three-year term of office in terms of section 7 of the Act,[256] the categories being: nine traditional health practitioners, one from each province (in practice for not less than five years); one person appointed on account of his/her knowledge of the law; three persons appointed as community representatives; and one representative from each of the four registrable categories in terms of this legislation.

## 1.14 CONCLUSION

The KwaZulu Act on the Code of Zulu Law[257] is believed to be unlikely to survive constitutional scrutiny, but be that as it may, the reason that the Interim Council is not yet legally fully operational may seemingly be ascribed to a lack of political will on the part of the regulators, alternatively for stakeholder reasons which remain unknown. The same conclusion is applicable to the publication of a policy on traditional medicine, the last publication having been in 2008.

[255] Department of Health Notice No 66 of 29 January 2019, promulgated in Government Gazette No 42195 on 29 January 2019.

[256] Act 22 of 2007.

[257] Act 16 of 1985.

# CHAPTER 2
# CUSTOMARY PRACTICE OF INITIATION: CIRCUMCISION AND OTHER SUCH PRACTICES: LEGISLATIVE PRECEPTS: 2006 - 2021

## 2.1 INTRODUCTION

The category of *traditional surgeon*, introduced previously in this thesis, is regulated and is registrable in terms of the Act.[258] Statistics and debate surrounding the number of deaths, penile amputations and disfigurement resulting from circumcision in particular will see elucidation subsequently, but in keeping with the originality of design of this thesis, this chapter provides a functionally and purposefully referenced record of legislation relating to the practice of circumcision. National legislation will receive precedence, but an offering of provincial, district and municipal legislation relating to customary initiation is also presented chronologically from 2006, not necessarily as a complete record of such legislation, but against the background of demonstrating that the matter has seen consideration and attention by various legislative bodies.

## 2.2 NATIONAL LEGISLATION

- **DRAFT POLICY ON THE CUSTOMARY PRACTICE OF INITIATION IN SOUTH AFRICA, 2015**; [259]
- **CUSTOMARY INITIATION BILL; CUSTOMARY INITIATION ACT, 2021**[260]

According to a report by the parliamentary monitoring group, the Customary Initiation Bill 2018 was passed by both houses of parliament and was sent to the president on 16 March 2021 for assent, which was granted on 1 June 2021.

The legislation is now termed the Customary Initiation Act[261] and seeks to provide for the effective regulation of customary initiation practices for males and females.

[258] Act 22 of 2007.

[259] Department of Traditional Affairs General Notice 471 of 2015, as promulgated in Government Gazette No 38814 on 22 May 2015.

[260] Department of Traditional Affairs Notice 528 of 2017, as promulgated in Government Gazette No 40978 on 14 July 2017; Act 2 of 2021, promulgated in Government Gazette No 44668 on 4 June 2021.

[261] Parliamentary Monitoring Group Notice: https://pmg.org.za/bill/777/, accessed 16 May 2021; Act 2 of 2021.

The main objectives are to protect, promote and regulate initiation; to provide acceptable norms and standards with a view to ensuring that initiation takes place in a controlled and safe environment; and to provide for the protection of life and the prevention of any abuse. The salient provisions of this Act are discussed subsequently in this thesis, also taking into consideration other legislation such as the Children's Act, amendments to which have been tabled in parliament,[262] together with any relevant international and regional treaty provisions.

## 2.3 PROVINCIAL LEGISLATION

- **MPUMALANGA: MPUMALANGA INGOMA BILL, 2006**; **MPUMALANGA INGOMA BILL, 2007**;[263]
- **NORTH WEST: NORTH WEST INITIATION SCHOOL MATTERS BILL, 2016**;[264]
- **EASTERN CAPE: EASTERN CAPE CUSTOMARY MALE INITIATION PRACTICE ACT, 2016**;[265] [266]
- **EASTERN CAPE: DRAFT REGULATIONS ON THE PROCESSES AND PROCEDURES FOR CONDUCTING CUSTOMARY MALE INITIATION AND THE ROLES AND FUNCTIONS OF DIFFERENT STAKEHOLDERS INVOLVED IN MALE INITIATION PROGRAMMES, 2017**;[267] [268]

[262] Act 38 of 2005, http://www.ci.uct.ac.za/ci/law-reform/childrens-act/latest-developments, accessed 12 May 2021.

[263] General Notice 459 of 2006, promulgated in Provincial Gazette, Extraordinary, No 1366, on 28 August 2006, and General Notice 367 of 2007, promulgated in Provincial Gazette, Extraordinary, No 1477, on 18 July 2007.

[264] Provincial Notice 160 of 2016, as promulgated in Provincial Gazette, Extraordinary, No 7681, on 22 August 2016.

[265] Act 5 of 2016, Provincial Notice 259 of 2016, as promulgated in Provincial Gazette No 3777 on 19 December 2016.

[266] This legislative precept also repeals the Eastern Cape Application of Health Standards in the Traditional Circumcision Act 6 of 2001.

[267] Provincial Notice 74 of 2017, as promulgated in Provincial Gazette, Extraordinary, No 3836, on 5 May 2017.

[268] n 265 above, draft regulation 4, para 1: *The Eastern Cape Province has experienced lots of challenges in relation to the practice of customary male initiation where scores of young initiates have unnecessary* (sic) *lost their innocent lives and some suffered penal amputations. The Department of Health has on many occasions reported that some initiates have committed suicide as a result of suffering penile amputations. The available evidence and reports suggest that some of these challenges are as a result of lack of clear processes and procedures to be followed whilst conducting customary male initiation practice. These challenges have necessitated the Eastern Cape Provincial Government to institutionalize the practice of customary male initiation through legislation.*

- **LIMPOPO: LIMPOPO INITIATION SCHOOLS ACT, 2016**;[269]
- **EASTERN CAPE: REGULATIONS ON THE PROCESSES AND PROCEDURES FOR CONDUCTING CUSTOMARY MALE INITIATION AND THE ROLE OF DIFFERENT STAKEHOLDERS INVOLVED IN CUSTOMARY MALE INITIATION PROGRAMMES, 2019**;[270]
- **LIMPOPO: COMMENCEMENT OF THE LIMPOPO INITIATION SCHOOLS ACT, 2016**;[271] and
- **LIMPOPO: LIMPOPO INITIATION SCHOOLS REGULATIONS, 2020**.[272]

## 2.4 DISTRICT AND MUNICIPAL LEGISLATION

- **GAUTENG: EKURHULENI METROPOLITAN MUNICIPALITY: PUBLIC HEALTH BY-LAW, 2009**;[273]
- **LIMPOPO: VHEMBE DISTRICT MUNICIPALITY: MUNICIPAL HEALTH BY-LAW, 2012**;[274]
- **NORTHERN CAPE: PHOKWANE LOCAL MUNICIPALITY: PROMULGATION OF HEALTH BY-LAWS FOR THE OPERATION AND MANAGEMENT OF INITIATION SCHOOLS, 2014**;[275]
- **GAUTENG: SEDIBENG DISTRICT MUNICIPALITY: PROMULGATION OF HEALTH BY-LAWS FOR THE OPERATION AND MANAGEMENT OF INITIATION SCHOOLS, 2015**;[276]
- **MPUMALANGA: EHLANZENI DISTRICT MUNICIPALITY: MUNICIPAL HEALTH SERVICES BY-LAW, 2018**;[277]

[269] Act 6 of 2016, Provincial Notice 65 of 2018, as promulgated in Provincial Gazette No 2931 on 10 August 2018.

[270] Provincial notice 198 of 2019, as promulgated in Provincial Gazette No 4268 on 15 July 2019.

[271] Act 6 of 2016, Proclamation 17 of 2020, as promulgated in Provincial Gazette 30741 on 27 March 2020.

[272] Proclamation 17 of 2020, as promulgated in Provincial Gazette 30741 on 27 March 2020.

[273] Local Authority Notice 1908 of 2009, as promulgated in Provincial Gazette, Extraordinary, No 256 on 27 November 2009.

[274] Local Authority Notice 30 of 2012, as promulgated in Provincial Gazette, Extraordinary, No 2055 on 16 March 2012.

[275] General Notice 135 of 2014, as promulgated in Government Gazette No 1850 on 3 November 2014.

[276] Local Authority Notice 1244 of 2015, as promulgated in Provincial Gazette, Extraordinary, No 315 on 21 July 2015.

[277] Provincial Notice 3 of 2018, as promulgated in Provincial Gazette No 2887 on 5 January 2018.

- **GAUTENG: LESEDI LOCAL MUNICIPALITY: MUNICIPAL HEALTH SERVICES BY-LAW, 2018**;[278]
- **NORTH WEST: CAPRICORN DISTRICT MUNICIPALITY: MUNICIPAL HEALTH SERVICES BY-LAW, 2018**;[279]
- **EASTERN CAPE: KOU-KAMMA LOCAL MUNICIPALITY: MUNICIPAL HEALTH SERVICES BY-LAW, 2018**;[280]
- **KWAZULU-NATAL: ZULULAND DISTRICT MUNICIPALITY: APPROVED MUNICIPAL HEALTH SERVICES BY-LAW, 2019**;[281]
- **EASTERN CAPE: JOE GQABI DISTRICT MUNICIPALITY: MUNICIPAL HEALTH SERVICES BY-LAW, 2019**;[282] and
- **MPUMALANGA: DR JS MOROKA MUNICIPALITY: PUBLIC HEALTH BY-LAW, 2021**.[283]

## 2.5 CONCLUSION

The promulgation of the Customary Initiation Act,[284] in light of available statistics and debate surrounding the number of deaths, penile amputations and disfigurement resulting from male circumcision particularly, discussed subsequently, is to be welcomed and the hope is expressed that the responsible authorities will now ensure proper safeguarding of persons undergoing circumcision. Existing provincial, district and municipal legislation may now require reconsideration and modification in the light of the promulgation of the 2021 national legislation.

[278] Provincial Notice 416 of 2018, as promulgated in Provincial Gazette No 123 on 2 May 2018.

[279] Local Authority Notice 62 of 2018, as promulgated in Provincial Gazette No 2905 on 18 May 2018.

[280] Local Authority Notice 136 of 2018, as promulgated in Provincial Gazette No 4098 on 6 August 2018.

[281] Provincial Notice 25 of 2020, as promulgated in Provincial Gazette No 2168 on 20 February 2020.

[282] Local Authority Notice 51 of 2019, as promulgated in Provincial Gazette No 4204 on 11 March 2019.

[283] General Notice 22 of 2021, as promulgated in Government Gazette No 3252 on 9 April 2021.

[284] Act 2 of 2021.

# CHAPTER 3
# CATEGORIES OF TRADITIONAL HEALTH PRACTITIONERS IN SOUTH AFRICAN LAW AND PREVALENCE OF CONSULTATION

## 3.1 INTRODUCTION

As opposed to the structured overview of the classes of persons practising within the construct of traditional medicine presented previously, this chapter presents the six categories of traditional health practitioners: *diviner*, *herbalist*, *student*, *traditional birth attendant*, *traditional surgeon* and *traditional tutor* as provided for in the Act,[285] together with statistics relating to consultation with practitioners within these categories, seemingly conflicting depending on the research source.

## 3.2 TRADITIONAL HEALTH PRACTITIONER CATEGORIES AS PROVIDED FOR IN THE TRADITIONAL HEALTH PRACTITIONERS ACT[286]

The definitions encompassed within this legislative precept are:

> *"**diviner**" means a person who engages in traditional health practice and is registered as diviner under this Act;*
>
> *"**herbalis**t" means a person who engages in traditional health practice and is registered a herbalist under this Act;*
>
> ***"student"** means a person training to be a traditional health practitioner;*
>
> *"**traditional birth attendant**" means a person who engages in traditional health practice and is registered as a traditional birth attendant under this Act;*
>
> *"**traditional surgeon**" means a person registered as a traditional surgeon under this Act;*
>
> ***"traditional tutor"** means a person registered under any of the prescribed categories of traditional health practice who has been accredited by the Council to teach traditional health practice or any aspect thereof;*

[285] Act 22 of 2007.

[286] Act 22 of 2007.

In addition, there is a definition of a 'speciality' in respect of any of the categories:

> *"**speciality**", in relation to any of the categories, includes any particular sphere of extensive knowledge and skill in which a traditional health practitioner specialises;*

Section 47(1)(f) of the Act[287] empowers the Minister of Health to make regulations, after consultation with the Interim Council, regarding the registration of the above-mentioned categories, the registration of specialities, the nature and duration of the training or the attainment of any additional qualifications, exemption from any such requirements, and the conditions relating to both the physical practice and the category of practice.

Section 19(1)(c) of the Act[288] requires the Registrar to keep registers in respect of the names of traditional health practitioners and students.

### 3.3 STATISTICS AND PREVALENCE OF CONSULTATION: *ISANGOMA*

Mander *et al* (2007) aver that 72% of Black South Africans use traditional medicines – an estimated 26.6 million consumers – and indicate that at least 133 000 persons are employed in this trade, stating further that *for those involved it is a major contributor to rural household incomes*.[289] Moagi, citing a 2008 Statistics SA report, indicated that up to 70% of South Africans regularly consult traditional healers, although the category of traditional health practitioner consulted was not specified.[290] The author of this thesis cannot however verify these statistics further given the inexact referencing.[291]

Latif, however, states that there are 200 000 traditional health practitioners, and that in rural areas 80% of the population consult these practitioners, given the cultural and

[287] Act 22 of 2007

[288] Act 22 of 2007.

[289] M Mander *et al* 'Economics of the traditional medicine trade in South Africa' (2007) 1 *South African Health Review* 189, 195.

[290] n 239 above, 119.

[291] Statistics South Africa *General Household Survey, 2008*: http://www.statssa.gov.za/publications/P0318/P03182008.pdf, accessed 19 February 2021, 74 - 78.

spiritual availability of their services; this information was sourced from the 2007/2008 South African Yearbook.[292] [293]

Gqaleni *et al*, citing Pretorius's estimate of 150 000 to 200 000 traditional healers in South Africa in 1999,[294] posit that this figure was verified and confirmed, as set out in the following table:

**Table 1: Number of traditional healers in South Africa, 2007**

| Province | Number of practitioners |
|---|---|
| EC | 10 780 |
| FS | 22 645 |
| GP | 61 465 |
| KZN | 14 941 |
| LP | 7 366 |
| MP | 57 524 |
| NC | 2 221 |
| NW | 5 935 |
| WC | 2 600 |
| Total | 185 477 |

Source: Compiled based on research by authors.

giving the number of traditional healers in South Africa in 2007 as 185 477, and based on own research and investigation.[295]

In 2009, Peltzer, having considered nationally representative population-based surveys from 1995 to 2007, concluded that consultations with traditional healers had ostensibly decreased over a period of 13 years: … *surveys from 1995 to 1998 found*

[292] South Africa: Department of Government Communication and Information systems 'Health' in D Burger (ed) *South African Yearbook 2007/08* (2008) 342.

[293] SS Latif 'Integration of African traditional health practitioners and medicine into the health care management system in the province of Limpopo' published Master of Public Administration thesis, University of Stellenbosch, 2010 16.

[294] E Pretorius 'Traditional healers' in N Crisp & A Ntuli (eds) *South African Health Review* (1999).

[295] N Gqaleni *et al* 'Traditional and complementary medicine' (2007) 12 *South African Health Review* 178.

*a 3.6 to 12.7% use of a traditional healer, while surveys from 2005 to 2007 showed 0.1% or less use of a traditional healer*.[296]

In 2010, Ross (in contrast to Latif, Pretorius, Gqaleni and Peltzer) estimated that there were 250 000 to 400 000 persons practising traditional medicine in the South African healthcare paradigm, without quantifying the statistics into diviners, herbalists, prophets or faith healers, traditional surgeons or birth attendants – the five broad categories she regards as inherent to this healthcare paradigm,[297] as opposed to the six categories of registration envisaged by the regulator. This author concluded further *that eight out of every 10 black South Africans are believed to rely on traditional medicine alone, or in combination with Western medicine*, citing Keeton.[298]

Ross also contrasted this number of traditional health practitioners with only 28 000 conventional medicine general practitioners[299] which sees further elucidation below.

In 2011, Nxumalo *et al* published research based on data collection in 2008:

> *… found relatively low traditional healer utilization rates. We found that age, health status, race, and residents influence utilization of such services. Traditional healer users were more likely to be poor, unemployed, living in rural areas, aged between 25 and 49 years and to have reported low health status. The differences noted in the utilization rates between survey respondents (2.5 per cent) and their families (0.8 per cent) could be due to problems of recall, secrecy regarding traditional healer use, and variable access to financial resources needed for traditional healer consultations.*
>
> *Our survey findings of low reported traditional healer utilization are borne out by the findings of other population-based surveys conducted in South Africa since 1990 that have found a decline in traditional healer consultations*.[300]

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[296] K Peltzer 'Utilization and practice of traditional/complementary/alternative medicine (TM/CAM) in South Africa' (2009) 6(2) *African Journal of Traditional, Complementary, and Alternative Medicines* 177.

[297] E Ross 'Inaugural lecture: African spirituality, ethics and traditional healing – implications for indigenous South African social work education and practice' (2010) 3(1) *SAJBL* 44 - 51.

[298] C Keeton 'Sangomas to join medical fraternity' *Sunday Times* 9 May 2004.

[299] n 297 above, 46.

[300] N Nxumalo *et al* 'Utilization of traditional healers in South Africa and costs to patients: Findings from a national household survey' (2011) 32(1) *Journal of Public Health Policy* 132 - 133.

Oyebode *et al* rejected the 80% statistic mentioned above in 2011 research, indicating that this statistic was first reported in 1983 and that its use had been traced, most likely to a World Health Organization 1983 textbook, with the original data on which the statistic had been based now lost.[301] They indicated that Kate Wilkinson had carried out the tracing[302] and, confirming the research by Peltzer and Nxumalo *et al* set out above, observed that:

> *We are not the first to make the observation that the use of TM* [Traditional Medicine] *is lower than the 80% commonly reported by the WHO* [World Health Organization] *and others, since a number of single country studies corroborate our findings. Analysis of nationally representative South African population-based surveys from 2005 to 2007 found <0.1% of the population had used TM* [Traditional Medicine] *in the past month (down from a high of 12.7% a decade earlier Peltzer*[303] *2009). A 2008 survey of households in South Africa (n = 4762) found that only 1.2% of respondents reported using traditional healers (Nxumalo et al. 2011)*.[304]

Oyebode *et al* conclude that the use of traditional medicine is considerably lower than is commonly reported, and that while their study indicates that traditional medicine is indeed used, no motivation for its continued use can be provided, and they question whether traditional health practitioners are consulted only when modern medicine is unavailable, or whether traditional medicine is effective and acceptable.[305]

## 3.4 STATISTICS RELATING TO SOUTH AFRICAN HEALTHCARE FACILITY FIRST VISITED

Pertinent to this thesis are the 2017 statistics published by Statistics South Africa for the 2017 General Household Survey as set out in the 2017 report Figure 19 (below), which indicates the South African healthcare facility first visited by members of various households for the period 2004 to 2007: [306]

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[301] O Oyebode *et al* 'Use of traditional medicine in middle-income countries: A WHO-SAGE study' (2016) 31(8) *Health Policy and Planning* 985.

[302] Reference provided by Oyebode *et al* is incomplete.

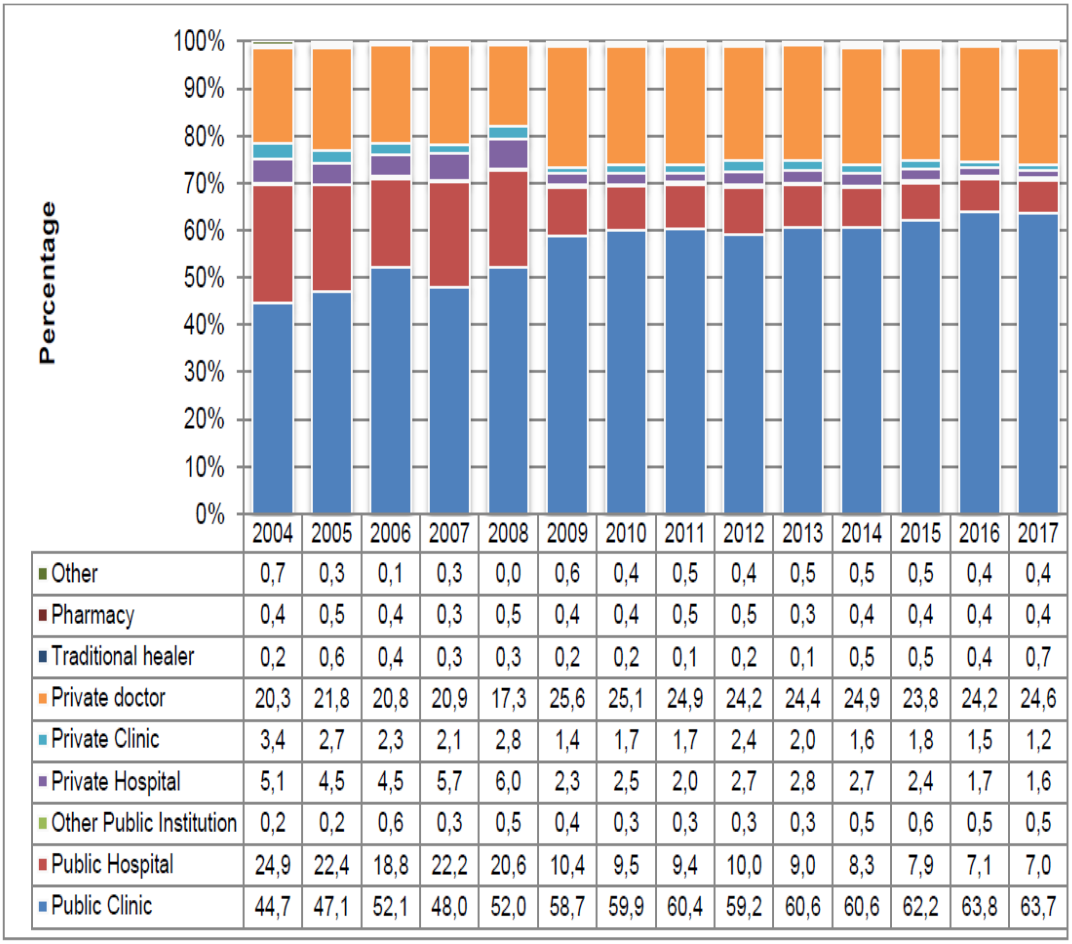
[303] n 296 above, 177.

[304] n 300 above, 989.

[305] n 301 above, 990.

[306] Figure 19: Statistics South Africa *General Household Survey 2017*: http://www.statssa.gov.za/publications/P0318/P03182017.pdf, accessed 19 February 2021 22.

**Figure 19: Percentage distribution of the type of health-care facility consulted first by the households when members fall ill or get injured, 2004–2017**




| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Other | 0,7 | 0,3 | 0,1 | 0,3 | 0,0 | 0,6 | 0,4 | 0,5 | 0,4 | 0,5 | 0,5 | 0,5 | 0,4 | 0,4 |
| Pharmacy | 0,4 | 0,5 | 0,4 | 0,3 | 0,5 | 0,4 | 0,4 | 0,5 | 0,5 | 0,3 | 0,4 | 0,4 | 0,4 | 0,4 |
| Traditional healer | 0,2 | 0,6 | 0,4 | 0,3 | 0,3 | 0,2 | 0,2 | 0,1 | 0,2 | 0,1 | 0,5 | 0,5 | 0,4 | 0,7 |
| Private doctor | 20,3 | 21,8 | 20,8 | 20,9 | 17,3 | 25,6 | 25,1 | 24,9 | 24,2 | 24,4 | 24,9 | 23,8 | 24,2 | 24,6 |
| Private Clinic | 3,4 | 2,7 | 2,3 | 2,1 | 2,8 | 1,4 | 1,7 | 1,7 | 2,4 | 2,0 | 1,6 | 1,8 | 1,5 | 1,2 |
| Private Hospital | 5,1 | 4,5 | 4,5 | 5,7 | 6,0 | 2,3 | 2,5 | 2,0 | 2,7 | 2,8 | 2,7 | 2,4 | 1,7 | 1,6 |
| Other Public Institution | 0,2 | 0,2 | 0,6 | 0,3 | 0,5 | 0,4 | 0,3 | 0,3 | 0,3 | 0,3 | 0,5 | 0,6 | 0,5 | 0,5 |
| Public Hospital | 24,9 | 22,4 | 18,8 | 22,2 | 20,6 | 10,4 | 9,5 | 9,4 | 10,0 | 9,0 | 8,3 | 7,9 | 7,1 | 7,0 |
| Public Clinic | 44,7 | 47,1 | 52,1 | 48,0 | 52,0 | 58,7 | 59,9 | 60,4 | 59,2 | 60,6 | 60,6 | 62,2 | 63,8 | 63,7 |

The legend for Figure 19 (emphasis added) reads as follows:

> *Figure 19 presents the type of health-care facility consulted first by households when household members fall ill or have accidents. The figure shows that 71,2% of households said that they would first go to public clinics, hospitals or other public institutions compared to 27,4% of households that said that they would first consult a private doctor, private clinic or hospital.* ***Only 0,7% of responding households said that they would first go to a traditional healer.*** *It is noticeable that the percentage of households that would go to public or private facilities have remained relatively constant since 2004 when the question was first asked in the GHS. The percentage of households that would first go to public clinics increased noticeably while those that indicated that they would first go to public hospitals decreased. The large change in the percentage of individuals who used private and public hospitals between 2008 and 2009 is due to a change in the questions that were asked during the two years.*[307]

[307] n 306 above, 22 - 23.

## 3.5 CAUTION IN USE OF STATISTICS

In the interests of caution, the statistics published by Statistics SA for the period 2004 to 2017 should then seemingly rather be used in any thesis about the prevalence of use of the services of traditional health practitioners, whatever the current ostensible minimal use of such services may be.

Notwithstanding the views of Oyebode *et al*, research by Schierenbeck *et al*, based on semi-structured interviews in the Eastern Cape concerning mental illness, found that persons sought the assistance of traditional healers before requesting assistance from conventional medicine practitioners or facilities.[308]

## 3.6 HEALTH PROFESSIONS COUNCIL AND ALLIED HEALTH PROFESSIONS COUNCIL STATISTICS

For the sake of inclusion, other diagnostic profession statistics are also given. As at 4 February 2021, the Health Professions Council of South Africa set the number of conventional medicine general practitioners at 27 873 out of a total number of persons registered in all professions under that council of 183 666.

The latter figure encompasses all specialities and other professions registered under this statutory health council. The total number of registrations over the past three years has declined and this may be ascribed to an attrition of approximately 19 500 persons in the register for the *Basic Ambulance Assistant* category of registration.[309]

By contrast, persons registered in complementary diagnostic health professions under the Allied Health Professions Council of South Africa in the diagnostic professions of Ayurveda, Chinese Medicine and Acupuncture, Chiropractic, Homeopathy, Naturopathy, Osteopathy, Phytotherapy and Unani-Tibb, number only 1 938 practitioners at the same date.[310]

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[308] n 301 above, 990; I Schierenbeck *et al* 'Collaboration or renunciation? The role of traditional medicine in mental health care in Rwanda and Eastern Cape Province, South Africa' (2018) 13(2) *Global Public Health* 166.

[309] E-Mail received from Ms Y Daffue, Health Professions Council of South Africa, IT Dept (Statistics and Data Analysis), 19 February 2021.

[310] Registers: Practitioners http://ahpcsa.co.za/practitioners/, accessed on 19 February 2021.

## 3.7 STATISTICS AND PREVALENCE OF CONSULTATION: *UMBELETHISI* OR THE TRADITIONAL BIRTH ATTENDANT

Mokgobi avers that traditional birth attendants are women of a certain age, who through the transfer of knowledge from generation to generation and experiential learning, are qualified to assist with the birthing of children.[311]

Peltzer sees this category of traditional health practitioner as declining, but also increasing:

> *Traditional birth attendance has also decreased for the women 20 years above from 1.4-2.2% in 1998 to 0.4-1.3% in 2003, but it increased for women below 20 years from 0.7% in 1998 to 1.4% in 2003. … Various local studies found higher rates of traditional birth attendants, in particular in rural areas, e.g. among 870 mothers in the rural Eastern Cape, 44.1% delivered the last child at home, 16.8% with the assistance of traditional birth attendant …, and among 181 postnatal care clients in the Eastern Cape 36% had consulted a traditional healer with their last pregnancy and 34% for postnatal care*.[312]

Mokgobi makes the general statement that this category of traditional health practitioner is in decline given the increased choice by parents to have children delivered in public healthcare facilities.[313]

## 3.8 CONCLUSION

Notwithstanding the ostensible decline in the practice of traditional medicine, it is actively extant in South Africa, in whatever statistical significance, and the general perception remains that Black South Africans consult persons practising traditional medicine as a primary approach to healthcare, rather than conventional or complementary health practitioners.

Notwithstanding the debate surrounding the number of persons practising traditional medicine, nor the quantifying of the statistics into the six categories envisaged by the regulator, if the research question finds that practitioners of traditional medicine require

[311] n 105 above, 27.

[312] n 296 above, 179.

[313] n 105 above, 28.

regulation, as opposed to self-regulation, then it will be incumbent on the regulators to achieve proper statistics to ensure concomitant proper registration.

# CHAPTER 4
# CLINICAL PRACTICES OR ACTS SPECIALLY PERTAINING TO THE PROFESSIONS OF TRADITIONAL MEDICINE

## 4.1 INTRODUCTION

Clinical practices, or acts, specially pertaining to the profession are those features of the system of traditional medicine which are employed in the actual interface between practitioner and patient for the purposes of diagnosis and treatment – this terminology, namely the specifying of an act in relation to traditional medicine, is considered central to any debate surrounding traditional medicine given that such is ostensibly inherent to the practice of traditional medicine, whether ritualised, or not.

An offering of information and research findings are thus presented at this juncture in this thesis and the conclusion as to whether any of these clinical practices or acts is in any way deleterious, or potentially deleterious to the health of the public, namely whether regulation should be maintained, or not, will be fundamental in reaching a conclusion to the research question. If the conclusion reached in consideration of the research question is that regulation is necessary to protect the health of the public, as opposed to self-regulation, then a cardinal feature of this original contribution in research will be the presentation of a legal scope of practice recommending either prescribing, or proscribing, as the case may be, the armamentaria, or range of clinical practices, medicines and equipment, used within this system of medicine, currently not a feature of extant regulation – any 'act' or action, deed, undertaking or performance in clinical practice[314] is required be explicitly specified, allowed or proscribed in law, as may be appropriate.

For the purposes of inclusivity of information, the definition of a *traditional health practice*, as provided for in the Act,[315] is cited immediately below, together with some discussion as to other salient aspects relating to such a healthcare establishment.

[314] Mhame (n 173 above) 13.

[315] Act 22 of 2007.

## 4.2 TRADITIONAL HEALTH PRACTICE

As indicated above, the definitions in the Traditional Health Practitioners Act were brought into operation by proclamation on 28 September 2018[316] and a *traditional health practice* is defined:

> ***"traditional health practice"*** *means 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 No. 53 of 1974), the Health Professions Act, 1974 (Act No. 56 of 1974), the Nursing Act, 1974 (Act No. 50 of 1974), the Allied Health Professions Act, 1982 (Act No. 63 of 1982), or the Dental Technicians Act, 1979 (Act No. 19 of 1979), and any other activity not based on traditional philosophy;*

Section 6(2)(f) of the Act[317] grants the Interim Council authority, in consultation with the Minister, to … *determine policy* [and] *make decisions relating to … scope of traditional health practice* and section 6(2)(h) of this legislation provides, equally in consultation with the Minister, to … *control and regulate traditional health practice.*

Sections 47(k) and (l) of the Act[318] empower the Minister, after consultation with the Interim Council, to make regulations relating to:

> *(k) standards of traditional health practice in order to ensure that practices are not detrimental to the health of patients or the general public;*
> *(l) scopes of practice of the various categories of traditional health practitioners;*

[316] n 254 above.

[317] Act 22 of 2007.

[318] Act 22 of 2007.

In contrast, the wording in the Allied Health Professions Act, empowers the Minister, on the recommendation of the that statutory health council, by regulation, to define …

> *the scope of any allied health profession by specifying the acts which shall for the purposes of the application of this Act be deemed to be acts pertaining to that profession …*[319]

Section 6(2)(b) of the Act,[320] however, obliges the Interim Council *to implement the health policies determined by the Minister concerning traditional health practice*, apparently then without consultation specifically in this circumstance, although consultation with the Interim Council is prescribed as set out above, namely in terms of sections 6(2)(f) and (h), and 47(k) and (l) of this legislation.

For the purposes of diagnosis, treatment and prevention of disease, traditional health practitioners carry out certain clinical practices or acts and a description of these for all categories of traditional healing, whether general or specific in application, follows.

## 4.3 CLINICAL PRACTICES OR ACTS WITHIN TRADITIONAL MEDICINE

### 4.3.1 DIVINATION

The act of divination or the power of clairvoyance is to determine the cause of illness relating to an individual or any other cause of malady, physical or otherwise. The three techniques of divination, that utilised by an *isangoma sekhanda*, a 'head' or 'ecstatic' diviner, or the *isangoma esichitha amathambo*, the 'bone thrower', or that used by a diviner possessed of great ancestors, the *amakhosi amakhulu*, have been discussed previously.[321]

Ozioma and Chinwe see divination as an integral part of the diagnosis of disease, using a transpersonal technique in which diviners gain knowledge of an individual's illness circumstance *by means of the use of randomly arranged symbols in order to*

[319] Section 16(2) Act 63 of 1982.

[320] Act 22 of 2007.

[321] n 67 above, 103.

*gain healing knowledge*.[322] The symbols or objects may be derived from one of many *animals, such as lions, hyenas, ant-eaters, baboons, crocodiles, wild pigs, goats or antelopes*, together with other objects which represent the forces controlling human beings.[323]

### 4.3.2 INTERVIEWS AND MEDICAL REPORTS

According to Ozioma and Chinwe, an oral interviewing process may also be employed, gleaning information for treatment not only from the patient, but also from other family members; natural is not separated from the spiritual, nor physical from the supernatural.[324] Clairvoyance, within the construct of traditional medicine custom, is also assumed to aid the traditional health practitioner in these processes.

### 4.3.3 SPIRITUAL PROTECTION ACTS

Ozioma and Chinwe posit that where spiritual protection against evil spirits is required, a talisman, charm, amulets, or even ritual markings may be used, as well as a ritual bath.[325] The views of Thornton regarding apotropaic magic, set out above, bear re-quoting:

> *This author avers that apotropaism is of greater significance in traditional medicine than in any therapeutic process, with the outcome of any visit to a traditional healer more likely to be an attempt to protect against harm than therapy,[326] stating further that the main goal of the izangoma would be to protect patients as 'exposed beings' and an extensive variety of items are used for this purpose; where these are of material substance, rather than of magical gestures, they are placed to redress vulnerability:*

[322] E-OJ Ozioma & OAN Chinwe 'Clinical practice of African traditional/herbal medicine' in PF Builders (ed) *Herbal medicine* (2019) *Intechopen,* DOI: 10.5772/intechopen.80348.

[323] Ozioma & Chinwe (n 322 above) n.p.

[324] Ozioma & Chinwe (n 322 above) n.p.

[325] Ozioma & Chinwe (n 322 above) n.p.

[326] Thornton (n 2 above) 217.

*These guarantee the wholeness, and therefore the health, of the patient. This is what I have called apotropaic magic, that is, the technology of a material logic protection that wards off untoward influence, or even reflects it back whence it came.*[327]


***SANGOMA***

**BARBARA TYRELL, UNDATED PRINT ON PAPER, 29,5 cm X 21,4 cm**

**REPRODUCED WITH PERMISSION OF THE OWNER**

[327] Thornton (n 2 above) 288.

### 4.3.4 SACRIFICES

Ozioma and Chinwe aver that animals may be slaughtered or buried alive to appease the ancestors. Sacrifices at midnight are considered particularly propitious to save the soul of the person at the point of death, the belief being that the spirit of the sacrificed animal is sufficiently strong to replace life. Ayebogin sees sacrifice as a universal phenomenon and sacrifices may be propitiatory, preventative, substitutionary, votive, for incorporation into any foundation construction, or for giving thanks.[328] The nature and extent of sacrifice within the construct of traditional medicine in South Africa remains somewhat abstruse. The distinction between sacrifice for purposes of religion and traditional medicine may be blurred, but where a cause of illness may be ascribed to disharmony among the ancestors, sacrifice as a ritual would fall within the construct of traditional medicine. The concept of sacrifice is discussed further later in this thesis.

### 4.3.5 ACTS OF SPIRITUAL CLEANSING

Spiritual cleansing may require the patient to bathe, either at specific times or for a specific number of days, either in water or in animal blood, according to Ozioma and Chinwe.[329]

### 4.3.6 ACTS TO APPEASE THE ANCESTORS

Causes of illness may also be attributed to disharmony with the ancestors, as indicated by Ngubane in cases of *abaphansi basifuthalele* or where 'the ancestors are facing away from us'.[330] The *isangoma* will seek to appease the ancestors by requesting the individual to provide certain items for sacrifice or libation, such as animals, alcohol, eggs or coloured cloth. At the direction of the *isangoma*, depending on the nature and severity of the case, these items may then be placed strategically to appease the ancestors, such as by throwing them into a river, leaving them to decompose, or

[328] D Ayebogin 'Sacrifice' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 583 - 584.

[329] E-OJ Ozioma & OAM Chinwe 'Clinical practice of African traditional/herbal medicine' in PF Builders (n 322 above) DOI: 10.5772/intechopen.80348.

[330] n 67 above, 51.

placing them at strategic places – for example, at crossroads outside of the community.[331]

### 4.3.7 ACTS OF EXORCISM

The *indiki* and *ufufunyane* forms of possession have previously been discussed as causes of illness[332] and symbolic treatment has also been discussed before.[333] Ngubane confirms that medicines to redress possession are administered in a ritual context and according to symbolic significance – medicines are principally herbal, known as *amakhubalo*, and mainly comprise dried bark and roots.[334]

Ozioma and Chinwe posit that the destruction of wax effigies may be used, but that any exorcism may also be accompanied by dancing and singing, usually to the beat of the drum or drums, and even by the flogging of the possessed person.[335]

### 4.3.8 ACTS OF LIBATION

Ozioma and Chinwe regard libation as the pouring of a liquid onto the earth or even onto certain objects while chanting or reciting some form of litany, involving firstly invocation, and then followed by supplication and, lastly, the giving of thanks.[336] As discussed above, Manda sees libation as:

> *… acts of pouring libation (of beer, milk or water), or giving portions of food to the living-dead, are symbols of communion, fellowship and remembrance.[337] They are the mystical ties that bind the living-dead to their surviving relatives.*[338]

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[331] E-OJ Ozioma & OAM Chinwe 'Clinical practice of African traditional/herbal medicine' in PF Builders (n 322 above) DOI: 10.5772/intechopen.80348.

[332] Ngubane (n 67 above) 142 - 145.

[333] n 67 above, 109.

[334] n 67 above, 109.

[335] E-OJ Ozioma & OAM Chinwe 'Clinical practice of African traditional/herbal medicine' in PF Builders (n 322 above) DOI: 10.5772/intechopen.80348.

[336] E-OJ Ozioma & OAM Chinwe 'Clinical practice of African traditional/herbal medicine' in PF Builders (n 322 above) DOI: 10.5772/intechopen.80348.

[337] Manda describes such acts as performing rituals or the performance of *amasikho*; n 29 above, 23.

[338] As cited by Manda (n 29 above) 22 - 23: JS Mbiti *African religions and philosophies* (1970) 25.

### 4.3.9 ACTS PERTAINING TO SOMATIC PERSPECTIVES

As discussed above, Ngubane indicates that in the treatment of somatic symptomatology, any herbal medicines containing healing properties or *amakhambi* are administered without ritual.[339]

Ozioma and Chinwe discuss not only herbal medicine, in concordance with Ngubane's view, but also indicate that clay and the application of herbs, together with counselling may be prescribed. The application of clay, according to these authors, may not only be applicable in skin conditions, but may also be used in preventative rituals to ward off malevolence, whereas counselling would be aimed at the patient to create a greater understanding of being in a state of harmony with the ancestors.[340]

### 4.3.10 *UKUGCABA*, INCISING THE SKIN, AND SCARIFICATION

Ngubane states that in cases of ecological causes of illness, it is believed that pollution can be caused by persons with evil intent. Pollution can be caused by using undesirable tracks or discarded material substances to contaminate *loci* which, when stepped over (*ukweqa*), can cause persons to contract a disease. Disease caused by stepping over dangerous tracks is known is known as *umeqo*.[341]

It is believed, according Ngubane, that the joints of the human body are the most defenceless parts through which evil may enter the body. To redress this illness, incisions are made into the skin over the joints to introduce *imithi* directly at the place of most risk to the person[342] – known as *ukugcaba*. This act within the traditional medicine construct leads to *imithi* being applied directly into small cuts made with a razor blade in the patient's skin – usually over the joints.

[339] Ngubane (n 67 above) 109.

[340] E-OJ Ozioma & OAM Chinwe 'Clinical practice of African traditional/herbal medicine' in PF Builders (n 322 above) DOI: 10.5772/intechopen.80348.

[341] n 67 above, 26.

[342] n 67 above, 25.

Scorgie *et al*, in a study relating to sexual health, confirm that *ukugcaba* – the incisions themselves being termed *izingcabo* – is an act within the traditional medicine paradigm carried out, according to them, by Zulu traditional health practitioners who make incisions on the head, abdomen, breasts and joints, but also in the genital area near the labia. Herbal substances are then introduced into the *izingcabo* to attract men and sustain their sexual satisfaction. According to these authors, this practice has been classified by some as 'injections' or 'immunisations/vaccinations', since the aim of the practice is to introduce *imithi* into the body. Furthermore, while 42% of the women in the study were aware of genital incisions, only 3% had submitted to this procedure. Scorgie *et al* conclude that while this particular practice in and around the genital area is not to be found in the traditional literature, they posit that since southern Africa is not an area in which genital mutilation is traditionally practised, this variant of *ukugcaba* has not been considered by researchers of genital mutilation.[343] The question of genital mutilation in traditional medicine is considered later in this thesis.

In an extraterritorial study in the Zambézia province of Mozambique, Audet *et al* conducted a separate general study among 236 traditional health practitioners. They reported that 75% of these practitioners conducted *ukugcaba* on at least four patients in the months preceding the study, that a new razor was used on an average of three occasions, but that practitioners *almost never used gloves* and most traditional health practitioners were exposed to patient blood repeatedly, and since there was a high prevalence of HIV, hepatitis B and C, together with other blood-borne agents, the practice of *ukugcaba* was an occupational hazard and the re-use of razors was a risk to the patient's health.[344]

Describing *ukugcaba* as an act where the practitioner *performs dozens of subcutaneous incisions using a razor blade to rub herbs directly to bloodied tissue*, Audet *et al* posited that traditional health practitioners are frequently exposed to various viral diseases, such as those caused by the same viruses as in the Mozambican study. They then conducted a qualitative study among 30 traditional

[343] F Scorgie *et al* '"Cutting for love": Genital incisions to enhance sexual desirability and commitment in KwaZulu-Natal, South Africa' (2010) 18(35) *Reproductive Health Matters* 64 - 65.

[344] CM Audet *et al* 'Occupational hazards of traditional healers: Repeated unprotected blood exposures risk infectious disease transmission' (2016) 21(11) *Tropical Medicine & International Health* 1476 - 1477.

healers in the Bushbuckridge sub-district in Mpumalanga to establish the use of personal protective equipment: the use of gloves worn during treatments where the practitioner is exposed to patient body fluids. It was established that while 90% of the traditional health practitioners reported the use of latex gloves, the use was irregular. Furthermore, where latex gloves were not available, items such as plastic shopping bags, bread bags, paper and even sticks were used to prevent exposure to patient body fluids, with the integrity of the item also being compromised. These authors estimate that traditional health practitioners *experience approximately 1 500 occupational blood exposures over the course of their lifetime*. The study group was reported to be infected with HIV at a *prevalence of 30% compared to 19% in the general population*; this meant a 2.4-fold higher set of odds of becoming HIV-positive than persons with no exposure.[345]

Audet *et al* conclude that while traditional health practitioners in the Mpumalanga study display an understanding of the danger of exposure to patient body fluids and have adopted various protective strategies, the use of personal protective equipment is inadequate from a health and safety perspective and is also inconsistent. These authors recommend training and messaging strategies, and increased availability of gloves – at low cost or free.[346]

As mentioned previously, Street *et al* conducted a study to determine the prevalence of the use of mercury among traditional health practitioners. Mercury is a naturally occurring metal which exists in elemental, inorganic and organic forms, and is a toxic and tenacious pollutant which is deleterious to human health. These authors report that the most common route of ingestion of this metal at the behest of traditional health practitioners is orally, but that the practice of administering mercury by *ukugcaba* was reported in 59% of the traditional health practitioner sample. They noted with concern that of the traditional health practitioners who administered mercury, 90% indicated that it was administered for childbirth, although not specifying the specific purpose during childbirth – such as the inducement of labour or pain relief. These authors

[345] CM Audet *et al* 'Traditional healers use of personal protective equipment: A qualitative study in rural South Africa' (2020) 20 *BMC Health Services Research* 655.

[346] n 345 above, 659.

indicate further that elemental mercury readily crosses the placental barrier and may also be present in breast milk, and is thus deleterious to the foetus and the suckling child. Another ostensible application of mercury administered by *ukugcaba* is for the protection of persons, employed within the local minibus taxi industry, for defence against harm caused by the use of weapons, according to these authors. They indicate that although the study involves a non-random sample, the prescription or administration of mercury by these traditional health practitioners implies an established cultural practice.[347]

### 4.3.11 TRANSMISSION OF SALIVA

Wojcicki *et al*, in a study on traditional medicine practices and exposure to body fluids in Zambia, found that the saliva of a traditional health practitioner could be used in any one of several ways, including:

- placing the mouth directly onto the patient's skin in cases of pain over the affected area, whether the skin is intact or broken, presumably as a soothing or healing practice;
- spitting onto the face of a child presenting with convulsions;
- masticating herbs which require pre-digestion before administering them to a child; and
- using saliva in a tattoo inking formulae and then placing the mixture onto the scarified skin.[348]

These same authors report that another common practice was for mothers or other caregivers to extract mucus from a child's blocked nose by sucking. Saliva was also used on nipples before breastfeeding; insect bites were often treated with saliva, presumably to relieve itching and to reduce inflammation; and for pre-mastication of infant foods prior to feeding infants.[349] The transmission of saliva in the practice of traditional medicine is further examined in stakeholder consultations.

[347] n 123 above, 71 - 72.

[348] JM Wojcicki *et al* 'Traditional practices and exposure to bodily fluids in Lusaka, Zambia' (2007) 12(1) *Tropical Medicine and International Health* 152.

[349] Wojcicki *et al* (n 348 above) 152.

### 4.3.12 TRANSMISSION OF SEMEN AND VAGINAL FLUIDS

The study by Wojcicki *et al*, as set out in the immediately preceding section, also addressed the question of the uses of semen and vaginal fluids as part of child-rearing in Zambia, albeit not from a traditional medicine practice perspective. These authors report that when couples resume sexual relations after the birth of a child, the father releases semen either onto the baby or onto the hands of the mother, who then smears it on the baby's body. This practice usually occurs when the child is approximately three or four months old and ostensibly strengthens the health of the child. A variant of this practice is that during sexual intercourse the mother holds the child, and the father will then withdraw and ejaculate onto the child. If the father fails to ejaculate, it is believed that the child will fall ill. In cases where the fontanelle remains open, mothers are advised to either rub vaginal fluids onto the fontanelle or rub the fontanelle with the father's penis.[350] This practice is further examined in stakeholder consultations.

### 4.3.13 BLOODLETTING, BLOOD-DRIPPING AND BLOOD-CUPPING

As indicated above, bloodletting is used to relieve pain; and blood-cupping (*ukulumeka*) can be used in cases of headaches. In cases of oedema in pregnant woman, 'blood-dripping' may be conducted in the last trimester of pregnancy.[351] These practices are also further examined in stakeholder consultations.

### 4.3.14 ULCER EXCISION

According to an *isangoma* who wishes to remain unnamed, ulcers, particularly those prevalent in diabetic neuropathy, require excision and treatment with *imithi*. This act, according to this *isangoma*, is both therapeutic and preventative given her view that

[350] n 348 above, 152.

[351] n 67 above, 109.

any admission to hospital for treating such ulcers would result in the death of the patient.[352]

### 4.3.15 INITIATION PRACTICES: MALES AND CIRCUMCISION

This thesis, as indicated previously, is primarily legal in commitment with regard to the practice of traditional medicine. It will not examine initiation practices or ceremonies as may be prevalent within various cultural or religious beliefs. Male initiation ceremonies, however, particularly the act of circumcision – an integral part of the traditional rite of passage from boyhood to manhood in certain cultural groupings – is carried out by traditional surgeons who are subject to the provisions of the Act.[353] This requires consideration against the most recent legislation relating to circumcision, namely the Customary Initiation Act[354] – unequivocally so, in the light of the number of deaths or disabilities that are reported annually because of this practice.

According to Rathebe, traditional male circumcision receives widespread publicity with a focus on the Eastern Cape given the rate of deaths among Xhosa initiates. This author states further that traditional initiation practices are also conducted in the Free State among the Basotho, in Limpopo, and in Mpumalanga. Rathebe does not speak to circumcision specifically in Limpopo and Mpumalanga, referring also to *grey literature available on the initiation processes of the Nedebeles, Pedis, Tsongas and Vendas*, without elaboration or any citation details.[355]

A circumcision pre-post intervention evaluation study in the Eastern Cape in 2007 was conducted by Peltzer *et al*, who reported that traditional surgeons and nurses registered with the health department were trained for five days on various aspects of male circumcision – such as safety procedures, control of infection, anatomy, post-

[352] Stakeholder consultation, 7 March 2021. Members of the public were able to consult *izangoma* who practised divination by means of 'bone-throwing' publicly at a monthly fair in Benoni, Gauteng, on the first Sunday of every month.

[353] Act 22 of 2007.

[354] Act 2 of 2021.

[355] PC Rathebe 'The role of environmental health in the Basotho male initiation schools: Neglected or restricted?' (2018) 18 (994) *BMC Public Health* n.p.

operative care, together with detection and early management of complications. These authors report that of the 192 initiates physically examined, 20.8% had mild delayed wound healing, 16.2% had a mild wound infection and 10.5% experienced mild pain, with 10.4% having had insufficient skin removed. On being questioned about the instrument used for the circumcision procedure, these initiates indicated that the circumcision had been carried out using either an *assegai* or spear (53%) or a surgical blade or knife (43%). These authors concluded that: [the] *Findings show weak support for scaling up traditional male circumcision*.[356]

In 2014, citing certain provincial houses of traditional leaders, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities publicised a table of statistics for the period 2008 to 2013. This indicated that in the Eastern Cape Province, 401 initiates died, and 332 236 initiates were admitted to hospital; in Limpopo Province, 18 initiates died, and 123 392 initiates were admitted to hospital; and in Mpumalanga Province, 66 initiates died, with no statistics available for initiates admitted to hospital.[357]

In a 2019 media report, Fihlani notes that the South African authorities had suspended several initiation schools due to initiate deaths and that 400 boys had died from botched circumcision in South Africa since 2012.[358]

Zuzile, in a 2021 media report, notes that 13 initiates had died during the December summer season, citing Faith Muthambi, Chairperson of the Co-Operative Governance and Traditional Affairs Portfolio Committee in Parliament, as stating that the Committee had heard that fatalities occurred because of dehydration and alleged fighting, despite the relevant department and the National House of Traditional

[356] K Peltzer *et al* 'Traditional circumcision during manhood initiation rituals in the Eastern Cape, South Africa: A pre-post intervention evaluation' (2008) 64(8) *BMC Public Health* n.p.

[357] Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 'Executive summary of the report on public hearings on initiation schools in South Africa' 2014 11.

[358] P Fihlani 'South Africa initiation school suspended after circumcision deaths' *BBC News* 20 December 2019: https://www.bbc.com/news/world-africa-50838014, accessed 15 May 2021.

Leaders undertaking to put safety measures in place. She also indicated that … *the Eastern Cape provincial government had a risk-adjusted plan to prevent fatalities*.[359]

In 2020, in a South African perspective on male initiation and circumcision, Jones set out statistics indicating that, as far as was known, for the period 2006 to 2018 there had been 714 deaths and that since 1994 there had been 1 767 deaths.[360] This author also cites the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 2014 report as having indicated that the deaths:

> *… are almost without exception due to the negligence of some traditional 'surgeons', some found operating under the influence of alcohol, while others have used unsterilised instruments, contributing to the spread of blood-related infections … as well as tetanus. In some cases, initiates have died from septic wounds, blood loss and/or other easily preventable results of unprofessional circumcisions.* [361]

Vivian speaks to psychiatric disorders in Xhosa-speaking men after circumcision, indicating that psychiatric outcomes were either schizophrenia or bipolar disorder, but also cultural-bound syndromes as transient psychoses.[362]

Jones also cites Lubabalo Ngcukana as reporting in 2018 that the Deputy Minister of Cooperative Governance and Traditional Affairs, Obed Bapela, had indicated that since 2006:

> *… at least 800 teens and men have had to undergo penile amputations after suffering complications related to traditional initiation. He also said penis transplants are expensive and unaffordable for government. We cannot run away from the issue of amputations. It is a very serious matter … Suicide among those who are amputated is also of concern because when they*

[359] M Zuzile 'Parliament concerned about deaths of initiates in Eastern Cape' *Timeslive* 31 March 2021: https://www.timeslive.co.za/politics/2021-03-31-parliament-concerned-about-deaths-of-initiates-in-eastern-cape/, accessed 16 May 2021.

[360] C Jones 'Male initiation and circumcision – A South African perspective' in J Grobbelaar & C Jones (eds) *Childhood vulnerabilities in South Africa: Some ethical perspectives* (2020) 144.

[361] As cited by Jones (n 360 above) 145: Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 'Executive summary of the report on public hearings on initiation schools in South Africa' 2014 7.

[362] LMH Vivian 'Psychiatric disorder in Xhosa-speaking men following circumcision' published DPhil thesis, University of Cape Town, 2008.

*have lost their manhood and they are in University, because of many challenges and pressures, they commit suicide.*[363]

As indicated previously, the Customary Initiation Bill 2018 received presidential assent in 2021 – this legislation now being termed the Customary Initiation Act.[364] This Act seeks to provide for the effective regulation of customary initiation practices for both males and females. Its main objectives are to protect, promote and regulate initiation; to provide acceptable norms and standards with a view to ensuring that initiation takes place in a controlled and safe environment; and to provide for the protection of life, the prevention of injuries and the prevention of all forms of abuse that initiates may be subjected to as a result of initiation practices. The salient provisions of this Act are discussed subsequently in this thesis, also considering relevant legislation such as the Children's Act, amendments to which have been tabled in Parliament,[365] together with any relevant international and regional treaty provisions.

### 4.3.16 INITIATION PRACTICES: FEMALES

Initiation practices or ceremonies for females are said to exist in the Bapedi (North Sotho), Basotho (South Sotho), Tswana and Venda ethnic groups.[366] As in the case of circumcision, these practices are addressed subsequently in this thesis, if, after stakeholder consultation, they are found to be acts specially related to the practice of traditional medicine.

### 4.3.17 FEMALES: FEMALE GENITAL MUTILATION

Langa-Mlambo and Soma-Pillay indicate that female genital mutilation may encompass partial or complete removal of the external genitalia or other injury to the female genital organs. Such practices include:

[363] n 360 above, 144: Citation disclaimer: n.p.

[364] Act 2 of 2021.

[365] n 262 above.

[366] Personal discussion with the Registrar of the Interim Traditional Health Practitioners Council, 7 November 2017.

- partial or total removal of the clitoris or the prepuce, or both, which is known as a clitoridectomy;
- partial or total removal of the clitoris and labia minora, with or without excision of the labia majora, which is known as excision;
- narrowing of the vaginal orifice with creation of a covering seal by cutting and juxtaposing the labia minora or the labia majora, or both, with or without the excision of the clitoris, which is known as infibulation; and
- any other harmful procedure to the female genitalia for non-medical purposes, such as pricking, piercing, incising the clitoris or labia, stretching the clitoris or labia, any cauterisation to the clitoris or surrounding tissue, any scraping of tissue surrounding the vaginal orifice ('angurya cutting'), any cutting of the vagina ('gishiri cuts'), and any introduction of corrosive substances or herbs into the vagina to cause bleeding or to induce tightening and narrowing of the vagina.[367]

The Customary Initiation Act defines female circumcision as being: … *in relation to a female child, means the removal of the clitoris by any means …*[368]

Without detailed explanation, Kitui reports that female genital mutilation occurs in Venda. According to this author, eight or so weeks after giving birth, newly delivered mothers undergo a traditional ceremony of the cutting of vaginal flesh, which is carried out by a traditional healer. The vaginal flesh so excised is mixed with a black powder and oil and is applied to the head of the newborn child to prevent *goni*, which is described as a swelling on the back of the head. This author reports further that female genital mutilation is also carried out in Venda as an initiation rite, with the initiates being branded with a mark on their thighs as evidence of having undergone initiation; migrants from other African countries are also said to carry out this practice, according to Kitui.[369]

[367] L Langa-Mlambo & P Soma-Pillay 'Violence against women in South Africa' (2014) 24 *Obstetrics and Gynaecology Forum* 17 - 18.

[368] Section 1, Act 2 of 2021.

[369] B Kitui 'Female genital mutilation in South Africa' AfricLaw 7 June 2012 n.p.

In a 2019 report, Nyembezi indicates that the Basotho baTlokwa practise female genital mutilation as a traditional rite of passage, with the baTlokwa chief, Montoeli Lehane, reasoning that since female ancestors underwent the practice, it defines culture and identity.[370]

As set out previously, Scorgie *et al*, confirm that *ukugcaba* – the act of incision – an act within the traditional medicine paradigm, is conducted by Zulu traditional health practitioners who make incisions on the head, abdomen, breasts and joints, but also in the genital area near the labia. Herbal substances are then introduced into the *izingcabo* to attract men and sustain their sexual satisfaction. Scorgie *et al* posit that since southern Africa is not an area in which genital mutilation is traditionally practised, this variant of *ukugcaba* has not been considered by researchers in the field of genital mutilation.[371]

Also as set out previously, Ngubane addressed the treatment of oedema in pregnant woman. This is a technique of 'blood-dripping' which may be conducted in the last trimester of pregnancy and involves a specialist introducing the index finger, wrapped in *insekane* grass, into the vagina to cause bleeding.[372]

As with circumcision, female genital mutilation, including the examples mentioned in the immediately preceding paragraphs, are further considered later in this thesis in the context of relevant legislation such as the Customary Initiation Act,[373] together with any relevant international and regional treaty provisions.

### 4.3.18 PARTURITION

As indicated previously, Mokgobi believes that traditional birth attendants are usually older woman who through experiential training, namely by witnessing and assisting in many births throughout their adult lives, have attained equivalency to the profession of midwifery, but sees this category of traditional health practitioner as being in decline

[370] N Nyembezi 'Basotho baTlokwa defends customary female circumcision' *@SABCNews* 3 February 2019 n.p.

[371] n 343 above, 64 - 65.

[372] n 67 above, 109.

[373] Act 2 of 2021.

given the increased choice by parents to have children delivered in public healthcare facilities.[374]

Peltzer cites both a decrease in the use of such services, and an increase in a particular grouping, as set out previously, particularly among younger women.[375]

Truter indicates that although the attention of these attendants is focused on problems in pregnancy and delivery, they are also responsible for:

> … teaching of behavioural avoidance amongst pregnant women, ritual bathing of the mother, a ritual disposing of the placentas, provision of healing medicine and traditional massage after delivery. They also give advice on postpartum and cord care and provide important support for breastfeeding as well as advice on marriage contraception and fertility. The inyanga or diviner acts as a consultant in case a difficult labour or complication occurs.[376]

This practice is also further examined in stakeholder consultations but should also be examined with reference to any South African Nursing Council midwifery legislation.

### 4.3.19 HYDROTHERAPY

Hydrotherapy[377] or the use of water in healing has been introduced nominally previously. In *thwasa*, as a cause of illness, Thornton refers to unnamed *izangoma* who describe this period of illness as being in or under water, and the emergence is as from deep water.[378] Nehusi indicates that water is recognised as the ultimate instrument of purification, both physically and spiritually, and rivers serve cosmic, social, economic, and other functions, with water divinities being integral to the respective spiritual systems. The boundaries between traditional medicine and religion may see connection, and acts specially relating to the profession of traditional medicine may include the use of water in acts of libation, ritual bathing, initiation

[374] n 105 above, 28.

[375] n 296 above, 179.

[376] n 106 above, 58.

[377] DO Ogungbile 'Medicine' Asante & Mazama (n 20 above) 415.

[378] n 2 above, 74 & 76.

ceremonies, and also the simple act of the taking of water in drinking as part of any healing process.[379]

### 4.3.20 MUTILATION OF THE BODY: AMPUTATION

De Beer[380] reviews medicinal and magical plants in southern Bushmanland in the Northern Cape from an ethnobotanical and anthropological perspective and cites Schapera as having indicated that cultural cross-pollination resulted in indigenous knowledge transformation, namely from the Xhosa to southern Bushmanland: bodily mutilation, namely the amputation of a finger joint may take place during childhood so that a child can reach adulthood.[381] Favazza states that this same practice still occurs among certain groupings within the Xhosa people where the joint of the little finger is amputated to help a sick child *to grow up strong and brave*.[382]

## 4.4 CONCLUSION

### 4.4.1 TRADITIONAL HEALTH PRACTICE

The intention of the legislature in removing the consultation requirement[383] with the Interim Council, especially given that the Minister of Health is almost always a medical practitioner (albeit someone who acts under advisement and in terms of collective cabinet decisions) requires further consideration against the possibility of divergence of opinion between the Minister and the Interim Council.

### 4.4.2 CLINICAL PRACTICES OR ACTS WITHIN TRADITIONAL MEDICINE

Taking into account the information and research findings presented in this chapter, certain clinical practices or acts within the practice of traditional medicine are

[379] KSK Nehusi 'Water' in MK Asante & A Mazama (eds) *Encyclopaedia of African religion* (2009) 709.

[380] JJJ de Beer 'An ethnobotanical and anthropological study of the medicinal and magic plants of southern Bushmanland, Northern Cape, South Africa' published PhD thesis, University of Johannesburg, 2020 65.

[381] As cited by De Beer (n 380 above) 65*:* I Schapera *The Khoisan peoples of South Africa: Bushmen and Hottentots* (1930) 69.

[382] As cited by De Beer (n 380 above) 65: MD Favazza *Bodies under siege: Self-mutilation and body modification culture and psychiatry* (1987) 1333.

[383] Section 6(2)(b), Act 22 of 2007.

considered cause for extreme concern and are considered deleterious to the health of the public, unequivocally so, leading to the view by the author of this thesis that regulation ought to be applied more strenuously, rather than otherwise.

Notwithstanding this view, issues surrounding acts such as the transmission of human semen, saliva or vaginal fluid; bloodletting, blood-cupping; *ukugcaba* or incising the skin to introduce *imithi* and ulcer incisions will be considered yet again in the context of the research question, namely whether regulation of traditional medicine should be maintained, or not, after consultation with stakeholders, the results of which are encompassed in a subsequent section of this thesis.

Issues surrounding initiation practices such as: circumcision, female genital mutilation and virginity testing are now subject to the provisions of the Customary Initiation Act,[384] which will be discussed more pertinently in a subsequent section of this thesis, and regulation is to be welcomed. The hope is expressed that the responsible authorities will now ensure proper safeguarding of persons undergoing any initiation practices – the statistics and debate surrounding the number of deaths, penile amputations and disfigurement resulting from male circumcision, in particular, as set out above, require no further elucidation as the nature of the ineffable deleterious effect on the health of initiates.

[384] Act 2 of 2021.

# CHAPTER 5
# ANIMALS: RITUAL AND SACRIFICIAL SLAUGHTERING, ABUSE OR CRUELTY

## 5.1 INTRODUCTION

The concept of the ritual or sacrificial slaughtering of animals was previously introduced nominally in this thesis. As indicated then, the nature and extent of sacrifice within the construct of traditional medicine in South Africa remains somewhat abstruse; the distinction between sacrifice for purposes of religion and traditional medicine may be blurred, but where a cause of illness may be ascribed to the disharmony among the ancestors, sacrifice as a ritual would fall within the construct of traditional medicine.

## 5.2 SACRIFICE IN ANCESTOR APPEASEMENT OR FAMILY QUARRELS

As indicated previously, Ozioma and Chinwe posit that animals may be slaughtered or buried alive in an act of ancestor appeasement, with such being propitiatory, preventative, substitutionary, and votive, for incorporation into any foundation construction or for giving thanks, and seeing this as an act specially related to the profession.[385] Ngubane refers to the sharing of a slaughtered goat as part of the ceremony of the 'washing of each other's hands' (*ukuthelelana amanzi*) to redress quarrelling among family members.[386]

## 5.3 SACRIFICE WITHIN *UKUTHWASA*

Sacrifice is a significant conclusion to *ukuthwasa*, the process undertaken by a neophyte to become an *isangoma* and Bührmann confirms this as being integral to the 'neckband' and 'taking home' ceremonies.[387] Krige, withal, mentions that in the process of slaughtering the goat the *ithwasa* will have been given oral medicine, not pertinently specified, which he or she has to place on the wound inflicted on the goat by using his or her mouth to draw blood from the wound. Some of this is then imbibed

[385] E-OJ Ozioma & OAM Chinwe 'Clinical practice of African traditional/herbal medicine' in PF Builders (n 322 above) DOI: 10.5772/intechopen.80348.

[386] n 67 above, 36.

[387] n 143 above, 74.

and some is returned to the wound. After the death of this animal, the skin will be cut into strips which are then worn over the shoulders and crosswise around the body and:

> *The gall of the goat, together with the contents of the bladder, is administered to the patient, who is also smeared with this mixture on the head, shoulders, arms, back and legs. Next, he is steamed together with the bladder. The function of this Nqwambisa ceremony would seem to be to establish definite contact, through the intermediary of the sacrificial victim, between the afflicted person and the spirits, to facilitate, as it were, possession of the patient by the spirit.*[388]

These authors do not, however, describe the exact manner of the slaughter or sacrifice, but Thornton, in confirming that sacrifice is part of *ukuthwasa* – the requisite act of sacrifice is the sacrificing of a white female goat for a male *ithwasa* and that of a white male goat for a female *ithwasa* – provides some vivid detail as to the act of sacrifice itself:

- the goat is hoisted above the head of the *ithwasa*;
- the throat of the animal is cut by the neophyte and the carotid arteries and jugular veins are severed; and
- the neophyte then embraces the animal, positioning his or her face into its severed neck and with mouth open, imbibes the blood, seeking to immerse himself or herself into the flow, thus absorbing the life force of the animal and becoming delirious in the process.[389]

Thornton also records, in the instance of the ceremony for one DabulaManzi, a male *ithwasa*, that a female goat could ostensibly not be found for this specific ceremony. For this reason a white hen was then slaughtered and the neophyte was made to imbibe the blood of the hen, as well, the sex of the hen, a female animal, then being seen as dominant above that of the male goat in this instance, given that the purpose in such ceremonies is to achieve a balance of male and female essence or essential substance using blood as a vehicle in the ceremony.[390] It is unclear if a fowl is used only if a correctly sexed goat cannot be found – or whether this must always occur.

[388] n 96 above, 306.

[389] n 2 above, 86 - 87.

[390] n 2 above, 87.

Thornton also describes how the *ithwasa* must imbibe water – hence this author's description of the graduation ceremony as the 'cleaving of water' or *eating intwaso* – infused with powdered herbs, which is an emetic:

> *This is the intwaso, a special liquid that will both test and heal him. It will make him strong if he is virtuous and the ancestors truly intend him to heal others or kill him if they do not.*[391]

*Ukuthwasa* is complete once all the blood imbibed is ejected and the vomitus is clear. Thornton then confirms Krige's discussion regarding the gallbladder. Other subsequent ceremonial aspects relating to the ceremony, not expounded here only to avoid prolixity, are also then discussed and recommended for further perusal by interested parties.[392]

## 5.4 SACRIFICE IN FESTIVAL CELEBRATIONS

The debate surrounding the ritual slaughtering of a bull according to a revival of a Zulu festival in celebration of the universe's rites of passage, known as *umkhosi ukweshwama*, in the *Smit* case,[393] was whether the slaughter occurred in a religious or cultural context. It is none the less submitted that it is also of relevance in the traditional health paradigm, if only for the caveat by Rautenbach:[394]

> *We must also be mindful that a blanket exception in the case of religious rituals does not deteriorate into cultural or religious relativism, with the result that ritual slaughtering is justified merely because it is rooted in cultural or religious belief. The remarks of Van der Reyden J in the Smit case dangerously point in this direction. Although one has to agree with the conclusion that the application had no factual basis, the court's statement that the Trust had no right to interfere with the religious and cultural practices of others because they found them intolerable was unfounded. The Animals Protection Act 71 of 1962, for one, is aimed at the protection of the 'finer feelings and sensibilities of their fellow human beings'*[395] *which will be harmed by animal cruelty*

[391] n 2 above, 88.

[392] n 2 above, 89.

[393] *Stephanus Smit v King Goodwill Zwelithini Kabhekuzulu* [2009] ZAKZPHC 75.

[394] C Rautenbach 'Umkhosi Ukweshwama: Revival of a Zulu festival' in TW Bennett (ed) *Traditional African religions in South African Law* (2011) 87 - 88.

[395] As cited: Footnote 146: *R v* Moato 1947 (1) SA 490 (O) 490 and approved in *S v Edmunds* 1968 (2) PH H398 (N).

> *and, surely, this gives one the right to approach a court if one's feelings and sensibilities are affronted by a ritual slaughtering. This is evident from a more recent decision, National Council of Societies for the Prevention of Cruelty to Animals v Openshaw,*[396] *where Cameron J expressed the view, albeit in a minority judgement, that the National Council had a 'real and continuing' interest in the law preventing cruelty to animals and thus had the right to apply for an interdict to prevent the feeding of live prey to tigers. Most notably, he went further than the previous few – that the aim of the Animals Protection Act 71 of 1962 was to prevent the finer feelings and sensibilities of fellow humans witnessing the abuse of animal – by declaring that, although the act does not confer rights on the animals it protects, it recognises that 'animals are sentient beings that are capable of suffering and experiencing pain'.*[397] [398]

Rautenbach concludes:

> *There is no good reason why this festival should not coexist with many other festivals that celebrate people's religious beliefs. Nevertheless, if there are rituals performed at this festival that do not pass the test of constitutionality they should not prevail merely because they are part of a religion. Neither should the followers of a religious belief regard themselves as outside the law merely because they have a constitutional right to practice their religion together with other members of their religious community*.[399]

Krige does, nevertheless, indicate that *izangoma* frequently offer sacrifices in order to propitiate the spirits and facilitate clear revelations.[400]

## 5.5 ABUSE OF ANIMALS

In a 2018 electronic media report, Alfreds described the conviction of a traditional healer, one Pauline Tukula, for animal abuse, the court having rejected her justification that she was a traditional healer and that the animals were used in traditional rituals;

[396] As cited: Footnote 147: 2008 (5) SA 339 (SCA) at para 36.

[397] As cited: Footnote 148: See para 38.

[398] Proposed United Kingdom legislation: The Animal Welfare (Sentience) Bill: https://bills.parliament.uk/publications/41515/documents/260, accessed 9 August 2021.

[399] n 394 above, 89.

[400] n 96 above, 308.

a vervet monkey and eight tortoises were removed to the Bloemfontein premises of the Society for the Prevention of Cruelty towards Animals.[401]

## 5.6 CONCLUSION

The rights of animals in South African law will see further examination subsequently in this thesis, not only from a perspective of animal sentience, but also from a perspective of use of wild animals or animal parts as *imithi*, known as *izinyamazane*, available from special *imithi* markets.

[401] D Alfreds 'The National Prosecuting Authority (NPA) welcomed the conviction of a sangoma accused of animal abuse' *News24* 28 May 2018: https://www.ofm.co.za/article/national/262610/npa-welcomes-sangoma-animal-abuse-conviction-in-bfn-issues-warning, accessed 15 May 2021.

# CHAPTER 6
# TRAFFICKING OF HUMAN BEINGS, BODY PARTS AND TRADITIONAL MEDICINE

## 6.1 INTRODUCTION

The Prevention and Combating of Trafficking in Persons Act,[402] was promulgated in 2013 and requires consideration in the context of traditional medicine. Regulations under section 43(3) of the Trafficking Act were promulgated in 2015.[403]

## 6.2 DEFINITION OF A *BODY PART*

The Trafficking Act provides for the definition of *body part* as meaning *any blood product, embryo, gamete, gonad, oocyte, organ or tissue as defined in the National Health Act*,[404] and 'exploitation' is defined to include *the removal of body parts*, with the latter defined as *the removal of or trade in any body part in contravention of any law*.

## 6.3 USE OF *BODY PARTS* IN TRADITIONAL MEDICINE

In 2012, in the year preceding the passing of the relevant legislation, Swart offers the view that:

- the belief that *umuthi* derived from human tissue or body parts is extremely efficacious for use as a medicine may be exploited by traffickers, but that data is limited for such forms of exploitation;
- parents also traffic their own children;
- the murder of persons for *umuthi* is prevalent in South Africa and in Mozambique and trafficking of body parts between these two countries occurs frequently; and

[402] Act 7 of 2013.

[403] Government Notice No R 1006 of 23 October 2015, promulgated in Government Gazette No 39318 on 23 October 2015.

[404] Act 61 of 2003.

- it was unclear whether people were trafficked and then killed to harvest body parts.[405]

Only in three cases unrelated to trafficking and addressed previously in this thesis in the section concerning the treatment of disease using body parts, and in a previously published thesis by the author of this thesis, [406] were the accused convicted of violating a corpse. In the other cases discussed previously, the accused were convicted of murder,[407] confirming the view by Carstens that no proper legal distinction is made, and perpetrators are charged with the crime of murder.[408] Behrens however indicates that: *Most traditional healers do not condone the use of human muti*.[409]

## 6.4 CONCLUSION

There is minimal evidence or data reportage at which stage body parts are removed for ostensible use in traditional medicine, whether from the living or from the dead – the paucity of published data also militates against substantive research into the issue of trafficking of persons for the use of body parts in traditional medicine. Notwithstanding that it is unlikely that any stakeholder will provide any further information on this issue, the results of consultation with stakeholders are encompassed in a subsequent section of this thesis.

[405] DN Swart 'Human trafficking and the exploitation of women and children in a southern and South African context' (2012) 13(1) *Child Abuse Research in South Africa* 62 - 73.

[406] Mullinder (n 3 above) 45.

[407] Mullinder (n 3 above) 26.

[408] n 191 above, 13.

[409] n 192 above, 9.

# CHAPTER 7
# TRADITIONAL MEDICINE: THE PHARMACOPOEIA OR MATERIA MEDICA

## 7.1 INTRODUCTION

The traditional medicine armamentarium, in particular the use of *imithi*, as opposed to equipment and techniques comprising a traditional medicine pharmacopoeia or materia medica – whether of plant, animal or mineral origin – and introduced previously in this thesis under the topic of the sources of healing power and the treatment of disease, together with the clinical practices, or acts specially pertaining to the profession of traditional medicine, is a significant and central element which must be considered in the research question. If the research question conclusion is that traditional medicine should remain regulated, then a cardinal feature of this original contribution in research will be the presentation of a legal scope of practice recommending either prescribing, or proscribing, as the case may be, the *imithi* used within this system of medicine, currently not a feature of extant regulation. Exact categorisation or classification of *imithi* is, however, multifaceted and multidimensional and this chapter offers views and information in this regard.

## 7.2 MULTIFACETED AND MULTIDIMENSIONAL USES OF *IMITHI*

### 7.2.1 RITUAL, APOTROPAIC, OR DOCTRINE OF SIGNATURE USAGE

*Imithi* may be used in a ritual sense, in an apotropaic magic sense of prescription or administration, or in line with the principles of the doctrine of signatures – otherwise described by De Beer as suggesting that a plant's form recapitulates its function[410] – or in line with conventional medicine pharmacological principles, or in some other usage form. An exposition of *imithi* used from a ritual sense as set out by De Beer resonates with the author of this thesis by way of exception since it focuses on a marginalised grouping in South Africa – the San and Khoi peoples – as opposed to other South African groups which are generally better known. This author indicates:

[410] n 380 above, 21 - 22.

*A specific focus of this study was to shed light on 'magic' plant use. … magic, ritual and charm plant use traditionally formed part of the holistic nature of the San healing processes ... A total of 21 plants were identified for magical, spiritual or charm uses: Acorus calamus, Agathosma betulina, Gonialoe variegata, Asclepias crispa, Asparagus spp., Boophone disticha, Cadaba aphylla, Cissampelos capensis, Datura stramonium,*[411] *Dianthus micropetalus, Diospyros lycioides, Galenia africana, Galium tomentosum, Garuleum bipinnatum, Helichrysum odoratissimum, Kedrostis africana, Olea europaea, Ptaeroxylon obliquum, Rhigozum obovatum, Ricinus communis, and Tulbaghia violacea. Comparisons were made with magic plant use by other cultural groups, such as Zulu, Vhavenda, and Sotho … Magic plant use is characteristic of most indigenous knowledge systems.*[412]

### 7.2.2 USAGE ACCORDING TO PLANT CHARACTERISTICS

In 1989, Hutchings categorised the characteristics of plants as a possible determinant of usage:

- suggestive forms – the form of the plant, for example suggestive of procreation, is then used in procreation-related conditions;
- colour – while not documented in any detail by this author, *imithi* have been characterised as red, white or black medicines by Ngubane, as set out previously;[413]
- plants that froth in water – saponins in plants froth when prepared in water and are widely used in the preparation of emetics, also characterised as such by Ngubane, as set out previously;[414]
- mucilage – exudates are used in wound healing, for healing rashes, and in purgatives;
- milky latex – used as a galactagogue;

[411] n 9, 16, 17 ,18 & 19, above.

[412] n 380 above, 13.

[413] n 67 above, 109.

[414] n 67 above, 120: *The goodness contained in the black medicines is symbolised by the white froth that comes up when it is beaten. The white froth is not used, however, but it is brought out as an indication of the equivocal nature of blackness. By contrast, with white medicine the froth is smeared on the face and the arms to emphasise the goodness of these medicines. That the treatment represents a transformation that is a process – progressing from the darkness of night to the goodness of daylight – is indicated by the fact that after treatment with black medicines in the wilderness people do not look back. They leave behind what is bad and proceed to the future that is good.*

- caustic nature – used as poultices in venereal diseases or for insertion into the womb in cases of uterine inflammation;
- scented plants – for cosmetic or purification purposes; and
- taste – for use as tonics or to discourage suckling.[415]

### 7.2.3 USAGE OF *IMITHI* ACCORDING TO MODERN PHARMACOLOGY

Hutchings, in a 1996 publication appraising the medicinal use of plants among the Zulu, indicates that there are many indications of support for traditional treatments or therapeutic usage in terms of modern pharmacological principles. This author proposes further research to validate traditional claims, believing that this may lead to belated recognition for traditional healing as a recognised and viable construct for healthcare within the South African medico-legal paradigm. Hutchings also indicates that this publication covers the usage of some 1 032 species from 537 genera and 147 families,[416] thereby expanding the 1962 oeuvre by Watt and Breyer-Brandwijk[417] by one-third. Dold and Cocks, as cited by Sobiecki, believe there is current research in pharmacology to seek new conventional medicine pharmaceuticals, but that there is little focus on the ritual use of *imithi* in traditional medicine.[418]

The Cape Kingdom Nutraceutical commercial enterprise, to cite an example, produces products from *Agathosma betulina* and *Agathosma crenulata*, known colloquially as buchu, and entered into a benefit-sharing agreement with the South African San Council and the National Khoisan Council in 2013. Published peer-reviewed research in 2021 led researchers to understand the potential of the healing properties of buchu, particularly in reversing the effects of metabolic syndrome, such as obesity, diabetes, hypercholesterolaemia and hypertension.[419] Montgomery indicates that there is a

[415] A Hutchings 'Observations on plant usage in Xhosa and Zulu medicine' (1989) 19(2) *Bothalia* 228 - 230.

[416] A Hutchings *et al* 'Zulu medicinal plants: An inventory' (1996) xi.

[417] As cited by Hutchings (n 416 above) xi: JM Watt & MG Breyer-Brandwijk *The medicinal and poisonous plants of southern and eastern Africa* (1962).

[418] As cited by JF Sobiecki 'The intersection of culture and science in South African traditional medicine' (2014) 14(1) *Indo-Pacific Journal of Phenomenology* 4: T Dold & M Cocks 'Imithi Yamasiko – culturally useful plants in the Peddie District of the Eastern Cape with specific reference to *olea europaea* subsp. *africana*' (1999) 21 *Plant Life* 24 - 26.

[419] 'Study proves Buchu is a healing herb' *Mail and Guardian* 28 May - 3 June 2021 8.

symbolic efficacy of medicine over and above pharmacological use and that significant communication problems have been generated between *botanists, social scientists, herbalists, religious authorities, medical patients and cultural contexts more generally*.[420]

### 7.2.4 THE TRADITIONAL MEDICINE CONTEXT

In addition, as presented previously:

- Ngubane posits that an initiate will receive instruction from a practising diviner, but certain *imithi or medicines will be* [also] *revealed to her by her own ancestors,* adding a lineage nuance to that neophyte's pharmacopoeia after transition to a practising diviner.[421]
- Thornton states that each person practises *in a way almost unique to that person and each context, each teacher, each ecology and pharmacopoeia of organic and mineral substances is local*.[422]

### 7.2.5 PSYCHOACTIVE USAGE IN DIVINATION AND HEALING RITUALS

Sobiecki speaks to the value of experiential accounts of *imithi* with psychoactive properties, calling for experiential insights from psychoactive use and the recording of related enhanced states of awareness as being beneficial to the understanding of healing consciousness, not only in the field of ethnography but by extension to psychology, ethnobotany and pharmacology.[423]

In an earlier publication, this author provides two appendices to the journal article, the first listing plants used in divination in southern Africa and the second listing plants

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[420] As cited by EJ Montgomery 'The materia medica of Vodu practitioners in southern Togo' (2015) 1(2) *The Applied Anthropologist* 5: AA Aiyeloja & OA Bello 'Ethnobotanical potentials of common herbs in Nigeria: A case study of Enugu State' (2006) 1(1) *Educational Research and Review* 16 – 22; and World Health Organisation: Traditional Medicine Strategy 2002 - 2005 (2002) Geneva.

[421] n 67 above, 102.

[422] n 2 above, 17.

[423] JF Sobiecki 'Psychoactive *ubulawu* spiritual medicines and healing dynamics in the initiation process of the southern Bantu diviners' (2012) 44(3) *Journal of Psychoactive Drugs* 222.

used in indigenous healing rituals in southern Africa with mention of their psychoactive effects.[424]

### 7.2.6 FURTHER RESEARCH

Considerable literature, whether from a botanical perspective or botanical medicine perspective, is available for researchers, but only a small selection[425] is footnoted below, arbitrarily so, and then for further perusal by interested parties, including also academic research.[426] Such has been minimally considered by the author of this thesis.

Interesting variations, tangential to this thesis and not in the field of law, would be any future study on the posology of *imithi* – in particular the administration or prescription of minute doses of toxins by traditional healers.[427] The doctrine of signatures, together

[424] JF Sobiecki 'A review of plants used in divination in southern Africa and their psychoactive effects' (2008) 20 *Southern African Humanities* 9, 16.

[425] TH Arnold *et al Medicinal and magical plants of southern Africa: An annotated checklist* (2002); JA Broster *Amagquira: Religion, magic and medicine in Transkei* (1981); AT Bryant *Zulu medicine and medicine-men* (1966); T Dold & M Cocks *Voices from the forest: Celebrating nature and culture in Xhosaland* (2012); CAM Louw *et al* 'Medicinal bulbous plants of South Africa and their traditional relevance in the control of infectious diseases' (2002) 84 *Journal of Ethnopharmacology* 147 -154; B-E van Wyk & N Gericke *People's plants: A guide to useful plants of southern Africa* (2018); S Vasuthevan & S Mthembu (eds) *De Haan's health of southern Africa* (2016).

[426] LE Philander 'An emergent ethnomedicine: Rastafari bush doctors in the Western Cape, South Africa' published dissertation, University of Arizona, 2013; KM Mathibela 'An investigation into aspects of medicinal plants used by traditional healers from Blouberg Mountain, Limpopo Province, South Africa' published MSc thesis, University of Limpopo, 2013; CM Monakisi 'Knowledge and use of traditional medicinal plants by the Setswana-speaking community of Kimberley, Northern Cape of South Africa' published MSc thesis, University of Stellenbosch, 2007; APMM Nzue 'Use and conservation status of medicinal plants in the Cape Peninsula, Western Cape Province of South Africa' published MSc thesis, University of Stellenbosch, 2009; SR Thornton-Barnett 'Ancestral pharmacopoeias: A paleoethnobotanical assessment of plant use in the Western Free State, South Africa' published MA thesis, Texas State University, 2013.

[427] AR Stebbing 'Hormesis – the stimulation of growth by low levels of inhibitors' (1982) 22(3) *Science of the Total Environment* 213 - 234: Abstract: *Hormesis is the name given to the stimulatory effects caused by low levels of potentially toxic agents. When this phenomenon was first identified it was called the Arndt-Schulz Law or Hueppe's Rule because it was thought to occur generally. Although this generalisation is not accepted today, there has never been more evidence in its support, justifying a re-examination of the phenomenon. Evidence from the literature shows that not only has growth hormesis been observed in a range of taxa after exposure to a variety of agents, but also that the dose-response data have a consistent form. While there are a number of separate hypotheses to*

with the 16 other theories and major hypotheses that underpin modern ethnobotany as offered in De Beer's research, would likewise be other and further interesting fields of study.[428]

### 7.2.7 EXTEMPORANEOUS COMPOUNDING OF MEDICINES[429]

As indicated previously, complementary medicines are now subject to registration.[430]

Also, any complementary healthcare practitioner who either dispenses, or compounds and dispenses, is required to have a dispensing, or compounding and dispensing, licence, as the case may be, in terms of the Medicines and Related Substances Act.[431]

With regard to practitioners of complementary medicine registered under the Allied Health Professions Council of South Africa, the view of this Council was that extemporaneous compounding of basic medicinal agents by healthcare practitioners who hold such a licence, and for a specific patient, with it then becoming a medicine in the hands of the practitioner only after extemporaneous compounding, was confirmed by the then-Registrar of the former Medicines Control Council, and now the South African Health Products Regulatory Authority.

The then-Registrar indicated that if the starting substance:

- was a raw material and fell within the legal scope of practice of the practitioner;
- complied with any pharmacopoeia or monograph in its production or use; and

*explain specific instances of hormesis, the evidence presented here suggests that different examples might have a common explanation, and the possibility of a general theory is considered*; https://pubmed.ncbi.nlm.nih.gov/7043732/, accessed 23 May 2021.

[428] n 380 above, 21 - 22.

[429] JR Falconer & KJ Steadman 'Extemporaneously compounded medicines' 2017 40(1) *Australian Prescriber* 5 - 8: *Extemporaneous compounding is the preparation of a therapeutic product for an individual patient in response to an identified need. It is a practical way to have medicines supplied when there is no other option.*

[430] n 172 above.

[431] Section 22(C)(1)(a) of Act 101 of 1965.

- satisfied the regulatory authority as to its manufacture, given quality and safety requirements incumbent on industry, such as good manufacturing practice and licensing;

then the intention was not that such basic medicinal agents should be registered or regulated, but that they would be considered as active pharmaceutical ingredients, and further that the intention was not that extemporaneous medicines should be regulated, but that the statutory health council would be relied on for guidance – specifically with regard to legal scopes of practice.[432]

This issue highlights the extreme importance of pharmacology, pharmacognosy and compounding education and training to ensure that all healthcare professionals, including those in the traditional medicine paradigm, enter the respective professions with competency in order not to jeopardise the health of the public and in consideration of issues of quality, safety and efficacy.

The issue that remains unclear is whether registration will also be the case for traditional medicines, and whether the licensing requirement will be applicable to practitioners of traditional medicine in future and, if not, whether this would not be seen as being inequitable and prejudicial in the South African medico-legal paradigm. The recommendation that various experts be appointed to the Interim Council has already been addressed, and this matter should equally be addressed in the Interim Council by a person qualified to do so, should such a matter become appropriate in the traditional medicine paradigm.

## 7.3 CONCLUSION

The appropriate focus should rather be decisive investigation by expert researchers and governmental agencies into whether the extant materia medica, in whatever form and from whichever usage perspective in traditional medicine, should not now rather see incisive scrutiny. This scrutiny should lead to either proscription in terms of extant

[432] Personal meeting between the Allied Health Professions Council and Ms Mandisa Hela, then-Registrar of the Medicines Control Council in Pretoria on 20 September 2014.

legislation or regulation acquiescence in terms of extant or future legislation by considering:

- any deleterious effects on biodiversity;
- any deleterious effect in relation to the health of the public or to animals;
- any pharmacodynamic interaction between conventional medicines and traditional medicine *imithi*: this is possible within a range from either potentiation, or increasing the effect of conventional medicines, to an antagonistic reduction of the effects of those medicines leading possibly to a nullification or neutralisation of conventional medicine benefits.

Consideration parameters may then include, but should not necessarily be limited to:

- those *imithi* which have recognised medicinal properties;
- those *imithi* which may have medicinal properties and require further research;
- those *imithi* which may either potentiate or antagonise conventional medicine benefits; and
- those *imithi* which should continue to be used in a ritual sense only, with no deleterious usage effects, such as in apotropaic magic applications or other categorisation applications.

The Act[433] empowers the Minister to make regulations, after consultation with the Interim Council, relating to *traditional medicines in order to protect the public and to ensure safety of use, administration or application*[434] – this against the apparent exclusion of the legal powers of the South African Health Products Regulatory Authority and the Medicines and Related Substances Act[435] and this requires consideration.

Another consideration would not only be the wording of the definition itself, but specifically the ultimate exclusion (emphasis added):

[433] Act 22 of 2007.

[434] Section 47(j), Act 22 of 2007.

[435] Act 101 of 1965.

> ***"traditional medicine"*** *means 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****;*

It is considered essential by the author of this thesis that serious consideration be also given to the possible pharmacodynamic interaction of *imithi*, especially in the treatment of HIV. Sibanda *et al* report that a 2014 laboratory study of the inhibition of major drug metabolising enzymes by various phytotherapeutic medicines[436] demonstrated the potential of these *imithi* to interact with anti-retroviral therapy and these authors call for further large randomised controlled trials.[437]

[436] *Hypoxis hemerocallidea*; *Echinacea purpurea*; *Moringa oleifera*; *Taraxacum officinale*; and *Lessertia frutescens.*

[437] M Sibanda *et al* 'Concurrent use of antiretroviral and African traditional medicines amongst people living with HIV/AIDS (PLWA) in the eThekwini Metropolitan area of KwaZulu Natal' (2016) 16(4) *African Health Sciences* 1119 - 1120.

# CHAPTER 8
# THE HUMAN IMMUNODEFICIENCY VIRUS, OTHER DISEASES AND TRADITIONAL MEDICINE

## 8.1 INTRODUCTION

That there exists in South Africa a considerable burden of disease, namely HIV infection, the acquired immunodeficiency syndrome ('AIDS'), tuberculosis, significant maternal and child rates of mortality, and non-communicable diseases, such as diabetes, together with malaria and sexually transmitted diseases ('STDs'), requires no further explication.

It is equally trite that there is resistance or aversion to the use of anti-retroviral therapy in HIV or AIDS, or mycobacterium therapy in the case of tuberculosis, with a lack of patient compliance in the case of the latter pathology being an ongoing medical concern in South Africa.

The South African government has acknowledged that these pathologies are not detected and treated in a timely manner and that this affects disease progression.[438]

Despite the debate about the actual number of persons rendering healthcare services in the traditional medicine paradigm, as offered previously, the question of the traditional medicine approach to persons suffering from infection by HIV, in particular, requires consideration – as do acts within this paradigm which may increase susceptibility to contracting the virus.

At this juncture in this thesis, some research information offered previously is incorporated here for the sake of emphasis and relevance of narration to underscore potential deleterious effects to the health of persons seeking healthcare services within the traditional healing paradigm; research studies offered for information subsequently, presented in a chronological order, are South African, unless stated otherwise.

[438] South African Government *Strengthening the South African health system towards an integrated and fully unified health system* Presidential Health Summit Compact 2019 21.

## 8.2 DISEASE TRANSMISSION IN TRADITIONAL MEDICINE

Wojcicki *et al* conducted a study in 2007 concerning traditional medicine practices and exposure to body fluids in Zambia, in particular the transmission of saliva, semen and vaginal fluids between either sexual partners or from parent to child, which has been elucidated previously.[439]

Kayombo *et al*, in a 2007 study concerning collaboration with traditional healers in managing HIV and AIDS in Tanzania, concluded that only three quarters of participants treating HIV or AIDS knew only some of the symptomatology and had attempted to manage these symptoms. They also noted that ostensible mistreatment of traditional healthcare practitioners during the colonial period remained a tangible challenge with the adoption of an appropriate strategy to access this group of healthcare workers for collaboration sustainability.[440]

Scorgie *et al* (2010) confirm that *ukugcaba* – the act of incision, with the incisions themselves being termed *izingcabo*, are conducted into the skin of the head, abdomen, breasts and joints, but also in the genital area near the labia. Herbal substances are then introduced into the *izingcabo* to attract men and sustain their sexual satisfaction.[441] Citing Chersich *et al* and Hilber *et al*, these authors indicate that these practices have been linked with increased transmission of STDs, including HIV.[442] Walwyn and Maitshotlo conducted a study in 2010 against the stated background that many HIV-positive persons regularly consult traditional health practitioners to determine the practices and use of herbal medicines in the treatment of HIV and AIDS.

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[439] n 348 above, 152.

[440] EJ Kayombo *et al* 'Experience of initiating collaboration of traditional healers in managing HIV and AIDS in Tanzania' (2007) 26(3:6) *Journal of Ethnobiology and Ethnomedicine* n.p.

[441] n 343 above, 64 - 65.

[442] As cited by F Scorgie *et al* (n 343 above) 65: MF Chersich *et al Association between intravaginal practices and HIV acquisition in women: Individual patient data meta-analysis of cohort studies in sub-Saharan Africa*: Abstract number: TUAC 204, 5th International AIDS Society Conference on HIV Pathogenesis, Treatment and Prevention, July 2009; Hilber AM *et al* 'Intravaginal practices, vaginal infections and HIV acquisition: Systematic review and meta-analysis' (2010) 5(2) *PloS One* e9119.

The findings published by these authors include that:

- 20% of the respondents claimed to be able to effect a cure in persons so affected;
- 88% prepared own medication, mostly of herbal origin, with such being sold in an aqueous extract form in a labelled bottle;
- no product had seen systematic evaluation, generally no record-keeping was maintained, and neither the particulars of the patient nor the composition of the medicine itself were recorded;
- quality control practices, such as *expiry dates, control storage conditions and batch records were totally unknown* in the sample; and
- training on HIV or AIDS had only been received by 38% of the sample, with 75% believing themselves to be well informed about the disease.

These authors concluded in that only one half of the sample group displayed a working knowledge of HIV and, *more disturbingly, 37% believe that only traditional medicines should be used for each treatment and a further 50% believe that traditional medicines and ARVs* [anti-retroviral drugs] *can be taken simultaneously*.[443]

In 2011, Groh *et al* researched barriers to anti-retroviral therapy in rural Mozambique, finding that all conventional healthcare workers blamed *patient preference for traditional medicine … for poor adherence*.[444]

In a 2012 article, Sloth-Nielsen[445] examines circumcision in the context of the Children's Act[446] and HIV and AIDS, noting that *current public health policy is advocating male circumcision as a critical tool for HIV prevention.*[447] As indicated

[443] D Walwyn & B Maitshotlo 'The role of South African traditional health practitioners in the treatment of HIV/AIDS; A study of their practices and use of herbal medicines' (2010) 11(2) *Southern African Journal of HIV Medicine* 11 - 17.

[444] K Groh *et al* 'Barriers to antiretroviral therapy adherence in rural Mozambique' (2011) 11(650) *BMC Public Health* n.p.

[445] J Sloth-Nielsen 'A foreskin too far? Religious, "medical" and customary circumcision and the Children's Act 38 of 2005 in the context of HIV/Aids' (2012) 16 *Law, Democracy and Development* 69 - 88.

[446] Act 38 of 2005.

[447] n 445 above, 71.

previously, amendments to the Children's Act have however now been tabled in parliament[448] and the Customary Initiation Act[449] has been promulgated.

Gyasi *et al* (2013) posit that the use of antiretroviral therapy together with traditional *imithi* may lead to drug interactions and suggested that patients be informed of this possibility during clinic visits.[450] Possible pharmacodynamic interaction between conventional medicines and *imithi* has been offered briefly previously.[451]

Davids *et al* (2014) confirmed that poison or pollution *is also seen as causal to especially HIV infection and is acquired through exposure to an environmental and/or spiritual "pollution"*,[452] confirming the views of Ngubane above with reference to the causes of illness in traditional medicine.[453]

Jones cites the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 2014 report as having indicated that the deaths *are almost without exception due to the negligence of some traditional 'surgeons', … others have used unsterilised instruments, contributing to the spread of blood-related infections such as HIV and AIDS, as well as tetanus.*[454]

Sibanda *et al* (2014) reported that persons living with AIDS continue to consult traditional health practitioners with traditional health medicines being used to treat the side effects of conventional medicine drugs *as well as fungal infections, dizziness, stomach upset and pain*. Other reasons for using traditional medicines would be to *supplement dietary intake, boost energy levels and improve immune response*. That

[448] n 262 above.

[449] Act 2 of 2021.

[450] R Gyasi *et al* 'Use of traditional medicine by HIV/AIDS Patients in Kumasi Metropolis, Ghana: A cross-sectional survey' (2013) 3 *American International Journal of Contemporary Research* 122.

[451] Sibanda (n 437 above) 1119 - 1120.

[452] D Davids *et al* 'Traditional health practitioners' perceptions, herbal treatment and management of HIV and related opportunistic infections' (2014) 10(77) *Journal of Ethnobiology and Ethnomedicine* n.p.

[453] n 67 above, 24 - 25; 77 - 78.

[454] As cited by Jones (n 360 above) 145: Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 'Executive summary of the report on public hearings on initiation schools in South Africa' 2014 7.

such traditional medicines can cure HIV or AIDS is an existing belief and these medicines *are regarded as a credible and convenient source of healthcare and dual treatment regularly takes place as a result*.[455]

Audet *et al* conducted a general study in Mozambique in 2016 and reported that 75% of these practitioners practised *ukugcaba* and that while a new razor was only used intermittently, the practitioners *almost never used gloves* and most traditional health practitioners were repeatedly exposed to patient blood. Since there was a high prevalence of HIV, hepatitis B and C viruses, together with other blood-borne agents, the practice of *ukugcaba* was deemed to be an occupational hazard and the re-use of razors was a risk to the patient's health.[456]

In a 2016 publication, referring to the global HIV infection rate in adolescents, Strode *et al* call for a change in the South African law to provide for HIV prevention as a valid medical reason for circumcision of boys under 16.[457] Leclerc-Madlala *et al* conclude in another 2016 publication that healthcare workers within the traditional healthcare paradigm can play a significant and vital role in an accelerated HIV response, stating that the underutilisation of these healthcare workers still remains a potential problem several decades into the epidemic.[458]

Audet *et al* posit that while traditional health practitioners acknowledge South African governmental health regulations requiring referral to conventional medicine clinics for HIV counselling and testing if any patient is suspected of being HIV-positive, they acknowledge that they may unwittingly treat patients who neither disclose their status, if known, nor display symptoms (the findings in a 2017 study). These authors believe that traditional health practitioners *continue to treat HIV-infected patients for both HIV and other opportunistic infections resulting from HIV*. Healer practices, moreover, showed increasing sophistication, with healers selecting which HIV-infected patients

[455] n 437 above, 1119.

[456] n 344 above, 1476 - 1477.

[457] AE Strode *et al* 'Addressing legal and policy barriers to male circumcision for adolescent boys in South Africa' (2016) 106(12) *South African Medical Journal* 1175.

[458] S Leclerc-Madlala *et al* 'Traditional healers and the "fast-track" HIV response: Is success possible without them?' (2016) 15(2) *African Journal of AIDS Research* 191.

to treat after having considered the levels of CD4 – a white blood cell involved in the human body's immune response. They then avoided treating any patient in a terminal state, given that the death of a patient is ostensibly not viewed as good for business.[459]

*Izinyanga*, according to Audet *et al*, citing Scorgie, were ostensibly the group of traditional health practitioners who believed that curing an HIV-positive infected patient was possible, rather than the *izangoma* group. This was quantified previously as an unexpected finding pursuant to the 2008 research by Scorgie.[460] The theft of intellectual property was used almost universally as an excuse for the lack of disclosure of treatment strategies and sources of medicines.[461] These researchers concluded that HIV symptoms in patients continue to be treated by traditional health practitioners in rural South Africa. Prices are said to be higher than free primary conventional healthcare clinic costs. They stated that an understanding of commonalities and differences between the traditional healthcare and conventional healthcare paradigms, specifically with regard to ensuring risk reduction, may lead to an improvement in the treatment of HIV in rural South Africa.[462]

As discussed previously, Audet *et al* conducted a qualitative study among traditional healers in the Bushbuckridge sub-district in Mpumalanga to establish the use of personal protective equipment in 2020. While 90% of the traditional health practitioners reported the use of latex gloves, the use of such was not regular. Where latex gloves were not available, items such as plastic shopping bags, bread bags, paper and even sticks were used to prevent exposure to patient body fluids, with the integrity of the item also being compromised. These authors estimate that traditional health practitioners *experience approximately 1 500 occupational blood exposures over the course of their lifetime*: the study group is reported to be infected with HIV at

[459] CM Audet *et al* 'Traditional healer treatment of HIV persists in the era of ART: A mixed methods study from rural South Africa' (2017) 17(434) *BMC Complementary and Alternative Medicine* 4.

[460] As cited by Audet *et al* (n 459 above) 4: F Scorgie 'Weapons of faith in a world of illness: Zionist profit-healers and HIV in rural KwaZulu-Natal' in T Falolo & MM Heaton (eds) *Health knowledge and belief systems in Africa* (2008) 83 - 106.

[461] As cited by Audet *et al* (n 459 above) 4: F Scorgie 'Weapons of faith in a world of illness: Zionist profit-healers and HIV in rural KwaZulu-Natal' in T Falolo & MM Heaton (eds) *Health knowledge and belief systems in Africa* (2008) 83 - 106.

[462] n 459 above, 6.

a *prevalence of 30%* [as] *compared to 19% in the general population*. This translates into a 2.4-fold higher set of odds of becoming HIV-positive than persons with no exposure.[463] These authors concluded that while there is an understanding of the danger of exposure to patient body fluids and while various protective strategies have been adopted, the use of personal protective equipment is inadequate from both a health and safety perspective and is also inconsistent. They recommend both training and messaging strategies, and increased availability of gloves – either at low cost or at no cost.[464]

Ondo, having reviewed the treatment of diabetes mellitus by traditional healthcare practitioners in Pretoria, concluded that the safety, efficacy and quality of traditional medicines requires improvement which would then concomitantly lead to an increase in the development of traditional medicine. This author sees this as crucial in the South African healthcare paradigm, as traditional healthcare practitioners are more influential and accessible than conventional medical practitioners.[465]

## 8.3 CONCLUSION

As indicated at the beginning of this chapter, the South African government has acknowledged that HIV, AIDS, tuberculosis, significant maternal and child rates of mortality, and non-communicable diseases, such as diabetes, together with malaria and STDs, are neither detected nor treated in a timely manner and that this affects disease progression.[466]

Taking into account the information and research findings presented in this chapter, cause for extreme concern is voiced by the author of this thesis given that the findings indicate that treatment practices are deleterious to the health of the public, unequivocally so, again leading to the view by the author of this thesis that regulation

[463] n 345 above, 655.

[464] n 345 above, 659.

[465] ZG Ondo 'How traditional healers diagnose and treat diabetes mellitus in the Pretoria Mamelodi area and how do these purported medications comply with complementary and alternative medicine regulation' (2019) 1(2) *Archives of Pharmacology and Therapeutics* 43.

[466] n 438 above, 21.

ought to be applied more strenuously rather than otherwise – notwithstanding this view, the finding that there is transmission of disease due to treatment practices will be considered yet in the context of the research question, namely whether regulation of traditional medicine should be maintained, or not, again after consultation with stakeholders, the results of which are encompassed in a subsequent section of this thesis.

# SECTION C:

# SOUTH AFRICAN TRADITIONAL MEDICINE: AN APPRAISAL OF LEGISLATIVE PRECEPTS

# CHAPTER 1
# INTERNATIONAL LEGAL AND REGIONAL INSTRUMENTS, TRADITIONAL MEDICINE AND THE CONSTITUTION

## 1.1 INTRODUCTION

This thesis seeks to draw conclusions and make recommendations about the future regulation of traditional medicine in South Africa fostering the ambit of extant legislation specific to this paradigm. This thesis does not have as its objective any major exposition of the supreme instrument of law in South Africa or international legal instruments, except as may be appropriate for the legal contextualisation of traditional medicine. South African history, both in the colonial and apartheid eras, clearly denigrated fundamental human rights for the vast majority of South Africans. The sequelae continue to resonate into the democratic era almost three decades later. Accordingly, then, information and views about these legal instruments follow in this thesis chapter.

## 1.2 INTERNATIONAL LEGAL INSTRUMENTS

The Universal Declaration of Human Rights,[467] the International Covenant on Economic, Social and Cultural Rights,[468] the International Covenant on Political and Civil Rights[469] [470] (known collectively as the International Bill of Rights), and the Convention on the Rights of Persons with Disabilities[471] are significant international legal instruments in the field of human rights.

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[467] United Nations *Universal Declaration of Human Rights* (1948) Geneva, accessed at https://www.un.org/en/about-us/universal-declaration-of-human-rights on 13 August 2021.

[468] United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) New York, accessed at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights on 13 August 2021. South Africa acceded on 3 October 1994.

[469] United Nations *International Covenant on Civil and Political Rights* (1996) New York, accessed at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR/aspx on 13 August 2021. South Africa acceded on 3 October 1994.

[470] Author's note: this Covenant provides generally for the limitation of rights to protect public health, rather than entitlement to health.

[471] United Nations *Convention on the Rights of Persons with Disabilities* (2007) New York, accessed at https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx on 13 August 2021. South Africa acceded on 30 November 2007.

Provisions relating to health are phrased, in the main, as either … *the right to a standard of living adequate for the health and well-being*,[472] … *the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*[473] or … *the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.*[474]

## 1.3 THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS[475]

The African Charter on Human and People's Rights is a regional human rights instrument and is said to be unique in that it includes rights not only for individuals but also for peoples, and also imposing duties.[476]

This regional Charter was acceded to on 9 July 1996 by South Africa, prior to 4 February 1997 when the Constitution became effective and was accompanied by a declaration espousing the view that consultation should take place between the parties on a number of issues:

> … *"possible measures to strengthen the enforcement mechanisms of the Charter" and "criteria for the restriction of rights and freedoms recognised and guaranteed in the Charter" and bringing the Charter in line with the UN's resolutions "regarding the characterisation of Zionism."* [477]

This regional Charter provides for health rights as being … *to enjoy the best attainable state of physical and mental health*, and obliging parties to the regional Charter … *to take the necessary measures to protect the health of the people and to ensure that they receive medical attention when they are sick*.[478]

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[472] n 467 above, Article 25.

[473] n 471 above, Article 12.

[474] n 468 above, Article 25.

[475] Organisation of African Unity [now African Union] *African Charter on Human and Peoples' Rights* (1981) Banjul, accessed at https://www.justice.gov.za/policy/african%20charter/afc_structure.html on 13 August 2021. South Africa acceded on 9 July 1996.

[476] World Health Organisation *Health and Human Rights: African Charter on Human and Peoples' Rights* (no date), accessed at https://www.who.int/hhr/Human_and_Peoples_rights.pdf on 13 August 2021.

[477] Department of Justice *African Charter on Human and Peoples' Rights* (no date), accessed at https://www.justice.gov.za/policy/african%20charter/africancharter.htm#top on 13 August 2021.

[478] n 475 above, 2: Articles 16(1) and (2), respectively.

A distinction is drawn between other rights having direct bearing on health rights:

> *The right to be free from the exploitation and degradation of man, particularly slavery, slave trade, torture, and cruel, inhuman or degrading punishment and treatment … or the obligation of States parties to care for the physical and moral health of the family … and to ensure the protection of the rights of women, children and the disabled*;[479]

and other provisions in the Charter said to have indirect bearing on health rights, such as the rights to non-discrimination; life; freedom of conscience, profession and religion; reception, expression and dissemination of information; free association; free assembly with others; freedom of movement and residence; work; and education.[480]

Supplementary rights in this regional Charter with bearing on health rights are said to be the duties on the parties to the Charter to ensure: the free disposition of wealth and natural resources; freedom of economic, social and cultural development; freedom to enjoy national and international peace and security; together with the right to enjoy the environment.[481]

The regional Charter does not differentiate between conventional, complementary or alternative, or traditional medicine systems, but the rights having direct and indirect bearing, as mentioned above under this regional Charter, seemingly suggest a reasonable comparison with a South African perspective, if not being somewhat more expansively posited.

## 1.4 THE SOUTH AFRICAN CONSTITUTION AND HEALTHCARE

Carstens and Pearmain indicate that although the Constitution contains several references to healthcare services and medical treatment, there is no explicit right to health but rather other rights, which when taken as a cohort, may be interpreted as the right to health.[482]

[479] n 475 above, 2: Articles 5 and 18, respectively.

[480] n 475 above, 2: Articles 2, 4, 8, 9, 10, 11, 12, 15, and 17 respectively.

[481] n 475 above, 2: Articles 20, 21, 22, 23 and 24 respectively.

[482] PA Carstens & D Pearmain *Foundational principles of South African medical law* (2007) 25 - 26.

These authors indicate that this cohort includes: *the right to life; the right to dignity; the right to bodily and psychological integrity; the right to privacy; the right to an environment that is not harmful to health and well-being; the right to emergency medical treatment; the right of access to healthcare services; and the rights to sufficient food and water and social security, including appropriate social assistance.*[483]

Dhai and McQuoid-Mason, in reflecting on a bioethical framework for health,[484] offer the view that the principle of autonomy is recognised in the Constitution in the following rights: the rights to *bodily and psychological integrity*, *privacy*, *life*, but also *the right to freedom of movement* and *the right to freedom of religion and belief*,[485] clarifying the latter two rights as being *the right of mentally competent patients to voluntarily discharge themselves*[486] and *respecting a mentally competent patient's right to refuse medical treatment for himself*.[487]

Moodley offers various categories of health rights under the Constitution, including *healthcare services*; *underlying conditions needed for health*; *special populations*; *foundational rights affecting health*; and *other*.[488]

This author includes the cohort of rights offered by Carstens and Pearmain,[489] but includes then:

> *… the right to have access to information; to freedom and security of person including freedom from all forms of violence from either public or private sources; to be free from torture; to freedom of religion and belief and opinion; to be free from medical experimentation without informed consent; to have access to adequate housing, to a basic education, including adult basic education; and progressive realisation of further education; children have the right to basic nutrition, shelter, basic healthcare services and social services; prisoners have the right to*

[483] Carstens and Pearmain (n 482 above) 25 - 26: as cited: sections 11, 10, 12(2), 14, 24(a), 27(1)(a), 27(1)(b) and (c) of the Constitution.

[484] A Dhai & D McQuoid-Mason *Bioethics, human rights and health law: Principles and practice* (2011) 39 - 40.

[485] n 484 above, as cited: sections 12(2)(a) and (b); 14, 11, 21(1).

[486] n 484 above, as cited: section 19(d) of the National Health Act 61 of 2003.

[487] n 484 above, as cited: *Hay v B* 2003 (3) SA 492 (W).

[488] K Moodley *Medical ethics, law and human rights: A South African perspective* (2013) 96 - 97.

[489] n 484 above, 25 - 26.

*conditions of detention consistent with human dignity, including the provision of nutrition and medical treatment; to equality (non-discrimination); to lawful, reasonable and procedurally fair administrative actions; and to academic freedom and freedom of scientific research.*[490]

Other provisions of the Constitution which address healthcare are to be found:

- in the provision that national legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that is prejudicial to the health of another province or the country as a whole;[491]
- the object of local government in the promotion of a safe and healthy environment;[492]
- the function of the South African Human Rights Commission to require information from organs of state to provide information on the measures taken towards the realisation of rights in the Bill of Rights concerning healthcare, among others;[493] and
- the functional areas of concurrent national, provincial and municipal competence in the provision of healthcare services.[494]

## 1.5 THE PATIENTS' RIGHTS CHARTER[495]

The Patients' Rights Charter, issued by the National Department of Health, serves as a set of guidelines *as a common standard for achieving the realisation* of the right to healthcare[496] and incorporates constitutional provisions together with provisions contained within the National Health Act relating to confidentiality, privacy, informed consent, refusal of treatment, and the right to be referred for a second opinion,[497] among others, and also sets out the responsibilities of patients.

[490] n 488 above, as cited: sections 27(3); 12(1); 12(1)(d); 15; 12(2)(c); 26; 29; 28; 35; 9; 33; and 16(1).

[491] Section 146(3)(a), the Constitution.

[492] Section 152(1)(d), the Constitution.

[493] Section 184(3), the Constitution.

[494] Parts A and B, Schedule 4, the Constitution.

[495] National Department of Health *Patients' Rights Charter* (no date), accessed at http://www.doh.gov.za/docs/legislation/patientsrights/chartere.html on 14 August 2021.

[496] n 495 above, first para.

[497] Sections 6 - 9, National Health Act 61 of 2003.

This national Charter clarifies the rights relating to healthcare as follows:

> ***Access to healthcare***
>
> *Everyone has the right of access to health care services that include:*
>
> i. *receiving timely emergency care at any healthcare facility that is open regardless of one's ability to pay;*
> ii. *treatment and rehabilitation that must be made known to the patient to enable the patient to understand such treatment or rehabilitation and the consequences thereof;*
> iii. *provision for special needs in the case of newborn infants, children, pregnant woman, the aged, disabled persons, patients in pain, person (sic) living with HIV or AIDS patients;*
> iv. *counselling without discrimination, coercion or violence on matters such as reproductive health, cancer or HIV/AIDS;*
> v. *palliative care that is affordable and effective in cases of incurable or terminal illness;*
> vi. *a positive disposition displayed by healthcare providers that demonstrate courtesy, common human dignity, patience, empathy and tolerance; and*
> vii. *health information that includes the availability of health services and how best to use such services and such information shall be in the language understood by the patient.*[498]

It would be appropriate at this junction to elucidate, briefly, on the limitation of rights in the Constitution.

## 1.6 LIMITATION OF CONSTITUTIONAL RIGHTS

As with Carstens and Pearmain,[499] De Vos and Freedman also confirm the legal position that although all rights protected under the Bill of Rights in the Constitution are fundamental, no right is absolute, since they are limited.[500] They are limited in certain cases in and of themselves and limited in others by the general application of section 36 of the Constitution, referring to section 7(3): *The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*[501]

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[498] n 495 above, unnumbered section 3, entitled: Access to healthcare.

[499] n 482 above, 120.

[500] P de Vos & W Freedman (eds) *South African constitutional law in context* (2021) 430.

[501] Section 36(1), the Constitution:

***Limitation of rights***

Against this background, with particular regard to the right to access healthcare services, an internal modifier limiting this right is relevant:

> *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*[502]

## 1.7 HEALTHCARE SERVICES IN SOUTH AFRICA: INSUFFICIENT GOVERNMENT CAPACITY

Lomhoza, commenting on the limitation of the right of access to healthcare services, indicates that the contention lies in the vagueness or lack of clarity of the timeframe in which socio-economic rights must be realised, and what is meant by *available resources*. This author offers the censure that it is the *inability of government departments to spend their budgets efficiently* and that this *presents somewhat of a stumbling block in addressing … socio-economic challenges*.[503]

The South African government has acknowledged that insufficient capacity exists and that the efficiency of public sector financial management systems and processes requires improvement: *Accruals have arisen because of inadequate skills, systems and funding levels*.[504] The actual severity of the considerable burden of disease in South Africa, where the South African government has indicated that the various pathologies are not detected and treated in a timely manner and that this affects disease progression,[505] should also be examined against the censure by Lomhoza, in the view of the author of this thesis.

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*36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

[502] Section 27(2), the Constitution.

[503] K Lomhoza 'Monitoring the right to healthcare in South Africa: An analysis of the policy gaps, resource allocation and health outcomes' (2013) *Studies in Poverty and Inequality Institute* 4.

[504] n 438 above, 61.

[505] n 438 above, 21.

## 1.8 NATIONAL OF DEPARTMENT OF HEALTH POLICY: EXCLUSION OF COMPLEMENTARY AND TRADITIONAL HEALTHCARE

The exclusion of practitioners of both traditional and complementary health from the South African public healthcare paradigm by National Department of Health policy, ostensibly against the background of the progressive realisation of the right of access to health against available resources,[506] was not specifically acknowledged by the South African government during its Presidential Health Summit in 2019.

An ostensible change to the existing policy position was however offered:

> *Social determinants of health play a significant role in health outcomes. An overall lack of integration across and within government departments as well as with Traditional Authorities, Traditional and Allied Health Practitioners and the Religious Sector at the community level poses a significant challenge to holistically addressing many of these social determinants, as well as the participation of community groups in the service planning and delivery. Resistance to the training, deployment and funding of posts for the specialised cadre providing mental, spiritual & disability health services reduces health to not only be in the absence of disease, against the WHO* [World Health Organization] *definition that includes mental and social well-being components as well. South Africa continues to prioritise curative health at the expense of a preventative/social & behavioural health approach*.[507]

The occupation of a practitioner of traditional medicine is governed by legislation, as has been addressed previously, but is subject to the applicable internal modifier in the relevant right, as is any profession regulated by law:

> *Every citizen has the right to choose the trade, occupation or profession freely. The practice of the trade, occupation or profession may be regulated by law*;[508]

[506] As raised during various meetings between the National Department of Health and the Allied Health Professions Council and other statutory health councils over a period of time; also, either personal observations by the author of this thesis, the Registrar of the Allied Health Professions Council: 2009 to 2022, or answers as provided to queries posed.

[507] n 438 above, 70.

[508] Section 22, the Constitution.

## 1.9 TRADITIONAL HEALTH IN A CONSTITUTIONAL CONTEXT

Regarding the South African traditional healthcare system itself, Rautenbach[509] offers that the core legal framework under which this is accommodated is indeed provided for in the Constitution, and particularly in the following provisions:

- *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth*;[510]
- *Everyone has the right to freedom of conscience, religion, thought, belief and opinion*;[511]
- *Everyone has the right to have access to health care services, including reproductive health care*;[512]
- *Everyone has the right to … participate in the cultural life of their choice* …;[513] and
- *Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other persons of that community-*

  *(a) to enjoy their culture, practice their religion and use their language; and*

  *(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society*.[514]

This author does not seemingly consider the right to freedom of association,[515] however, or the complete cohort of rights as set out by Carstens and Pearmain above[516] as legal tenets for consideration in the context of traditional medicine.

Against this constitutional right and in consideration of the essentiality of the research question, namely whether regulation of this profession is to be continued, or not, in consideration of the cardinal feature of this original contribution to research by this thesis, namely the proposal of any legal scope of practice for this profession, regard must be given to any act or action, deed, undertaking or performance in clinical

[509] C Rautenbach 'Institutionalisation of African traditional medicine in South Africa: Healing powers of the law?' 2011 (74) *Journal for Contemporary Roman Dutch Law* 41.

[510] Section 9(3), the Constitution.

[511] Section 15(1), the Constitution.

[512] Section 27(1)(a), the Constitution.

[513] Section 30, the Constitution.

[514] Section 31(1), the Constitution.

[515] Section 18, the Constitution.

[516] n 482 above, 25 - 26.

practice,[517] specifically whether the clinical act is considered central, or ostensibly inherent *per se* to the practice of traditional medicine – whether or not ritualised.

It is considered appropriate that such be explicitly specified, and either allowed or proscribed in terms of the appropriate legislative instrument,[518] specifically against the 2014 promulgated *Objects of Council*, which provides as follows:

> ***Objects of Council***
> *5. The objects of the Council are to-*
> *(a) promote public health awareness;*
> *(b) ensure the quality of health services within the traditional health practice;*
> *(c) protect and serve the interests of members of the public who use or are affected by the services of traditional health practitioners;*
> *(d) promote and maintain appropriate ethical and professional standards required from traditional health practitioners;*
> *(e) promote and develop interest in traditional health practice by encouraging research, education and training;*
> *(f) promote contact between the various fields of training within traditional health practice in the Republic and to set standards for such training;*
> *(g) compile and maintain a professional code of conduct for traditional health practice; and*
> *(h) ensure that traditional health practice complies with universally accepted health care norms and values.* [519]

## 1.10 FUTURE POLICY ON AFRICAN TRADITIONAL MEDICINE AND *UBUNTU*

As indicated previously, the question of *ubuntu* in South African law, as a general tenet, is not the subject of this thesis, but must necessarily be considered in any review of the legislation that exists in the regulation of traditional medicine or in the development of any future legal precepts. Rautenbach, in referring to the 2008 Draft Policy on African Traditional Medicine for South Africa,[520] posits that the explicit reference to *ubuntu* in this draft policy may conflict with constitutional values, in

[517] Mhame (n 173 above) 13.

[518] Act 22 of 2007.

[519] Section 5, Act 22 of 2007.

[520] n 246 above.

particular against the equality clause,[521] given that no preference may be given by the legislature to any particular religion, but concludes:

> *Whether or not the government's explicit mentioning of ubuntu may be interpreted as its endorsement of a specific religion or philosophy for South Africa could become a point of debate in future, which may eventually impel the institutionalisation of traditional medicine into the political arena.*[522]

The question of *ubuntu* will no doubt see much debate in future and is for further opinions on the matter, interested parties may wish to refer to the views offered by Radebe and Phooko who examine *ubuntu* and the law in South Africa with a view to exploring and examining its substantive content;[523] a response to these views is offered by Kroetze.[524]

## 1.11 CONCLUSION

Any person seeking healthcare within the traditional medicine construct, or indeed practise traditional medicine, may do so, with the caveat that the right to do so is limited. If the conclusion reached in consideration of the research question is that regulation is essential, in order to protect the health of the public, dismissing self-regulation, then a cardinal feature of this original contribution in research by means of this thesis will be the presentation of proposed changes to the extant legislative precepts, including proposing a legal scope of practice recommending either prescribing, or proscribing, as the case may be, the armamentaria, or range of clinical practices, medicines and equipment, used within this system of medicine, currently not a feature of extant regulation.

[521] Section 9, the Constitution.

[522] n 509 above, 43.

[523] SB Radebe & MR Phooko 'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu' (2017) 36(2) South African Journal of Philosophy, 239-251.

[524] IJ Kroeze 'Once More *uBuntu*: A Reply to Radebe and Phooko" 2020(23) PER / PELJ 1 - 22.

# CHAPTER 2
# THE TRADITIONAL HEALTH PRACTITIONERS ACT, 2007[525] AND THE DRAFT POLICY ON AFRICAN TRADITIONAL MEDICINE[526]

## 2.1 INTRODUCTION

Traditional medicine legislation, including the KwaZulu Act on the Code of Zulu Law,[527] together with the 2004 and 2007 versions of the Act,[528] were introduced previously; the practice of traditional medicine in South Africa was also examined previously in the context of various international legal instruments, and in the context of the Constitution.[529]

In the period 2008 to 2018, all provisions of the Act[530] were brought into operation by proclamation[531] and this legislative precept is thus now fully valid, but the Interim Council is not yet operational. The purpose of this legislation, applying to traditional medicine in South Africa, persons practising such, and persons engaged in or learning about such, is:

> *... to provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; to provide for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners' profession; and to provide for matters connected therewith.*[532]

In addition to the Interim Council, there are five other statutory health councils in South Africa: the Allied Health Professions Council;[533] the Dental Technicians Council; the Health Professions Council; the Nursing Council; and the Pharmacy Council –

[525] Act 22 of 2007.

[526] General notice (n 244 above), Foreword.

[527] Act 16 of 1985.

[528] Act 35 of 2004 and Act 22 of 2007, respectively.

[529] Act 108 of 1996.

[530] Act 22 of 2007.

[531] See above: Section B, Chapter 1, setting out information regarding these developments.

[532] Section 2, Act 22 of 2007.

[533] As indicated previously, the author of this thesis has been the Registrar of the Allied Health Professions Council from 2009 to 2022. The views expressed in this chapter, particularly, are based on his regulatory experience in, and familiarity with, the South African medico-legal paradigm.

reference is made to these councils in the definition of a *traditional health practice*.[534] In general, legislation constituting the six statutory health councils is distinguished by similarity, rather than any specific absolute individuality of any legislative precept, but unquestionably with specific provisions as may be required for the specific functions of the various statutory health councils.

As has been indicated in the preface of this thesis, the question to be posed is whether a seemingly occidental legal approach is appropriate for the regulation of a healthcare profession which may only partly or possibly not at all resort within an occidental healthcare paradigm?

Comments are offered at this juncture in this thesis as may be appropriate to the Act[535] itself, but limited to those provisions which require comment, rather than being a critique of the entire legislative precept and the following information concerning certain provisions within this legislation and the Interim Council are offered, together with other personal comments, as set out below.

## 2.2 THE DRAFT POLICY ON AFRICAN TRADITIONAL MEDICINE FOR SOUTH AFRICA, MORE THAN A DECADE IN THE MAKING

Rautenbach posits the position that although this legislation defines traditional medicine, it does not institutionalise such.[536] As indicated previously, a policy on traditional medicine for South Africa institutionalising traditional medicine into the South African healthcare system is expected to be finalised soon.[537] Comments on the Policy on African Traditional Medicine for South Africa were invited in 2008 and the policy is ostensibly only now, some 14 years later, reaching finalisation.[538]

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[534] Section 1, Act 22 of 2007: ***"traditional health practice"*** *… but excluding the professional activities of a person practising any of the professions contemplated in the Pharmacy Act, 1974 (Act No. 53 of 1974), the Health Professions Act, 1974 (Act No. 56 of 1974), the Nursing Act, 1974 (Act No. 50 of 1974), the Allied Health Professions Act, 1982 (Act No. 63 of 1982), or the Dental Technicians Act, 1979 (Act No. 19 of 1979), and any other activity not based on traditional philosophy;*

[535] Act 22 of 2007.

[536] n 509 above, 42.

[537] n 246 above.

[538] n 246 above.

According to Rautenbach, *this legislation is not to integrate traditional medicine with allopathic or alternative medicine, but to adopt a sui generis system on par with the conventional healthcare system*. This author further states that traditional medicine is *uniquely African*, cannot be compared with conventional medicine and complementary or alternative medicine, *which are already integrated into the public health care system*.

This author posits that certain aspects of traditional medicine are not necessarily *uniquely African*, however, but may be largely resonate with aspects of other systems of traditional medicine, although this would be a matter for further research.[539] That complementary and alternative medicine is *integrated into the public health care system* according to this author is, however, erroneous.[540] The practice of regulated complementary or alternative medical care remains within the South African private medico-legal paradigm and is not part of the South African public healthcare system. As indicated previously, however, the exclusion of practitioners of traditional and complementary health from the South African public healthcare paradigm by National Department of Health policy, ostensibly against the background of the progressive realisation of the right of access to health against available resources,[541] was not specifically acknowledged by the South African government during its Presidential Health Summit in 2019. An ostensible change to the existing policy position was, however, offered as set out above.[542]

## 2.3 THE ACT AND THE INTERIM COUNCIL: ALMOST TWO DECADES IN THE MAKING

Consideration of the 1985 KwaZulu Code of Zulu Law[543] aside, debate about the Bill relating to traditional medicine commenced in 1998, but the first enabling legislative

[539] n 509 above, 34.

[540] Rautenbach (n 509 above) 34.

[541] As raised during various meetings between the National Department of Health and the Allied Health Professions Council and other statutory health councils over a period of time; also, either personal observations by the author of this thesis, the Registrar of the Allied Health Professions Council: 2009 to 2022, or answers as provided to queries posed.

[542] n 438 above, 70.

[543] Act 16 of 1985.

precept[544] relating to this paradigm was deemed invalid because of a lack of sufficient, or reasonable levels of, participation at provincial level; the Act[545] was enacted in early 2008.[546] The year 2019 saw a National Department of Health notice calling for the nomination of candidates to serve on the Interim Council,[547] such a notice having been previously issued in 2011.[548]

As far as the author of this thesis is aware, the Interim Council is yet to be formally constituted, registration procedures have yet to commence and no funding has been made available by parliament,[549] with the result that the Interim Council Registrar occupies a position in the National Department of Health.[550]

While the number of traditional healers practising traditional medicine is a matter for debate, as discussed previously,[551] it is believed that this grouping constitutes a significant stakeholder group in South Africa, not only within a health paradigm, but also as a potential political dynamic. While the reasons behind the length of time taken to regulate this profession, with the Interim Council not yet legally fully operational, are not understood, the ostensible intransigence of the responsible legislators should be queried, particularly against the primary mandate of any statutory health council: the protection of the health of the public.

## 2.4 THE TRADITIONAL HEALTH PRACTITIONERS ACT[552]

### 2.4.1 DEFINITIONS

As mentioned previously, Manda decries comment about the use of the word ‘traditional’ (found in various definitions) where *the premise is that the quality of reason*

[544] Act 35 of 2004.

[545] Act 22 of 2007.

[546] Act 22 of 2007.

[547] n 255 above, Department of Health Notice.

[548] n 249 above, General Notice.

[549] Section 16(1)(a), Act 22 of 2007.

[550] Mullinder (n 541 above).

[551] n 306 above, 22 - 23.

[552] Act 22 of 2007.

*is pre-scientific, illogical and therefore, not rational*, seeing this as a limited approach, and moreover … *fails to recognize that traditional types of healing do also seek to uncover and heal the natural causes of illness.*[553]

The previous discussion, referencing Ngubane specifically,[554] about causes of illness, sets out this author's views on natural causes of illness. Accordingly, Manda's views[555] are not believed to be apposite to the general meaning ascribed in this section of the Act.[556]

Thornton indicates that [the definitions in] the Act[557] do not *mention religion or cult, initiation,[558] spirits, mediums, possession or trance states, all of which are associated with traditional healing* … and that *the legal definition fails to locate a specific central practice* and that this would therefore *include virtually anything that might have a 'traditional' component*.[559]

Definitions are generally restraining and unless certain practices or enterprises are proscribed, definition is not necessarily required. Thornton may possibly not have appreciated that these may very well be inherent to the understanding of the definitions of *"traditional health practice"*, *"traditional medicine"* and *"traditional philosophy"*.[560]

### 2.4.2 POTENTIAL LIAISON BETWEEN ALL HEALTH PRACTITIONERS[561]

Similar provisions are to be found in the Health Professions Act and the Nursing Act, but not in the Dental Technicians Act, the Pharmacy Act, or in the Allied Health Professions Act. [562]

[553] n 29 above, 122.

[554] n 67 above, 23 - 25.

[555] n 29 above, 122.

[556] Act 22 of 2007.

[557] Act 22 of 2007.

[558] Note: now regulated by Act 2 of 2021, the Customary Initiation Act.

[559] n 2 above, 13.

[560] Section 1, Act 22 of 2007.

[561] Section 6(2)(a), Act 22 of 2007.

[562] Act 56 of 1974, Act 33 of 2005, Act 19 of 1979, Act 53 of 1974, and Act 63 of 1982, respectively.

As discussed previously, the debate about statistics on the use of the services of any of the categories of traditional healers aside, as Leclerc-Madlala *et al* conclude in a 2016 publication, healthcare workers within the traditional healthcare paradigm can play a significant and vital role in an accelerated HIV response. They stated that the under-utilisation of these healthcare workers still remains a problem several decades into the epidemic.[563] Oyebode *et al* [564] and Schierenbeck *et al*, based on semi-structured interviews in the Eastern Cape concerning mental illness, however found that persons seek the assistance of traditional healers before requesting assistance from conventional medicine practitioners or facilities.[565]

Liaison across the various statutory health councils is to be welcomed and indeed regarded as imperative given that each system of medicine has its limitations, real or perceived, furthermore there is a growing use of phytotherapy medicines, *imithi*, as they are known in traditional medicine, and these are considered subsequently.

### 2.4.3 APPOINTMENT OF A MEDICAL PRACTITIONER AND PHARMACIST TO THE INTERIM COUNCIL[566]

As indicated in the immediately preceding section, liaison across statutory health councils is to be welcomed, and the appointment of a medical practitioner and a pharmacist to the Interim Council is likewise to be welcomed given the interdisciplinary sharing of knowledge and expertise. It however remains to be seen if there are objections to such appointments given that the education and training of these persons is occidental in nature and neither traditional nor African.

### 2.4.4 DISQUALIFICATION AS A MEMBER OF THE INTERIM COUNCIL[567]

There is proscription from being appointed as a member of the Interim Council, either at the time of appointment, or having held office in the preceding 12 months as a

[563] n 458 above, 191.

[564] n 301 above, 990.

[565] n 308 above, 166.

[566] Sections 7(g) and (h), Act 22 of 2007.

[567] Section 9(g)(i) and (ii), Act 22 of 2007.

member of the National Assembly, any provincial legislative body, the National Council of Provinces or any municipal body or being or having been, in the preceding 12 months, an office bearer or employee of any party, organisation or body of a political nature. Similar provisions are found in the Health Professions Act and the Nursing Act, but not in the Dental Technicians Act, the Pharmacy Act, or in the Allied Health Professions Act.[568]

### 2.4.5 APPOINTMENT OF A NATIONAL DEPARTMENT OF HEALTH EMPLOYEE AND A PHARMACIST, AMONG OTHERS, TO THE EXECUTIVE COMMITTEE OF THE INTERIM COUNCIL[569]

The appointment of a National Department of Health employee to the executive committee of the Interim Council militates against the autonomy of a statutory health council, in the view of the author of this thesis. The Interim Council is further obliged *to implement the health policies determined by the Minister concerning traditional health practice*,[570] with no consultation with the Interim Council being required. No consultation requirement is to be found in the Health Professions Act, nor in the Nursing Act, but is the case in the Dental Technicians Act, the Pharmacy Act, and in the Allied Health Professions Act.[571] It remains to be seen whether this may be contentious in future.

### 2.4.6 FUNDING[572]

As far as the author of this thesis is aware, no funding has been made available by parliament, and the Interim Council Registrar occupies a position in the National Department of Health. All other statutory health councils have, as their only source of income, registration fees and no extraneous funding is available – except possibly by application to the National Department of Health for special projects. Since the intention is that this Council is to be funded mainly by public funds, the requirement[573]

[568] Act 56 of 1974, Act 33 of 2005, Act 19 of 1979, Act 53 of 1974, and Act 63 of 1982, respectively.

[569] Sections 13(f) and (g), referencing sections 7(d) and (g), Act 22 of 2007.

[570] Section 6(2)(b), Act 22 of 2007.

[571] Act 56 of 1974, Act 33 of 2005, Act 19 of 1979, Act 53 of 1974, and Act 63 of 1982, respectively.

[572] Section 16(1)(a), Act 22 of 2007.

[573] Section 17(c), Act 22 of 2007.

that legal compliance with the Public Finance Management Act [574] is required, is standard.

### 2.4.7 THE KEEPING OF REGISTERS[575]

The Registrar is obliged to keep separate registers for persons in each of the four categories of registration and the Minister may, after consultation with the Interim Council, make regulations for the registration of specialities.[576] This requirement is in keeping with that for other statutory health councils and is an important source of information for the public to ascertain whether any person is legally registered to practise for gain.

The Registrar is, however, only obliged to register a traditional health practitioner if he or she is satisfied that the person applying for registration is suitably qualified or if the Interim Council is so satisfied.[577]

### 2.4.8 PROOF OF QUALIFICATIONS[578]

The requirement that any applicant be required to furnish proof of his or her qualifications is, at the outset, seemingly problematic in the sense that the *ukuthwasa*, the process undertaken by a neophyte to become an *isangoma*, one of the categories for registration for example, is not a formalised education and training exercise. This is also true for the other two categories of registration.

In the case of a traditional surgeon – as discussed more fully subsequently – the circumcision of initiates, between the ages of 16 and 18 and over the age of 18, is further regulated in terms of the Customary Initiation Act in that the circumcision may only be performed by a registered medical practitioner, or a registered traditional surgeon, who, if not a registered medical practitioner, is then under supervision of a

[574] Act 1 of 1999.

[575] Section 19(c)(iii), Act 22 of 2007.

[576] Section 47(1)(f), Act 22 of 2007.

[577] Section 21(5), Act 22 of 2007.

[578] Section 21(2)(b), Act 22 of 2007.

registered medical practitioner.[579] Proof of qualification as a medical practitioner would be possible, given the formalisation of the education and training in South Africa and elsewhere.

### 2.4.9 PROCEDURE AT INQUIRY AND APPEAL[580]

The lodging of an appeal generally suspends any sanction until the appeal process is finalised. In the case of the Interim Council, the Health Professions Council and the Nursing Council, the common law position has been changed and the penalty remains effective until the appeal is heard, the same distinction then being the case, as indicated in this section of this thesis previously, between these councils and the other statutory health councils in this procedure.[581]

### 2.4.10 PAYMENT IN KIND

It is noted that when practising for gain, *payment in kind* is permitted,[582] this is however against the provision that:

> *(3)(a) The patient may, within three months after receipt of the account contemplated in subsection (2), apply in writing to the Council for a determination of the amount which, in the opinion of the Council, should have been charged for the services to which the account relates*.[583]

A reconciliation between these two provisions may prove contentious.

### 2.4.11 EDUCATION AND TRAINING

The Act[584] contains various provisions relating to education and training, notably powers of the Minister, either on recommendation by, or in consultation with, the

[579] Section 28(6)(c) and (d), Act 2 of 2021.

[580] Section 34(2), Act 22 of 2007.

[581] Act 56 of 1974, Act 33 of 2005, Act 19 of 1979, Act 53 of 1974, and Act 63 of 1982, respectively.

[582] Section 42(8), Act 22 of 2007.

[583] Section 42(3)(a), Act 22 of 2007.

[584] Act 22 of 2007.

Interim Council relating to minimum standards of either curricula or examinations and the duration of the educational programme, or powers granted to the Interim Council in respect of education and training. [585]

The Interim Council, however:

> *… may approve minimum requirements pertaining to the education and training of traditional health practitioners in consultation with relevant departments, quality assessment bodies or a body of traditional health practitioners accredited by the council for the specific purpose;*[586]

The National Qualifications Framework Act[587] does not distinguish between the powers of statutory councils, including statutory health councils, and other bodies purporting to regulate professions. It merely speaks to *professional bodies* and a point of divergence of opinion has been evident for a number of years with the Allied Health Professions Council raising the ostensible arrogation of powers of approval or control of education and training by the Council on Higher Education, the South African Qualifications Authority and Quality Council on Trades and Occupations over those enjoyed, in law, by the Allied Health Professions Council of South Africa.[588] This ostensible arrogation of powers has now been raised formally at the Forum of Statutory Health Professional Councils, a body comprising members of all statutory health councils which advises the Minister of Health,[589] with a view to the matter being raised at national level so as to avoid any further dilution of the powers of statutory health councils in approving minimum standards of competency to enter practice.[590]

This matter would then be pertinent when the Interim Council is required to consult with the quality assurance bodies.[591] The challenge for the Interim Council, as experienced by the Allied Health Professions Council of South Africa, is that when matters relating to the education and training of persons who practise outside the

[585] Section 22, 28 and 47(1)(b), Act 22 of 2007.

[586] Section 6(1)(i), Act 22 of 2007.

[587] Act 37 of 2008.

[588] Section 16A, Act 63 of 1982.

[589] Section 50, Act 61 of 2003.

[590] Mullinder (n 541 above).

[591] Section 6(1)(i), Act 22 of 2007.

conventional medical paradigm are raised with bodies which function mostly within this paradigm, challenges arise. The establishment of any formal institution of higher education and training for traditional medicine, whether public or private, is regarded as unfeasible for the Interim Council, not only from this perspective, but also from a funding perspective. Institutions of higher education and training are loath to develop programmes of education and training for professions which are non-mainstream, for example, for complementary and alternative medicine professions. It would also be a marked departure from the current system of the training for initiates and would likely be rejected as being untraditional and not meeting the requirements of the ethos and philosophy of traditional medicine.

It is further difficult to envisage how continuing education[592] would be formalised.

Also, and as presented previously, Thornton sees six disciplines in traditional medicine, which would militate against a standardised curriculum for education and training – given that they ostensibly individualise the practice of traditional medicine. Two of these disciplines are:

- a discipline of knowledge of 'foreign' and water spirits, and *kufemba*, a healing ritual carried out by interceding with these spirits[593] and that each person practises *in a way almost unique to that person and each context, each teacher, each ecology and pharmacopoeia of organic and mineral substances is local*;[594]

and

- *the teaching relationship between the gobela,* the teacher of the arts and knowledge of *bungoma*, the neophyte, *ithwasa,* the initiation school, *mpandze,* and the systems of transmission of knowledge.[595]

[592] Section 28, Act 22 of 2007.

[593] n 2 above, 11.

[594] n 2 above, 17.

[595] n 2 above, 12.

In the same context, also indicated previously, Ngubane posits that an initiate will receive instruction from a practising diviner, but certain *imithi*, *or medicines will [also] be revealed to her by her own ancestors,* adding a lineage nuance to that neophyte's pharmacopoeia after transition to a practising diviner.[596]

### 2.4.12 REGULATIONS REGARDING TRADITIONAL MEDICINES

As indicated previously, the Act provides that the Minister may make regulations after consultation with the Interim Council regarding *traditional medicines in order to protect the public and to ensure safety of use, administration or application.*[597] The definition for a traditional medicine (emphasis added),[598] addressed previously, provides:

> ***"traditional medicine"*** *means 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****;*[599]

The powers of the Minister, after consultation with the Minister, appear to exclude the legal powers of the South African Health Products Regulatory Authority and the Medicines and Related Substances Act.[600] While complementary medicines are now subject to registration, albeit subject to litigation,[601] medicines for use within the traditional medicine paradigm are not subject to this legislative precept.[602]

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[596] n 67 above, 102.

[597] Section 47(1)(j), Act 22 of 2007.

[598] See n 29 above.

[599] Section 1, Act 22 of 2007.

[600] Act 101 of 1965.

[601] n 172 above, *The Alliance of Natural Health Products in South Africa v Minister of Health and South African Health Products Regulatory Authority*.

[602] Regulation 9(1)(d), General Regulations No 859, promulgated in the Government Gazette No 41604 on 25 August 2017.

According to Gower, there is an expert working group or committee currently considering traditional medicines, but whether this group is considering proprietary or non-proprietary medicines requires clarification.[603]

### 2.4.13 LETTERS OF INDISPOSITION

Diagnostic practitioners registered under the Allied Health Professions Council of South Africa, for example, are entitled to issue letters of indisposition in terms of the relevant legislation.[604] No such empowering legislation is to be found for any person registerable under the Interim Council, and yet cursory research shows at least two sets of regulations requiring employers to accept such letters of indisposition, albeit in the earlier set of regulations. The traditional healer is required to be registered, but not so required in the latter set of regulations; both sets of regulations have, however, expired.[605]

## 2.5 CONCLUSION

Observations concerning certain provisions of the Act[606] and the Interim Council have been offered previously, together with other personal comments. The efficacy of any legislative instrument can, however, only be evaluated against its use in regulating the paradigm of traditional medicine in the registration of the four categories of traditional health practitioners; stakeholder views will be garnered and addressed subsequently.

Questions about the length of time taken to bring this legislation fully into operation, the fact that the adoption of a policy regarding African traditional medicine itself is some 14 years in the making, the challenges of funding and the fact that registration

[603] Personal discussion, Dr Neil Gower, Chairperson: Complementary Medicines Committee, South African Health Products Regulatory Authority, on 22 March 2022.

[604] Regulation 53, Regulation R 266 of 26 March 2001.

[605] Department of Labour Regulation R 1051, Metal and Engineering Industries Bargaining Council: extension to non-parties of the main collective re-enacting and amending agreement, promulgated in Government Gazette No 38366 on 24 December 2014; Department of Labour Regulation R 1363, Motor Ferry Industry Bargaining Council of South Africa: extension to non-parties of the main collective agreement, promulgated in Government Gazette No 44005 on 18 December 2020.

[606] Act 22 of 2007.

categories are not yet open, appear to reinforce the notion that there is little political will to bring about effective regulation.

The question of whether the persons practising traditional medicine actually wish to be regulated (also in conjunction with conventional medical practitioners and conventional pharmacists, whether as part of the membership of the regulatory body or in the practice of male circumcision) and whether this legal modus of regulation might be viewed as 'untraditional' is likely to be contentious.

Education and training in the broader sense, whether in the accreditation of any institution of education and training and any system of continuing education, seen against the nature of formalised training against the highly individualised practice of certain practices within the paradigm, may be very challenging. Questions about not only the safety and efficacy, but also the quality of traditional medicines, together with the ostensible exclusion of the relevant regulatory authority, would also seem to be problematic.

# CHAPTER 3
# THE CUSTOMARY INITIATION ACT:[607] MALE AND FEMALE CIRCUMCISION, FEMALE GENITAL MUTILATION AND OTHER RELEVANT LEGISLATIVE PRECEPTS

## 3.1 INTRODUCTION

The question of legislation dealing with initiation, together with initiation practices for males and females, including male circumcision and female genital mutilation, was considered previously in the section of this thesis relating to enabling legislation, statistics and other healthcare services for traditional medicine. An offering of provincial, district and municipal legislation relating to customary initiation was also presented from 2006 – not necessarily as a complete record of such legislation, but against the background of demonstrating that the matter has seen consideration and attention by various legislative bodies.

The Customary Initiation Act[608] was enacted in 2021. The Preamble to this Act recognises certain constitutional rights including the right to life; the right to bodily and psychological integrity; the rights of persons to enjoy their culture; the rights of persons to form, join and maintain cultural associations; and the rights of children to be protected from maltreatment, neglect, abuse or degradation.[609] The Preamble further recognises that customary initiation is not only regarded as a sacred and respected practice, but also as a rite of passage to adulthood and that it is an accomplishment of *ideals, values and aspirations of both the individual and community, reflected in the transfer of teachings about culture, tradition and respect (especially for women and the elderly).* Notably, the Preamble also recognises abuse resulting from initiation causing serious injuries and also deaths of initiates; lack of proper regulation of initiation schools; lack of an overriding, overreaching legislation dealing with initiation; and the fact that certain initiation schools ostensibly operate for personal gain only and not for the welfare or well-being of initiates.[610]

[607] Act 2 of 2021.

[608] Act 2 of 2021.

[609] Sections 11, 12(2), 31(a), 31(b) and 28(d) respectively, the Constitution.

[610] Preamble: Act 2 of 2021.

The practice of male circumcision is conducted by traditional surgeons whose conduct is subject to the provisions of the Act,[611] and as an act specifically pertaining to that profession within traditional medicine. The practice of female genital mutilation, which includes circumcision of females, may not necessarily fall within the paradigm of traditional medicine, but it is nevertheless addressed given that a secondary, but no less important consideration is to provide any interested person with a single resource overview of the South African traditional medicine paradigm and any other related issues – functionally and purposefully referenced.

Accordingly, it is considered appropriate to reference provisions of the legislation relating to initiation in some detail, as set out in this section of this thesis.

## 3.2 THE CUSTOMARY INITIATION ACT:[612] NATIONAL AND PROVINCIAL OVERSIGHT REGULATORY BODIES

As indicated in the introduction to this part of this thesis, this legislation seeks to regulate the practice of customary initiation effectively and to establish oversight and coordinating committees – a National Initiation Oversight Committee and a Provincial Initiation Oversight Committee – providing also for the responsibilities, roles and functions of persons or institutions involved in the practice of customary initiation or in any governance capacity. These include traditional leaders, principals of initiation schools, caregivers, parents or legal or customary guardians, the South African Police Services, the National Prosecuting Authority, the National House of Traditional and Khoi-San Leaders, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the National Department of Health. Provision is also made for regulatory powers of both the relevant cabinet minister and provincial premiers, and provincial peculiarities are recognised.[613]

[611] Act 22 of 2007.

[612] Act 2 of 2021.

[613] Sections 4 to 25, Act 2 of 2021; section 37, Act 2 of 2001: this section provides for a process to be followed to accommodate any *specific provincial area or community peculiarities* by allowing any premier, after consultation and by subsequent notice in the provincial gazette, to make the provisions of the Act applicable to persons other than principals, caregivers or traditional surgeons.

The following definitions are relevant at this part of this thesis:

> *"**initiate**" means any person who attends an initiation school for the purposes of undergoing customary or cultural practices, rituals or ceremonies in accordance with the customs and traditions of the community concerned;*
>
> *"**initiation**" means any customary or cultural practices, rituals or ceremonies taking place at an initiation school in accordance with the customs and traditions of the community concerned, and may include teachings relating to ideals, values, aspirations and respect;*
>
> *"**initiation school**" means any place where initiation takes place and which is registered as an initiation school as contemplated in section 26 of this Act, irrespective of whether such place is located within or outside the area of jurisdiction of a kingship or queenship council, principal traditional council or traditional council;*

and

> *"**sacred and secret**" means traditional and religious customs and rituals which are performed and taught before, during and after initiation, and which for traditional or religious reasons are not to be made public;* [614]

This legislation provides that initiation is a voluntary customary practice and, as such, no person may be forced to attend any initiation school or undergo any initiation practice; if any person chooses to do so, then consent in the prescribed manner is required, but no person under the age of 16 may attend an initiation school.[615] This provision is addressed more pertinently subsequently; persons aged 16 to 18 are required to get written consent, personal consent, parental consent or consent from the customary or legal guardian, to undergo initiation. For any person above the age of 18, written consent is required, and, in all cases, written consents are required to be submitted to the principal of the applicable initiation school prior to any initiation procedure, and the principal is required to forward the written consents to the Provincial Initiation Coordinating Committee.[616]

[614] Section 1, Act 2 of 2021.

[615] Sections 37(3) and (4), Act 2 of 2021, make provision for the setting of a higher minimum age.

[616] Sections 28(1), (2) and (3), Act 2 of 2021.

This thesis examines the practices in initiation, only as far as these fall within the ambit of traditional medicine, in particular rites of passage. Accordingly, then, subsequent discussion focuses mainly on the role of a traditional surgeon, but the practice of female genital mutilation, which includes circumcision of females and may not necessarily fall within the paradigm of traditional medicine, is nevertheless addressed.

## 3.3 THE CHILDREN'S AMENDMENT BILL[617]

The Children's Amendment Bill[618] is now briefly considered at this part of this thesis. This Bill proposes:

- deletion of the definition of circumcision;[619] and
- substitution of the definition of genital mutilation by defining such to read:

> ***"genital mutilation"*** *means a procedure performed for non-medical reasons that has no health benefit and intentionally –*
> *(a) causes injury to genitals;*
> *(b) removes any part of the genitals; or*
> *(c) alters genital organs;*[620]

and by amending section 12 of the Children's Act[621] by substituting the following for subsection (3):

> *(3) Genital mutilation* ***[or the circumcision]*** *of* ***[female]*** *children is prohibited.* [622]

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[617] n 262 above: Bill: B 18 - 2020.

[618] n 262 above: Bill: B 18 - 2020.

[619] n 262 above: Bill: B 18 - 2020: Clause 1(f); the deleted definition in Act 38 of 2005 reads: ***'circumcision'****, in relation to a female child, means the removal of the clitoris by any means*; this phraseology is incorporated *verbatim* into the definition for circumcision in relation to females and males in the Customary Initiation Act: Act 2 of 2021, but is quantified for a male child by: …*whether partially or wholly, as part of a customary initiation process*.

[620] n 262 above: Bill: B 18 - 2020: Clause 1(m); the substituted definition would change the original definition which reads: ***'genital mutilation'****, in relation to a female child, means the partial or complete removal of any part of the genitals, and includes circumcision of female children*. Note: this latter definition is, however, included *verbatim* in the Customary Initiation Act: Act 2 of 2021.

[621] Act 38 of 2005.

[622] n 262 above: Bill: B 18 - 2020: Clause 6. Note: section 28(4) of the Customary initiation Act reads: *(4) In terms of section 12(3) of the Children's Act, genital mutilation or circumcision of female children is prohibited …*

This latter amendment is clarified as an amendment to section 12 to align the prohibition of genital mutilation with the new definition.[623] The proposed changes to the definition of genital mutilation, as quoted immediately above, would lead to different phraseology in the definitions in the Children's Act and Customary Initiation Acts.[624] While these differences may not be of any major significance, consistency should however be considered.

## 3.4 THE CUSTOMARY INITIATION ACT:[625] MALE CIRCUMCISION, TRADITIONAL SURGEONS AND THE ROLE OF A MEDICAL PRACTITIONER

The definition for male circumcision in terms of this Act encompasses … *the surgical removal of the foreskin, whether partially or totally, as part of a customary initiation process*.[626] Referencing the Children's Act,[627] the customary initiation legislation also distinguishes between male children under the age of 16, between the ages of 16 and 18, and over the age of 18, and as follows:

- attendance at any initiation school by male children under the age of 16 is prohibited,[628] nevertheless with provision existing for the minimum age to be raised,[629] circumcision being permissible, however, if the procedure is to be performed for medical[630] or religious purposes[631] with the procedure in both

[623] n 262 above: Bill: B 18 - 2020; Memorandum, Objects of Bill, para 2.6.

[624] Acts 38 of 2005 and 2 of 2021, respectively.

[625] Act 2 of 2021.

[626] Section 1, Act 2 of 2021.

[627] Sections 12(8), (9) and (10), Act 38 of 2005.

[628] Section 28(2), Customary Initiation Act, Act 2 of 2021.

[629] Sections 37 (3) and (4), Customary Initiation Act, Act 2 of 2021, which read as follows: *(3) Provincial legislation may determine a higher minimum age than the minimum age provided for in sections 2(4)* and 28(2) and *(4) In the absence of provincial legislation … , a Premier may, after consultation with the Minister, any relevant MEC, the provincial house and the PICC, by notice in the Provincial Gazette determine a higher minimum age than the minimum age provided for in section 2(4) and 28(2).* [Note section 2(4) refers to any *principal, care-giver, traditional surgeon or traditional health practitioner*].

[630] As offered previously in this thesis: n 434 above: *In a 2016 publication, referring to the global HIV infection rate in adolescents, Strode et al call for a change in the South African law to provide for HIV prevention as a valid medical reason for circumcision of boys under 16*.

[631] Section 12(8)(a) and (b), Children's Act, Act 38 of 2005; section 28(6)(a), Customary Initiation Act, Act 2 of 2021.

categories then being provided for equally in terms of the Children's and the Customary Initiation Acts;[632]

- circumcision of male children between the age of 16 and 18 is permitted if, with consent, proper counselling has been conducted and in the prescribed manner[633] – further, such circumcision may only take place as provided for in the Children's Act and as provided for in applicable regulations, and as part of an initiation process;[634] and
- circumcision of male children over the age of 18, with the consent of the initiate, is subject to the customary initiation legislation under discussion,[635] the applicable regulations[636] and any conditions as may be prescribed under the National Health Act.[637]

Circumcision of initiates aged 16 to 18 and over the age of 18, is further regulated in terms of this customary initiation legislation in that the circumcision may only be performed by a registered medical practitioner, or a registered traditional surgeon, who, if not also a registered medical practitioner, then must carry out the procedure under supervision of a registered medical practitioner.[638]

In the case of traditional surgeons, this customary initiation legislation provides further that registration is required in terms of the Act.[639] In terms of the interim arrangements

[632] Acts 38 of 2005 and 2 of 2021, respectively.

[633] In addition to consent required by the child in terms of section 12(9)(a), (b) and (c) of the Children's Act, consent in terms of section 28(3)(a) and of the Customary Initiation Act, Act 2 of 2021, is also required, by a parent or guardian for the child to undergo initiation, including consent to be circumcised where circumcision is part of the initiation practice or procedure.

[634] Section 28(6)(b), Customary Initiation Act, Act 2 of 2021, referencing section 12(9), the granting of consent in terms of section 12(9)(a) specifically, and section 12(10) of the Children's Act, Act 38 of 2005; regulations 5 and 6 of the General Regulations Regarding Children, promulgated under Government Notice R 261 in Government Gazette No 33076 on 1 April 2010.

[635] Section 28(6)(c) and (d), Customary Initiation Act, Act 2 of 2021.

[636] Regulations 5(2) of the General Regulations Regarding Children, promulgated under Government Notice R 261 in Government Gazette No 33076 on 1 April 2010.

[637] Section 43(3)(a), Act 61 of 2003: *43. (1) The Minister may prescribe- (a) minimum standards and requirements for the provision of health services in locations other than health establishments, including schools and other public places;.*

[638] Section 28(6)(c) and (d), Act 2 of 2021.

[639] Act 22 of 2007.

provided for in this legislation, however, application must also be made to the Provincial Initiation Oversight Committee for registration[640] and, if granted, the applicable letter of registration must be in the possession of the traditional surgeon at all times[641] and the procedure may only be carried out if all the required consent forms have been provided.[642]

A further stipulation for any circumcision by any traditional surgeon to be carried out in terms of any initiation process, is that it may only proceed as provided for in the legislation relating to the three age categories as set out immediately above,[643] but also that a certificate shall be obtained from a medical practitioner who:

> *… is practicing within the province where the relevant initiation school is located, indicating whether a prospective initiate is fit to participate in the initiation practices and that he or she has no medical, physical or psychological condition that may cause complications during or after initiation;*[644]

which certificate must:

> *(a) be obtained within 21 calendar days prior to the day on which an initiation school is to commence;*
> *(b) specifically indicate whether the child has any bleeding or breathing disorder, congenital abnormalities or any disability; and*
> *(c) be submitted to the principal of the particular initiation school and the relevant care-giver by the parents or legal or customary guardian of the initiate, as the case may be*.[645]

In addition, any traditional surgeon who is involved in any initiation practice or any aspect of any initiation practice must be older than 40 years, must have undergone an

[640] Section 41(3), Act 2 of 2021: The provisions of subsections (1) and (2) only apply until the provisions of the Traditional Health Practitioners Act which regulate the registration of traditional surgeons come into operation.
[641] Section 23(1)(a)(i), referencing section 41, and section 23(1)(b), Act 2 of 2021. Section 33(8)(c), Act 2021: Failure to do so is … *an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.*
[642] Sections 28 and 22(1)(c), Act 2 of 2021.
[643] Section 28(6), Act 2 of 2021.
[644] Section 22(1)(c), Act 2 of 2021.
[645] Section 22(2), Act 2 of 2021

initiation process himself and may not be involved in any initiation practice or any aspect of any initiation practice until ten years have lapsed after any initiation practice.[646]

Failure by any traditional surgeon to hold the necessary registration is a criminal offence:

> *Any traditional surgeon who is not registered, whether in accordance with the provisions of section 41 of this Act or in terms of the Traditional Health Practitioners Act, but performs duties at an initiation school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment, or to any relevant fine or imprisonment as may be provided for in terms of the Traditional Health Practitioners Act.*[647]

Failure by any traditional surgeon, as well as by other stakeholders, to arrange medical treatment for any initiate for certain conditions[648] is, equally, a criminal offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years, or to both the fine and such imprisonment.[649]

## 3.5 THE CUSTOMARY INITIATION ACT:[650] FEMALE GENITAL MUTILATION, INCLUDING FEMALE CIRCUMCISION AND VIRGINITY TESTING

The definition for female circumcision in terms of this Act encompasses … *the removal of the clitoris by any means*…[651] and the definition for genital mutilation reads: *… in relation to a female child, means the partial or complete removal of any part of the genitals, and includes circumcision of female children*.[652]

[646] Section 2(4)(a) and (b), Act 2 of 2021.

[647] Section 33(3), Act 2 of 2021, referencing Act 22 of 2007.

[648] These conditions are as provided for in section 21(5)(a), Act 2 of 2021: … *any symptom of ill-health, serious injury, infection or excessive, recurring or continuous bleeding, whether as a result of circumcision or not* … and similarly provided for in section 23(3)(a), where the onus to inform the parents or legal or customary guardian of the initiate lies with the care-givers in the first instance and with the traditional surgeon in the latter instance.

[649] Section 33(7), Act 2 of 2021.

[650] Act 2 of 2021.

[651] Section 1, Act 2 of 2021.

[652] Section 1, Act 2 of 2021.

Referencing the Children's Act, which prohibits genital mutilation and circumcision of female children,[653] the legislation under discussion at this juncture regarding initiation provides that any consent contemplated by the relevant section of this legislation *may not include consent to such mutilation or circumcision and may not form part of any initiation practice*.[654]

Referencing the Children's Act, which prohibits virginity testing of children under the age of 16,[655] the consent contemplated in this initiation legislation may not include consent to such virginity testing in the case of children under the age of 16,[656] whereas for children 16 to 18, the provisions of the Children's Act are applicable,[657] including relevant regulations.[658] For persons over the age of 18, virginity testing may be performed if written consent has been given and if the virginity testing is part of an initiation process and *no child or any other person may be forced or coerced to undergo virginity testing as part of an initiation process*.[659]

The question of female genital mutilation, including female circumcision and virginity testing, as cultural practices in the Basotho baTlokwa people, is expounded later in the discussion about cultural defences in law, but the legal position is as set out immediately above.

[653] Section 12(3), Act 38 of 2005.

[654] Section 28, Act 2 of 2021.

[655] Section 12(4), Act 38 of 2005.

[656] Section 28(4), Act 2 of 2021.

[657] Sections 12(5), (6) and (7), Act 38 of 2005:

*(5) Virginity testing of children older than 16 may only be performed- (a) if the child has given consent to testing in the prescribed manner; (b) after proper counselling of the child; and (c) in the manner prescribed.*

*(6) The results of a virginity test may not be disclosed without the consent of the child.*

*(7) The body of a child who has undergone virginity testing may not be marked.*

[658] Regulations 3 and 4 of the General Regulations Regarding Children, promulgated under Government Notice R 261 in Government Gazette No 33076 on 1 April 2010.

[659] Sections 28(5)(c) and (d), Act 2 of 2021.

## 3.6 FEMALE GENITAL MUTILATION: THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT[660]

This Act proscribes unfair discrimination against any person on the ground of gender, including discrimination against any person having been subject to female genital mutilation.[661]

## 3.7 INTERNATIONAL AND REGIONAL CONVENTIONS AND CHARTERS

In addition to international and regional human rights legal instruments to which South Africa is a party and which have seen elucidation previously, Kitui[662] indicates that the Convention on the Elimination of all forms of Discrimination against Women[663] obligates state parties to ensure that all cultural practices that violate the rights of women are eliminated.[664] South Africa ratified this convention on 15 December 1995, without entering any reservations.[665]

Regionally, according to this author,[666] the Protocol to the African Charter on the Rights and Welfare of the Child on the Rights of Women in Africa[667] imposes a duty on state parties to institute measures that prohibit all forms of harmful practices.[668] South Africa ratified this convention on 7 January 2000.[669]

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[660] Act 4 of 2000.

[661] Section 8(b), Act 4 of 2000.

[662] n 369 above, n.p.

[663] United Nations *Convention on the Elimination of all forms of Discrimination against Women* (1979) New York, accessed at https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women on 17 March 2022.

[664] Article 5(a).

[665] http://www.dirco.gov.za/foreign/Multilateral/inter/treaties/discrim.htm,accessed 17 March 2022.

[666] Kitui (n 369 above), n.p.

[667] United Nations *Charter on the Rights and Welfare of the Child on the Rights of Women in Africa* (1990) New York, accessed at https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf on 17 March 2022.

[668] Article 21.

[669] https://www.acerwc.africa/ratifications-table/, accessed on 17 March 2022.

## 3.8 CONCLUSION

Available statistics have been considered, which reflect not only fatalities in cases of male circumcisions, but also penile amputations, possible transmission of disease and other complications previously.

Female genital mutilation, including female circumcision, is posited as not being practised generally in southern Africa,[670] but Kitui[671] and Nyembezi[672] have reported on such practices in Venda and among the Basotho baTlokwa peoples, respectively, which are believed to be part of initiation rituals although they do not resort within the traditional medicine paradigm. A media release issued by the Department of Cooperative Governance and Traditional Affairs[673] indicates that the first National Initiation Oversight Committee meeting was convened by the responsible minister and that both a Chairperson and Deputy-Chairperson were elected in terms of the applicable legislation on 7 March 2022. The responsible minister is reported to have:

> *… wished the Committee well, urging them to work in ensuring zero deaths and injuries in initiation schools as initiations are a noble African custom that represents a rite of passage into adulthood.* [674]

Accomplishing the purpose of this legislation to regulate customary initiation practices will, no doubt, be the subject of publicity, debate and research in the future – particularly should this regulatory mechanism fail to prevent further fatalities or initiation-related injuries, but the hope is expressed that the responsible authorities will now ensure proper safeguarding of persons undergoing any initiation practices – the statistics and debate surrounding the number of deaths, penile amputations and disfigurement resulting from male circumcision, in particular, as set out above, require no further elucidation as the nature of the ineffable deleterious effect on the health of initiates.

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[670] Scorgie (n 343 above) 64 - 65.

[671] n 369 above, n.p.

[672] n 370 above, n.p.

[673] https://www.cogta.gov.za/index.php/2022/03/07/national-initiation-oversight-committee-elects-chairperson-and- deputy-chairperson/; issued 7 March 2022, accessed 18 March 2022.

[674] Sections 4(1)(a), (b), (c) and 5(1)(a), (b), Act 2 of 2021.

# CHAPTER 4
# THE APPLICABILITY OF ANY CULTURAL DEFENCE IN SOUTH AFRICAN LAW

## 4.1 INTRODUCTION

The essential aim of the research question of this thesis, as set out in the preface above, is to draw conclusions and make recommendations about any future legal regulation of traditional medicine with specific regard to legal scopes of practice. It is not inconceivable that in any future debate about proposed regulation of this healthcare profession that the concept of a cultural defence may be raised to counter any proposed future regulation of the profession.

In what may be regarded as a seminal *oeuvre* relating to the interaction of law and culture, Renteln examines the importance of culture within the parameters of justice and conflicts in various court proceedings and argues for maximum compromise or understanding of cultural matters when examining legal questions.[675]

## 4.2 CULTURAL PRACTICES AND TRADITIONS

Renteln avers that culture is germinal to the individual identity and affects, and motivates and inspires rationale, conduct or behaviour in any situation in the affairs of any individual. A distinction is also drawn by this author between, as termed by her, a *cultural practice* and a *tradition*, highlighting the difficulty of the validity or reality of any *tradition* as being integral to the person or group and not necessarily meeting the requirements for acceptance as a *cultural practice*.

In any debate to determine the validity of the distinction, it would be important to ascertain whether the *tradition* was of any influence in any particular situation and it would be incumbent on any court of law to consult various stakeholders to ascertain the importance of any *tradition* to gain an understanding of the relevance of the factors influencing the particular rationale, conduct or behaviour in any state of affairs, and whether it may meet any requirements for acceptance as a *cultural practice*.[676]

[675] AD Renteln *The cultural defense* (2004).

[676] n 675 above, 10 - 11.

The significance of the extent of influence of any *cultural practice* on any individual is, according to Renteln, the purview of anthropologists, social psychologists and other academic disciplines and may be termed *enculturation* or, as expounded, how the manner of the raising of children affects both *cognition and behaviour*.[677] The question of the critique within anthropology, notably the question of the redress of colonial perspectives and the ostensible insouciance on the part of African anthropologists resisting engagement in considering the interaction between humans, ancestors and non-human agents was alluded to in the preface of this thesis.

It may, in the view of the author of this thesis, become increasingly relevant in future South African legal proceedings – particularly where questions about any *cultural practice* are raised in determining legal questions.[678]

## 4.3 LEGAL PLURALISM

In discussing the implications of *enculturation*, Renteln argues that the meeting of any *cultural practice* with any legal system could result in *legal pluralism* (which should be distinguished from *cultural pluralism*) and believes that persons should have the right to follow any *cultural tradition*[679] without any governmental interference and that this *is a fundamental right that is guaranteed under international law and finds its strongest formulation in Article 27 of the International Covenant on Political and Civil Rights.*[680]

Renteln also states that there is a presumed superiority of any dominant legal system with authorities striving for uniformity of the system, but that there is much debate in political theory about the relationship between equality and difference and that the common thread in all cases where *cultural practice* is a feature, is where litigants strive for equal treatment under the law – but by being treated differently.[681]

[677] n 675 above, 12.

[678] Nyamnjoh (n 5 above) 63.

[679] Presumably Renteln means *cultural practice* given her differentiation between the two concepts: n 675 above, 10 - 11.

[680] n 675 above, 14 - 15.

[681] n 675 above, 16 & 18.

Renteln considers various possible litigation conflicts: homicide, children, drugs, animals, marriage, attire and the dead,[682] of which, for the South African context within the framework of traditional medicine, drugs and animals may be the most relevant for consideration in terms of a *cultural practice*.

## 4.4 TREATMENT ANIMALS IN THE CONTEXT OF A CULTURAL DEFENCE

The ritual slaughtering of animals in the practice of traditional medicine, particularly within the initiation process of becoming a healer, but also in celebratory and other contexts, was alluded to previously.[683] Questions of possible abuse or cruelty will later be examined against extant legislation, the Animals Protection Act.[684]

## 4.5 SOUTH AFRICAN CONSTITUTIONAL PRECEPTS

In the context of any cultural defence, regard should be had to the following constitutional provisions, as may be appropriate (emphasis added):

- *Equality.-*

*(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. …*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief,* ***culture****, language and birth. ...*[685]

- *Freedom of religion, belief and opinion.-*

*(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*

…[686]

[682] n 675 above, 23 - 159.

[683] See above: Section B, in particular Chapter 5.

[684] Act 71 of 1962.

[685] Section 9, the Constitution.

[686] Section 15, the Constitution.

- *Language and culture.-*

*Everyone has the right to use the language and to participate in the **cultural life** of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.*[687]

- ***Cultural**, religious and linguistic communities.-*

*(1) Persons belonging to a **cultural**, religious or linguistic community may not be denied the right, with other members of that community—*

*(a) to **enjoy their culture**, practise their religion and use their language; and*

*(b) to form, join and maintain **cultural**, religious and linguistic associations and other organs of civil society.*

*(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.*[688]

- *Interpretation of Bill of Rights.-*

*(1) When interpreting the Bill of Rights, a court, tribunal or forum-*

*(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*

*(b) must consider international law; and may consider foreign law.*

*(2) When interpreting any legislation, and when developing the common law or **customary law**, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*

*(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, **customary law or legislation**, to the extent that they are consistent with the Bill.*[689]

- *Establishment and governing principles.-*

*(1) The following state institutions strengthen constitutional democracy in the Republic:*

*…*

*c) The Commission for the Promotion and Protection of the Rights of **Cultural**, Religious and Linguistic Communities.*

*…*[690]

- *Recognition.-*

*(1) The institution, status and role of traditional leadership, according to **customary law**, are recognised, subject to the Constitution.*

[687] Section 30, the Constitution.

[688] Section 31, the Constitution.

[689] Section 39, the Constitution.

[690] Section 181, the Constitution.

> *(2) A traditional authority that observes a system of **customary law** may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.*
> *(3) The courts must apply **customary law when that law is applicable**, subject to the Constitution and any legislation that specifically deals with **customary law**.*[691]
>
> - *Role of traditional leaders.-*
>
> *(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.*
> *(2) To deal with matters relating to traditional leadership, the role of traditional leaders, **customary law** and the customs of communities observing a system of **customary law**-*
> *(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and*
> *(b) national legislation may establish a council of traditional leaders.*[692]
>
> - ***Customary international law**.-*
>
> ***Customary international law** is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*[693]

As briefly elucidated previously, no right accorded in terms of the Constitution is absolute. Rights are limited in and of themselves, and by application of the specific constitutional clause dealing with the limitation of rights;[694] the right to culture, however formulated, is therefore also limited.

## 4.6 THE DEBATE FOR A CULTURAL PRACTICE AS A DEFENCE

Carstens indicates that even though the question of a cultural defence has seen substantive consideration in the United States, the United Kingdom and in European countries, he posits that:

> … a cultural defence should have particular significance in a hybrid system such as South Africa where the new constitution (as a value-driven legal dispensation in which human rights are entrenched), is often in conflict with principles of customary law.[695]

[691] Section 211, the Constitution.
[692] Section 212, the Constitution.
[693] Section 232, the Constitution.
[694] Section 36, the Constitution.
[695] n 191 above, 1 - 2.

Referring to the duty on the judiciary to develop the common law according to constitutional values, Carstens regards the Constitution as a motivating force for official acknowledgment that such a defence is necessary in South Africa, albeit in the context of the limitation clause.[696]

Matthee, in a published thesis,[697] examines the question of a cultural defence in the context of South African criminal law. While not addressing traditional medicine as such, he offers the view that the context in which conflict arises between African customary law and the South African common law, is within the paradigm of the indigenous belief in witchcraft, which, as indicated previously, is not the subject of this thesis.

Matthee posits that the most common scenarios in which a cultural defence might be raised are with regard to criminal offences are: the killing of witches; human *umuthi* and murders to obtain human *umuthi*; the phenomenon of necklacing (placing a rubber tyre soaked in petrol around a person's neck or chest, setting this alight, leading to the death of the person); the custom of *ukuthwala* (abduction of a young girl in marriage negotiations, addressed briefly below); and the belief in the *tokoloshe* (an evil spirit that can cause harm and malevolence).[698] This published thesis is recommended for further perusal by interested parties given its substantive and comprehensive exposition of the topic.

Grobler analyses the question of a cultural defence in South African criminal law expansively and systematically considering the constitutional right to enjoy own culture, albeit also from a belief in witchcraft whereas this thesis considers traditional medicine. It is succinctly but eloquently put by Grobler: *The raison d'être of the cultural defence is, of course, culture …*[699]

[696] n 191 above, 21.

[697] Matthee, JL, 'One person's culture is another person's crime: a cultural defence in South African Law?' LLD, North-West University, 2014.

[698] n 697 above, 14, 17, 108.

[699] n 78 above, 4.

This published thesis is also recommended for further perusal by interested parties given its substantive and comprehensive exposition of the topic, and Grobler makes the following cogent and salient points:

- social cohesion in South Africa is constitutionally promoted by guaranteeing the rights of freedom of religion, belief and opinion,[700] participation in the cultural life of choice,[701] and enjoyment of cultural and religious practices,[702] but only as far as these rights are not inconsistent with other fundamental constitutional rights;[703]
- *the right to culture imposes certain obligations or duties on the state* ... and the state may not compel assimilation by another culture, which is also provided for in the constitutional provision that customary law must be applied when that law is applicable, subject to the Constitution, but, together with any legislation that also deals with especially customary law;[704]
- whereas customary law has been recognised in other areas of South African law, such as family law, the criminal justice system is still regarded as occidental in its approach;[705]
- a lucid example would be the Witchcraft Suppression Act,[706] a legislative precept that encroaches not only on the beliefs and practices of a particular group of persons in South Africa, but potentially on the rights of other religions such as persons who identify themselves as pagans;[707] the adoption of the 2007 Mpumalanga Witchcraft Suppression Bill, with similar provisions to the 1957 Suppression of Witchcraft Act, has been significantly criticised by both the Traditional Healers Organisation and the South African Pagan Council;[708]

[700] Section 15, the Constitution.

[701] Section 30, the Constitution.

[702] Section 31, the Constitution.

[703] n 78 above, 6.

[704] n 78 above, 12 - 13.

[705] n 78 above, 13.

[706] Act 3 of 1957, as amended by the Witchcraft Suppression Amendment Act, 50 of 1970 and the Abolition of Corporal Punishment Act, 33 of 1997. The operation of this Act was also made uniform across the former homelands by the Justice Laws Rationalisation Act, 18 of 1996.

[707] n 78 above, 21.

[708] n 78 above, 36.

- consistent application of legislation by the law enforcement authorities and the courts would appear to be problematic, particularly when applied to the witchcraft legislation;[709]
- the cultural defence should be formalised, but this however pivots on the fact that culture influences and changes over time and therefore *culture needs to be defined in order to apply the cultural defence properly*;[710]
- *culture … involves associative practices and not individual beliefs*[711] and although religion and culture are intertwined in African culture, underpinned by *ubuntu* as a *Weltanschauung*, also discussed previously in this thesis, African traditional religion flows from and is integral to African culture[712] and, in the view of the author of this thesis, the same may also then be said for traditional medicine;
- it is imperative in any matter before law enforcement authorities or the judiciary that any cultural context be set out or elucidated fully for the purposes of a defence;[713]
- in the cases of *Zanhibe*[714] and *Sikunyana,*[715] consent by a victim is not a defence in traditional medicine given that it is not recognised in modern medicine as either normal or standard practice, but this precedent may be revisited in light of the current regulatory framework given that these cases were decided in 1954 and 1961, respectively;[716] and
- the Constitution places a duty on the judiciary to develop a distinct and discrete cultural defence in order to guarantee that minority culture rights are protected by taking into account all cultural factors,[717] and any cultural defence must aid *the court in understanding the state of mind as it is influenced by culture. The*

[709] n 78 above, 21.

[710] n 78 above, 40.

[711] n 78 above, 47.

[712] n 78 above, 63.

[713] n 78 above, 76.

[714] As cited by Grobler (n 78 above) 81: *R v Zanhibe* 1954 3 SA 597 (T).

[715] As cited by Grobler (n 78 above) 81: *S v Sikunyana and Others* 1961 (3) ECD 549.

[716] n 78 above, 82.

[717] n 78 above, 83 - 84.

*cultural defence will, therefore, if formalised, help the court to apply the subjective test of intention properly*.[718]

As discussed previously, Carstens, in examining the question of the role of cultural factors against possible defences in criminal law, avers that a distinction should be made between witchcraft murders and *umuthi* murders, or the killing of innocent victims in order to obtain certain body parts in traditional medicine, and that South African criminal law makes no distinction in either case – with perpetrators being prosecuted for the common-law crime of murder. Furthermore, according to this author, the procedure which is followed in any *umuthi* murder, where a body part or a body with missing parts is found, should always be the performance of a medico-legal autopsy in terms of the Inquests Act,[719] the concept of a death, other than a natural death, being defined in the Regulations Regarding the Rendering of Forensic Pathology Services,[720] promulgated in terms of the National Health Act.[721] [722]

## 4.7 CAVEATS AGAINST CULTURAL PRACTICES AS DEFENCES IN LAW

Both Renteln and Grobler offer opinions on why any cultural defence should be approached with caution.

These include: deterrence as a crime method control mechanism may be undermined given that the acceptance of a cultural defence could lead to continuation of the cultural practice with members of the minority community continuing the practice with impunity;[723] there is a danger that the acceptance of any cultural defence may lead to the weakening of a justice system in general;[724] a cultural defence could possibly undermine the rights of vulnerable groups such as women and children;[725] the acceptance of any cultural defence might not only be seen as condoning any particular

[718] n 78 above, 143.

[719] Act 58 of 1959.

[720] Government Notice No R 341 of 15 April 2005, promulgated in Government Gazette No 27464 on 15 April 2005.

[721] Act 101 of 1965.

[722] n 191 above, 1.

[723] Renteln (n 675 above) 192.

[724] Renteln (n 675 above) 192.

[725] Renteln (n 675 above) 192.

cultural practice, but could even encourage it;[726] the acceptance of a cultural defence violates the principle of equal protection and is mooted *as an illegitimate form of affirmative action or unequal preferential treatment insofar as any departure from the single standard is unacceptable*;[727] [728] the acceptance of any cultural defence may reinforce community stereotypes contrary to the aim of national cohesion in any country;[729] the acceptance of any cultural defence may lead to blurring of the lines between legitimate and illegitimate uses of the defence itself;[730] other existing defences within law could rather be used depending on the particular circumstances of the case;[731] in terms of procedure, culture should rather be used and appropriately considered during sentencing as a mitigating circumstance, rather than a defence;[732] social practices do not equate cultural practice and cultural practices may not be followed by all members of a particular group;[733] and no system of law can be seen as being neutral, since it would already embody the values of the dominant group.[734] Vincent issues the caveat that political strategies for combating social ills, such as poverty and other forms of social marginalisation, should not be seen in the context of culture.[735]

Notwithstanding the debate and the difficulty in defining culture, the validity of a cultural practice in the context of a cultural defence may not be discounted and the views offered by both Carstens and Grobler, as set out previously, calling for the formalisation of a cultural defence should be offered a formal judicial appraisal – *the inherent power* [of the judiciary conferred by the Constitution] *to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*[736] should be exercised – this, notwithstanding any doctrine of

[726] Renteln (n 675 above) 193.

[727] Renteln (n 675 above) 193.

[728] Grobler (n 78 above) 149.

[729] Renteln (n 675 above) 193.

[730] Renteln (n 675 above) 193.

[731] Renteln (n 675 above) 194.

[732] Renteln (n 675 above) 194.

[733] Grobler (n 78 above) 144, 157.

[734] Grobler (n 78 above) 158.

[735] L Vincent 'Cutting tradition: The political regulation of traditional circumcision rights in South Africa's liberal democratic order' 2008 34(1) *Journal of Southern African Studies* 91.

[736] Section 173, the Constitution.

entanglement,[737] by extension to all cultural practices and not confined to religious practices.

## 4.8 CULTURAL DEFENCE OF FEMALE GENITAL CIRCUMCISION, *UKUTHWALA* AND VIRGINITY TESTING RAISED AS CULTURAL PRACTICES WITHIN THE BASOTHO BATLOKWA PEOPLE[738]

Nyembezi report that the Basotho baTlokwa practise female genital mutilation as a traditional rite of passage, and that these people hold that African traditions include female genital circumcision, *ukuthwala* – abduction of a young girl in marriage negotiations – and virginity testing, and are not prohibited according to African beliefs, and believe that human rights violations do not exist from a customary law perspective:

> *It's a human rights violation in the eyes of somebody else not in the eyes of the people. But to force those people who have not been brought to a standard where they can graduate and march out of the custom and do something else, to those people it is unfair and unjust and it's a waste of time to try and say they must not do these customs because they will never get it to be stopped.*[739]

Vincent indicates that legislation regulating cultural practices such as traditional circumcision and female virginity testing appears, in many ways, to undermine the idea of a right as a claim, trumping competing considerations,[740] stating further that:

> *Cultural belief systems which appear to verge dangerously close to myth, religion and superstition have long troubled the project of modernity, which bases itself upon rationality, progress and revelation of the terminal, immutable qualities of humanity.*[741]

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[737] Defined as the: *reluctance of the courts to become involved in doctrinal disputes of a religious character*: *Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W) para 39.

[738] https://en.wikipedia.org/wiki/Tl%C3%B4kwa_tribe#:~:text=The%20term%20Batl%C3%B4kwa%20(also%20Batlokoa,themselves%20as%20of%20Tl%C3%B4kwa%20descent: *The term Batlôkwa (also Batlokoa, or Badogwa) refers to several Kgatla communities that reside in Botswana, Lesotho and South Africa. It comprises the followers of Tlôkwa kings, and the members of clans identified as Tlôkwa, or individuals who identify themselves as of Tlôkwa descent*, accessed 5 March 2022.

[739] n 370 above, n.p.

[740] n 735 above, 91.

[741] As cited by Vincent (n 735 above) 91*: D Harvey The condition of postmodernity* (1971) 112.

and, in expressing a somewhat abstruse sentiment given the clear danger to the public that the lack of regulation would afford (regulation itself not having militated against elimination of harm especially, in the view of the author of this thesis), holds that:

> *Solutions to the controversy, which present themselves as efforts at compromise between tradition and modernity emerge in reality as mechanisms for the extension of centralised state power expressed through the sanctioned medical bureaucracy into arenas where it was previously absent or contested by alternative authority structures.*[742]

## 4.9 CONCLUSION

Renteln offers the view that it should not be assumed that persons who move from one culture to another should be expected to conform to the new legal system in all respects, and that should cultural minorities be afforded cultural practice protections, then they would see such as vested interests, lending then support to the state rather than opposition to it. This author calls for the adoption of inclusive policies to allow individuals to follow cultural practices as a more prudent strategy.[743] As indicated previously, South African history, both in the colonial and apartheid eras, requires no explication as to the denigration of fundamental human rights for the vast majority of South Africans, and the sequelae continue to resonate into the democratic era almost three decades later. Renteln's views may require further consideration given the establishment of immigrant communities in South Africa, such as those from Ethiopia or Somalia, as arbitrary examples.

Grobler, acknowledging Renteln,[744] Bennett,[745] Ramirez[746] and Van Broeck,[747] lists a series of questions to guide the judiciary as to whether the cultural defence would be acceptable, or not.

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[742] n 735 above, 91.

[743] n 675 above, 219

[744] n 675 above, 207.

[745] As cited by Grobler (n 78 above) 164: Bennett 'The cultural defence and the custom of Thwala in South African law' (2010) *University of Botswana Law Journal* 14 - 19.

[746] As cited by Grobler (n 78 above) 164: Ramirez 'The virtues of the cultural defense' (2009) *Judicatare* 209.

[747] As cited by Grobler (n 78 above) 164: Van Broeck 'Cultural defence and culturally motivated crimes (cultural offence)' (2001) *European Journal of Crime, Criminal Law and Criminal Justice* 23.

These questions are:

1. *Is the defendant a member of a specific cultural or ethnic group?*
2. *Does the act committed by the defendant form part of, and meet the requirements of, a tradition/practice that is required, approved, or obligatory in the above-mentioned culture?*
3. *Whilst the subjective motive of the defendant for committing the crime in question based on the above-mentioned tradition?*
4. *Does the above-mentioned tradition differ from the dominant culture? So creating a clash between the majority and minority culture?*
5. *Did the defendant know, or have a good reason to know, the relevant law?*[748]

Matthee offers a succinct synopsis of the various scenarios mentioned above where indigenous beliefs and customs may result in the infringement of various fundamental constitutional rights and is recommended for perusal by any interested party.[749]

Judgement in the *Mogaramedi* case, and quoted previously, delivered by acting judge Dosio, bears repeating at this point within the context of the use of human body parts in traditional medicine:

> *[35] Bearing in mind the strong cultural belief surrounding traditional healers and the fact that muti killings are unlikely to stop in the future, it is the task of this court to deter the killing of innocent people for such purposes. The community must be protected. The aspect of general deterrence is important to restore the trust the community have in the justice system. To regard such killings as substantial and compelling circumstances would send out the wrong message to the community. The prevalence of such cases in South Africa is high* [xviii] [750]*. The continuation of such killings will create more instability in the communities where such practices arrive. A strong message must be sent out that such conduct will not be condoned in a civilised society. Where such killings arise they must be punished with the full strength of the law.*[751]

Carstens indicates unequivocally that *a denial of the cultural defence erodes the notion of justice in the African cultural context*, warning also that the application of any such

[748] n 78 above, 164.

[749] n 697 above, 276.

[750] As cited by D Dosio AJ: DN Swart 'Human trafficking and the exploitation of women and children in a southern and South African context' (2012) 13(1) *Child Abuse Research in South Africa* 62 - 73.

[751] n 211 above, para 35: 2015 ZAGPPHC; 2015 1SACR 427 (GP).

defence, required to be free from preconception, prejudices and be heard with objectivity, might certainly be a challenge going forward.[752]

[752] n 191 above, 22.

# CHAPTER 5
# THE RIGHTS OF ANIMALS IN SOUTH AFRICAN LAW

## 5.1 INTRODUCTION

The concept of the ritual or sacrificial slaughtering of animals was introduced nominally in this thesis previously, and the nature and extent of sacrifice within the construct of traditional medicine in South Africa remains somewhat abstruse. The distinction between sacrifice for purposes of religion or traditional medicine may be blurred, but animal sacrifice is said to be inherent to *ukuthwasa*, the process undertaken by a neophyte to become an *isangoma*, described by both Krige[753] and Thornton,[754] in particular in *isiko lentambo* or the neckband ceremony, and in *ukugodusa* or the taking home ceremony, which *conclude* the process of *ukuthwasa*.[755]

Ozioma and Chinwe aver that animals may be slaughtered or buried alive in order to appease the ancestors[756] or that bathing in animal blood might take place for spiritual cleansing,[757] and this implies that at the very least venesection, if not sacrifice, then occurs.

## 5.2 SOUTH AFRICAN LEGISLATION REGARDING TREATMENT OF ANIMALS

South African legislation governing the treatment of animals is the Animals Protection Act[758] and the Performing Animals Protection Act.[759]

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[753] n 96 above, 306.

[754] n 2 above, 86 - 87.

[755] Bührmann (n 143 above) 74.

[756] n 322 above, n.p.

[757] n 322 above, n.p.

[758] Act 71 of 1962, as amended by the: General Law Amendment Act, 102 of 1972; Animals Protection Amendment Act, 7 of 1972; Animals Protection Amendment Act, 54 of 1983; Animals Protection Amendment Act, 20 of 1985; Animals Protection Second Amendment Act, 84 of 1985; Protection of Animals Amendment Act, 7 of 1991; and the Animal Matters Amendment Act, 42 of 1993.

[759] Act 24 of 1935, as amended by the: General Law Amendment Act, 62 of 1955; Animals Protection Amendment Act, 7 of 1972; Animals Protection Amendment Act, 54 of 1983; Animals Protection Amendment Act, 20 of 1985; Protection of Animals Amendment Act, 7 of 1991; and the Performing Animals Protection Act, 4 of 2016, which granted licensing to the National Department of Agriculture, Forestry and Fisheries, removing the licensing from the purview of the Department of Justice.

A private member's Animals Protection Amendment Bill, which has, as its main objective the intention to prohibit the sale and manufacturing of cosmetics tested on animals and to criminalise such, among other things, appears not to have seen further consideration.[760]

Another private member's bill, the Draft Animals Protection Amendment Bill would appear to have a similar purpose.[761] The memorandum to this amendment bill includes the introductory remark[762] that two court cases, *Smit* and *Lemthongathai*, as set out below, were *mentioned with approval by the Constitutional Court in the matter of the National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*.[763]

The ritual slaughtering of a bull according to a revival of a Zulu festival in celebration of the universe's rites of passage, known as *umkhosi ukweshwama* in the *Smit* case,[764] was whether the slaughter was in a religious or cultural context. It is submitted that it is also of relevance in the traditional health paradigm, if only for the caveat by Rautenbach, citing Cameron:[765]

> *The Animals Protection Act 71 of 1962, for one, is aimed at the protection of the 'finer feelings and sensibilities of their fellow human beings'[766] which will be harmed by animal cruelty and, surely, this gives one the right to approach a court if one's feelings and sensibilities are affronted by a ritual slaughtering. This is evident from a more recent decision, National Council of Societies for the Prevention of Cruelty to Animals v Openshaw,[767] where Cameron J expressed the view, albeit in a minority judgement, that the National Council had a 'real and continuing' interest in the law preventing cruelty to animals and thus had the right to apply for an interdict to prevent the feeding of live prey to tigers. Most notably, he went further than the previous few – that the aim*

[760] As introduced in the National Assembly (proposed section 76); explanatory summary of Bill published in Government Gazette No 41289 of 30 November 2017.

[761] Explanatory summary published in accordance with Rule 276(1)(c) of the Rules of the National Assembly, released on 11 September 2020.

[762] n 761 above, 8.

[763] 2016 ZACC 46.

[764] *Stephanus Smit v King Goodwill Zwelithini Kabhekuzulu* [2009] ZAKZPHC 75.

[765] n 394 above, 87 - 88.

[766] n 395 above: as cited: Footnote 146: *R v Moato* 1947 (1) SA 490 (O) 490 and approved in *S v Edmunds* 1968 (2) PH H398 (N).

[767] n 396 above: as cited: Footnote 147: 2008 (5) SA 339 (SCA) para 36.

> *of the Animals Protection Act 71 of 1962 was to prevent the finer feelings and sensibilities of fellow humans witnessing the abuse of animals – by declaring that, although the act does not confer rights on the animals it protects, it recognises that 'animals are sentient beings that are capable of suffering and experiencing pain'.*[768] [769]

In the *Lemthongathai* case, Navsa ADP indicated:

> *… the duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general.* [770]

## 5.3 CONCLUSION

While animal sentience may not formally be recognised in law or policy in South Africa, cruelty towards domestic animals, as well as wild animals, birds and reptiles in captivity, or under the control of human beings, is prohibited. The hope is expressed that in future animal sentience will be recognised in law.

[768] n 397 above: as cited: Footnote 148: para 38.

[769] n 398 above: proposed United Kingdom legislation: The Animal Welfare (Sentience) Bill: https://bills.parliament.uk/publications/41515/documents/260, accessed on 9 August 2021.

[770] 2014 ZASCA 131.

# CHAPTER 6
# SOUTH AFRICAN TRADITIONAL MEDICINE AND UNIVERSAL HEALTH COVERAGE FOR ALL AS ENVISAGED UNDER THE NATIONAL HEALTH INSURANCE BILL[771]

## 6.1 INTRODUCTION

Flowing from the limited constitutional right to healthcare, food, water and social security,[772] the proposed national health universal access to healthcare services for the general population has as its aim a right to access comprehensive healthcare services free of charge at the point of care at accredited health facilities, such as clinics, hospitals and private health practitioners.[773] The Bill itself envisages establishing a funding mechanism for this system, with concomitant powers, functions and governance structures and, among other things, the purchasing of healthcare services on behalf of the recipients of the system.[774]

## 6.2 LEGISLATIVE PROCESS FOLLOWED

A parliamentary media release issued on behalf of the Chairperson of the Portfolio Committee on Health in February 2022 sets out the status of the required legislative progress:

- public hearings have been concluded;
- virtual oral hearings provided an opportunity for stakeholders to make further input on written submissions or to submit written presentations;
- participants included various organisations – professional or from civil society, faith-based or lobbyist – together with researchers and academics and public health entities, whether traditional healers, healthcare funders, medical aid scheme administrators, healthcare administrators or hospital groups, and other

[771] B 11 - 2019, explanatory summary of Bill and prior notice of its introduction published in the Government Gazette no 42598 on 26 July 2019.

[772] Section 27, the Constitution; limitation as expressed in section 27(2): (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

[773] N Kirby 'National Health Insurance (NHI) Bill' https://www.werksmans.com/legal-updates-and-opinions/national-health-insurance-bill/ (2019) 1.

[774] n 771 above, Objects of the Bill.

groupings, such as statutory bodies, government departments, sector experts, political organisations and labour unions;

- public hearings took place across all provinces in 33 district municipalities, with 11 564 attendees and 961 submissions.

It indicated that a common theme throughout the consultation process was a recognition that healthcare reform was necessary to bring about equitable access to these services for all South Africans, with the next step in the process being consideration by the sponsor of this Bill, the National Department of Health, to respond to all inputs – whereafter the matter will be further considered by the parliamentary portfolio committee.[775]

The right of universal access to comprehensive healthcare services free of charge at the point of care at accredited health facilities, such as clinics, hospitals and private health practitioners, is understandably regarded as a necessity by many persons. As indicated previously, South African history in both the colonial and apartheid eras, clearly denigrated fundamental human rights for the vast majority of South Africans. The sequelae continue to resonate into the democratic era almost three decades later, and in the sphere of health.

The exact scope and range of services that will be available under the proposed system remain undefined. Statutory health councils were, however, led to understand that it would be for the benefits committee of the National Department of Health to recommend to the Minister of Health at some future stage which services should be made available to all South Africans under the proposed system.[776] Notwithstanding, this Bill makes provision for the realisation of objectives for all statutory health councils (emphasis added):

[775] https://www.parliament.gov.za/press-releases/media-statement-committee-health-concludes-public-hearings-national-health-insurance-bill, issued 24 February 2022 and accessed 24 March 2022.

[776] Mullinder (n 541 above); views expressed by Dr Aquina Thulare, a medical practitioner, holding the position of Technical Specialist on Health Economics for the National Health Insurance (NHI) in the Department of Health, with responsibilities in the areas of policy and legislative development as well as the development of the implementation plan for the NHI at the time of briefing.

*(h) the initiation of legislative reforms in order to enable the introduction of National Health Insurance, including changes to the—*

*(i) Medicines and Related Substances Act, 1965 (Act No. 101 of 1965);*

*(ii) Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973);*

*(iii) Health Professions Act, 1974 (Act No. 56 of 1974);*

*(iv) Dental Technicians Act, 1979 (Act No. 19 of 1979);*

*(v) Allied Health Professions Act, 1982 (Act No. 63 of 1982);*

*(vi) Medical Schemes Act, 1998 (Act No. 131 of 1998);*

*(vii) Mental Health Care Act, 2002 (Act No. 17 of 2002);*

*(viii) National Health Act;*

*(ix) Nursing Act, 2005 (Act No. 33 of 2005);*

***(x) Traditional Health Practitioners Act, 2007 (Act No. 22 of 2007);** and*

*(xi) other relevant Acts.*

## 6.3 CONCLUSION

No guarantee exists at this stage that the services of all registered healthcare practitioners in the traditional medicine paradigm or otherwise will be made available to all South Africans pursuant to the introduction of the right of universal access to comprehensive healthcare services free of charge at the point of care at accredited health facilities.

# CHAPTER 7
# BIODIVERSITY, SAFETY OF TRADITIONAL MEDICINES AND THE PHARMACOPOEIA OR MATERIA MEDICA

## 7.1 INTRODUCTION

The traditional medicine armamentarium was considered previously in the treatment of disease as an empirical source of healing power, whether for somatic conditions, in a ritual or symbolic context, or from other perspectives, such as possibly in an apotropaic context,[777] or according to the doctrine of signatures,[778] or where traditional treatments accord with modern pharmacological principles.[779] Traditional medicines require some contextualisation in terms of environmental and safety issues, as set out subsequently, taking into account not only the applicable legislation but also policy formulated by the South African Department of Environmental Affairs.[780]

## 7.2 NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT[781]

The objectives of this legislative precept include providing for using indigenous resources in a sustainable manner, within the management and conservation of biological diversity, together with *the fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources*.[782]

Certain provisions include protection of threatened or protected ecosystems, protection of threatened or protected species, and the regulation of trade in threatened or protected species.[783] The objectives as set out in this legislation fall within the legislative framework of the National Environmental Management Act.[784]

[777] Thornton (n 2 above) 40.

[778] De Beer (n 380 above) 21 - 22.

[779] Hutchings (n 416 above) xi.

[780] Department of Environmental Affairs 'National Biodiversity Strategy and Action Plan' 2015 - 2025: https://www.cbd.int/doc/world/za/za-nbsap-v2-en.pdf, accessed 3 April 2022.

[781] Act 10 of 2004.

[782] Section 2(a), Act 10 of 2004.

[783] Sections 51 - 62, Act 10 of 2004.

[784] Act 107 of 1998.

## 7.3 TRADITIONAL MEDICINES: INCREASED USAGE AND THE 'NATIONAL BIODIVERSITY STRATEGY AND ACTION PLAN'[785]

As indicated previously, Mander believes that the regulation of African traditional medicines should be a matter of high priority, given that the trade of these medicines in South Africa is a large and growing industry.[786]

Ekor's view resonates with that of Mander:

> *The use of herbal medicinal products and supplements has increased tremendously over the past three decades with not less than 80% of people worldwide relying on them for some part of primary healthcare;*[787]

Previous consideration of statistics and the prevalence of consulting traditional health practitioners referenced Mander (2007) as stating that an estimated 26.6 million consumers use traditional medicine, with a figure of at least 133 000 persons being employed in this trade.[788]

The South African Department of Environmental Affairs revised its approach to biodiversity and published a second action plan in 2014 for the period 2015 to 2025. In addressing the challenge of pressures on biodiversity, in particular the livelihood loss resulting from impacts on biodiversity assets, this department not only cited Mander by mentioning these 2007 statistics, but added that more than 2 000 plant species are used for traditional medicinal purposes – generating approximately R2.9 billion a year.[789]

The Department of Environmental Affairs action plan also indicates that the utilisation *of indigenous plant species in personal hygiene products, cosmetics, complementary medicines, food flavourants and essential oil products is estimated to be between R41*

[785] n 780 above.

[786] n 289 above, 189.

[787] M Ekor 'The growing use of herbal medicines: Issues relating to adverse reactions and challenges in monitoring safety' (2014) 4(177) *Frontiers in Pharmacology* 1.

[788] n 289 above, 189.

[789] n 780 above, 21.

*million and R57 million per year*, this statistic having been referenced as from a 2012 draft report produced by this governmental department.[790]

Other references to medicinal plants in this departmental strategy and action plan include action, or proposed action, relating to:

- medicinal plants harvested in the wild, with over-harvesting or habitat loss affecting long-term endurance, with *Species of special concern are those that have particular ecological, economic or cultural significance*;[791]
- sustainable management being required by establishing integrated programmes, with propagation strategies to alleviate harvesting pressures;[792]
- datasets being developed to fill data *lacunae* relating to medicinal plants;[793]
- the use of a national system to record indigenous knowledge with the support of, among others, the University of Johannesburg chair for medicinal plants;[794] and
- the compilation of information for 40 000 species by 2025 for medicinal and plants used for other purposes.[795]

Against the background of over-harvesting, a print media report informs that *Tulbaghia violacea*, known as wild garlic, is commonly on sale at nurseries, but that *Tulbaghia capensis* is a separate and distinct species which is not available commercially and is a natural antibiotic and in danger. A spokesman for CapeNature is quoted in the print media article as stating:

> *The unlawful harvesting and associated trade in wild animals and plants are depriving South Africa of its biodiversity, natural heritage and capital. This trade is enormous in volume and scope, absorbing a broad range of wild animals and species …*

[790] As cited: DEA (Department of Environmental Affairs). 2012. Draft report on the study of nature and extent of bioprospecting and biotrade industry in South Africa. Department of Environmental Affairs, Pretoria.

[791] n 780 above, 30.

[792] n 780 above, 31.

[793] n 780 above, 57.

[794] n 780 above, 58.

[795] n 780 above, 58.

The spokesman indicates further that between 2017 and 2021, seven active court cases were underway in the Durbanville area: *where persons were found in possession of commercial quantities of protected flora without required documentation prescribed by the legislation.* The CapeNature spokesperson is reported as indicating that while sustainability is important, acknowledgment must be given to the fact that the trade in plant species offered was an important living across the country.[796]

## 7.4 TRADITIONAL MEDICINE: ISSUES OF SAFETY

Against the background of the increased use of traditional medicine, Ekor, referencing Bandaranayake,[797] indicates that the revival of interest in, and increased use of, herbal medicines has been attributed to certain factors. These include:

- a dissatisfaction with conventional medicines for various reasons including the notion that herbal or natural medicines do not have damaging sequelae;
- natural medicines are safe, cheaper and more effective;
- the quality, safety and efficacy of these medicines has improved;
- conventional medicine practitioners have not identified the pathologies correctly; and
- a tendency to self-medicate.[798]

This author does not, however, mention any medicines within any traditional medicine paradigm which would encompass the belief of the healing power of these medicines in the treatment of disease as described previously and in the introduction to this chapter.

Although Ekor also offers researched examples of damaging sequelae or adverse effects of certain commonly used herbal medicines, the abstract of the article then offers a succinct summary of the issues:

[796] E Stoltz 'Wild garlic harvesters back in court' *Mail and Guardian* 7 - 13 May 2021 12.

[797] As cited: WM Bandaranayake 'Quality control, screening, toxicity, and regulation of herbal drugs' in I Ahmad, F Aqil & M Owais (eds) *Modern phytomedicine. Turning medicinal plants into drugs* (2006) 25 - 57. DOI: 10.1002/9783527609987.ch2.

[798] n 787 above, 2.

> *… Although therapies involving these agents have shown promising potential with the efficacy of a good number of herbal products clearly established, many of them remain untested and their use are either poorly monitored or not even monitored at all. The consequence of this is an inadequate knowledge of their mode of action, potential adverse reactions, contraindications, and interactions with existing orthodox pharmaceuticals and functional foods to promote both safe and rational use of these agents. Since safety continues to be a major issue with the use of herbal remedies, it becomes imperative, therefore, that relevant regulatory authorities put in place appropriate measures to protect public health by ensuring that all herbal medicines are safe and of suitable quality…*[799]

Mention of possible pharmacodynamic interaction between conventional medicines and *imithi* has been offered briefly before. As stated then, this is possible within a range, from either potentiation or increasing the effect of conventional medicines, to an antagonistic reduction of the effects of those medicines leading possibly to a nullification or neutralisation of conventional medicine benefits.

Mills *et al* report that a systemic bioavailability of conventional drugs might see a decrease when taken concomitantly with *Hypericum perforatum* or St John's Wort,[800] a phytotherapeutic medicine being claimed to aid in the treatment of depression.

Two other studies relating to possible drug interaction were cited previously:

- Gyasi *et al* (2013) posit that the use of antiretroviral therapy together with traditional *imithi* may lead to drug interactions and suggested that patients be informed of this possibility during clinic visits;[801] and
- Sibanda *et al* report that a 2014 laboratory study of the inhibition of major drug metabolising enzymes by various phytotherapeutic medicines[802] demonstrated the potential of these *imithi* to interact with anti-retroviral therapy and call for further large randomised controlled trials.[803]

[799] n 787 above, 1.

[800] E Mills *et al* 'Interaction of St John's wort with conventional drugs: Systematic review of clinical trials' (2004) 329(7456) *British Medical Journal* 27.

[801] n 450 above, 122.

[802] *Hypoxis hemerocallidea*; *Echinacea purpurea*; *Moringa oleifera*; *Taraxacum officinale*; and *Lessertia frutescens.*

[803] n 437 above, 1119 - 1120.

Two further examples of personal interest for the author of this thesis, each relating to flora and fauna respectively, are now given briefly below, in support of the safety and biodiversity issues raised in this chapter.

## 7.5 *LESSERTIA FRUTESCENS*[804] AND TRADITIONAL MEDICINE: ISSUES OF SAFETY AT A BIOCHEMICAL LEVEL

Van Wyk and Gericke believe that *Lessertia frutescens* is a pre-eminent African adaptogen and is used in various conditions, including in conditions of fever; anorexia; gastritis; dysentery; as a prophylaxis against and in the treatment of cancer; asthma; coughs; kidney and liver conditions; and against stress and anxiety.[805]

In a published thesis, Davidson,[806] citing Crane *et al*,[807] indicates that nitric oxide, a reactive gaseous lipophilic molecule, functions at low levels in the signalling process of many separate and distinct physiological processes such as blood pressure, neurotransmission and cellular communication. At elevated levels, however, citing Thomas,[808] together with Lowenstein and Snyder,[809] Davidson indicates that nitric oxide is a cytotoxic defence mechanism by the host, particularly in neoplastic diseases, resistance to infection and in the regulation of immunity. Its production results from the oxidation of the protein amino acid L-arginine to L-citrulline, according to Davidson,[810] citing Crane *et al*[811] and Evans *et al*.[812]

[804] Formerly known as *Sutherlandia frutescens*.

[805] B-E van Wyk & N Gericke *People's plants: A guide to useful plants of southern Africa* (2018) 176.

[806] TE Davidson 'The effect of *Sutherlandia frutescens* 200CH on CD4 and symptomatology in persons with the human immunodeficiency virus syndrome' M Tech (Homeopathy) thesis, University of Johannesburg, 2006; the author of this thesis was the thesis supervisor.

[807] As cited: BR Crane, AS Arvai, R Gachui, C Wu, DK Ghosh & ED Getzoff (1997) 'The structure of nitric oxide synthase oxygenase domain and inhibitor complexes' (1997) 287 *Science* 425 - 431.

[808] As cited: G Thomas (2000) *Medicinal chemistry – an introduction* (2000) 431 - 436.

[809] As cited: CJ Lowenstein & SH Snyder 'Nitric oxide, a novel biological messenger' (1992) 70 *Cell* 705 - 706.

[810] n 806 above, 17 - 18.

[811] n 806 above, as cited.

[812] As cited: TG Evans, K Rasmussen, G Wiebke & JB Hibbs (1994) 'Nitric oxide synthesis in patients with advanced HIV infection' (1994) 97 *Clinical Experimental Immunology* 83 - 86.

According to van Wyk and Gericke, however, L-canavanine[813] (a non-proteinogenic L-alpha-amino acid) is a highly active compound in *Lessertia frutescens*, and acts as *a potent L-arginine antagonist*,[814] with the effect that the host cytotoxic mechanism against infection may then be compromised – this then being detrimental to the host.

Given this ostensible antagonistic effect against the host defence mechanism when using *Lessertia frutescens,* the report by Sibanda *et al* that a 2014 laboratory study showed that various phytotherapeutic medicines[815] (including *Lessertia frutescens)* demonstrated the potential of these *imithi* to interact with anti-retroviral therapy,[816] and increased research into the safety of traditional medicines is urgently indicated.

## 7.6 DEPARTMENT OF ENVIRONMENTAL AFFAIRS 2014 BIODIVERSITY MANAGEMENT PLAN FOR *GYPAETUS BARBATUS MERIDIONALIS*,[817] THE BEARDED VULTURE

The executive summary of this management plan informs that the bearded vulture:

> *… is an endangered species inhabiting the Maluti Drakensberg mountains of southern Africa including Lesotho and the Free State, KwaZulu-Natal and the Eastern Cape provinces of South Africa. The population is an isolated one whose numbers are continually declining as a result of numerous threats to the species.*[818]

The aim of the management plan is to ensure the survival of the species and the species conservation objectives that should be met to ensure this include, among others, addressing illegal trade usage and usage as part of the traditional medicine armamentarium.[819]

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[813] L-canavanine is a structural analogue of L-arginine and replaces L-arginine in biochemical reactions.

[814] n 805 above, 176.

[815] *Hypoxis hemerocallidea*, *Echinacea purpurea*, *Moringa oleifera*, *Taraxacum officinale*, and *Lessertia frutescens.*

[816] n 437 above, 1119 - 1120.

[817] Department of Environmental Affairs Government Notice No 350 of 2014, promulgated in Government Gazette No 37620 on 8 May 2014 in terms of section 43(3) of the National Environmental Management: Biodiversity Act, 2004.

[818] n 817 above, ii.

[819] n 817 above, iii.

With regard to the practice of traditional medicine in South Africa, the management plan informs that:

- by citing various authors,[820] vultures are important constituents for usage in the action of prophesying the outcome of future events, such as the outcome in horse-racing or political events, but there is no known trade in the eggs of the species, ostensibly not being practised actively; [821]
- poisoning, whether indirectly for control of predation or directly for use in traditional medicine, is an identified threat;[822]
- an overarching principle is that the extent of use of vultures in any illegal trade or for traditional medicine is unknown;[823]
- an operational goal would be to increase law enforcement to ensure legislative compliance for users of poison;[824] and
- an objective would be *to address the use of vultures in illegal trade and traditional medicine*.[825]

The management plan proposes the following action steps:

- verify the use of these birds in traditional medicine (and illegal trade) by engagement with vendors in *imithi* markets, by researching indigenous knowledge to understand usage and reasons for usage, an also to engage with traditional healers on conducted research;[826]

[820] As cited: PJ Mundy, D Butchart, JA Ledger & SE Piper *The vultures of Africa* (1992); DH Maphisa 'Vultures in Lesotho: Past, present and future' Vultures in the 21st century: Proceedings of a workshop on vulture research and conservation in southern Africa, AF Boshoff, MD Anderson & WD Borello (eds), Johannesburg, Vulture Study Group, Endangered Wildlife Trust (1997) 90 - 96; citation for Beilis & Esterhuizen 2005 not found in reference list; M Mander, N Diederichs, L Ntuli, M Khulie, V Williams & S McKean (2007) 'Survey of the trade in vultures for the traditional health industry in South Africa' Futureworks, unpublished report.

[821] n 817 above, 10.

[822] n 817 above, 16.

[823] n 817 above, 18.

[824] n 817 above, 31.

[825] n 817 above, 33.

[826] Number 72; n 817 above, 34.

- review applicable guidelines for intervention to address identified threats by involving representatives from the various traditional healing associations and by developing and highlighting actions and solutions for conservation;[827]
- support any initiative for permits to be granted to traditional healing for the use of vultures in the traditional medicine paradigm;[828]
- *investigate the option of making 'doomed' material or feathers available to Traditional Healers*;[829]
- engage with traditional healers to alter the conviction of vulture usage in traditional medicine and encourage use of *alternative animal parts since they are not dependant on using vultures*, and influence the education and training of traditional healers;[830]
- *Educate the population to use traditional healers that are trained*;[831]
- engage with traditional healers in the revision of any environmental policies;[832] and
- other action steps would involve help raising awareness and involvement in education and training on vulture issues, together with raising awareness and education and training not only for South African traditional healers, but also for those in Swaziland and Lesotho, prior to implementing law.[833]

Nieman *et al* confirm the use of vultures in traditional medicine but indicate that, most commonly, *leopard, chacma baboon, Cape porcupine, monitor lizard species, puff adder, African rock python, and the black-backed jackal* animal parts or products were being used in traditional medicine.[834] Birdlife International informs *that reductions* [in

[827] Number 73; n 817 above, 34.

[828] Number 74; n 817 above, 34.

[829] Number 75; n 817 above, 34.

[830] Number 76; n 817 above, 35.

[831] Number 77; n 817 above, 35.

[832] Number 90; n 817 above, 38.

[833] Numbers 97 and 98; n 817 above, 39.

[834] WA Nieman *et al* 'Traditional medicinal animal use by Xhosa and Sotho communities in the western Cape Province, South Africa' (2019) 15(34) *J Ethnobiology Ethnomedicine* 1.

the numbers of the bearded vulture] *are suspected to be rapid in parts of the Himalayas and India, and in the isolated South African population*.[835]

## 7.7 CONCLUSION

No mention is made in the Department of Environmental Affairs 2014 Biodiversity Management Plan of the Interim Council or the Act.[836] This requires change and reference to this legislation into any proposed legal scope of practice, an original contribution to research, if the research question is answered by finding that continued regulation is essential.

There are ecosystems and species of animals or plants that are threatened and should be protected, and there is trade in threatened or protected species; stakeholders will be approached for information as to whether the use of indigenous resources is occurring within a sustainable manner within the management and conservation of biological diversity, and whether there is *fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources*. [837]

[835] BirdLife International 'Species factsheet: *Gypaetus barbatus*' (2022) http://www.birdlife.org, accessed 6 April 2022.

[836] Act 22 of 2007.

[837] Section 2(a), Act 10 of 2004.

# CHAPTER 8
# INDIGENOUS KNOWLEDGE AND SOUTH AFRICAN LAW: OWNERSHIP OF SOUTH AFRICAN TRADITIONAL MEDICINE

## 8.1 INTRODUCTION

The significance of oral or written sources, as sources of indigenous knowledge, together with concepts relating to healing and healing practices, pertinent to traditional medicine, have been introduced previously as an introductory contextualisation to the analysis of the regulatory framework pertaining to traditional medicine in South Africa.

Against this background and for the purposes of this thesis, reference will only be made to traditional medicine in the position taken in South Africa in terms of the governmental approach to indigenous knowledge, as opposed to a more comprehensive discussion in the governmental approach about the realms of agriculture, indigenous languages and folklore.

## 8.2 INDIGENOUS KNOWLEDGE SYSTEMS POLICY: DEPARTMENT OF SCIENCE AND TECHNOLOGY, UNDATED.[838]

Under the then-Minister of the Department of Science and Technology,[839] Mangena,[840] an undated policy on indigenous knowledge systems was published. A North-West University publication sets the date of this policy in 2004.[841] This governmental department policy states that it is necessary:

- for a particular focus on traditional medicine;[842]
- to redress the ongoing inequalities (given the disadvantages faced by indigenous communities in the past due to marginalisation, suppressions and

[838] Department of Science and Technology *Indigenous Knowledge Systems* (no date), accessed at https://www.dst.gov.za/images/pdfs/IKS_Policy%20PDF.pdf on 16 April 2022.

[839] Renamed the Department of Science and Innovation in 2019.

[840] M Mangena, then-Minister of Science and Technology, 29 April 2004 - 10 May 2009.

[841] North-West University 'Indigenous Knowledge Systems Centre' 2, accessed at https://natural-sciences.nwu.ac.za/indigenous-knowledge-systems-centre/home on 16 April 2022.

[842] n 838 above, 9.

ridicule) regarding indigenous knowledge systems within, among others, the *guilds of traditional healers*;[843]

- to recognise the *de facto* role of traditional medicine,[844] the development of legislation to regulate such in South Africa over some 200 000 practitioners,[845] given that up to 80% of the population in Africa use traditional medicine to meet healthcare needs, this often being the only affordable source of healthcare;[846] and
- to recognise the existence of sub-groups *within communities, such as traditional healers … who mediate and develop* indigenous knowledge *among themselves, rather than the broader community*.[847]

According to the North-West University publication,[848] this policy was followed by the Department of Basic Education 2011 Curriculum and Assessment Policy Statement, and both the Protection, Promotion, Development and Management of Indigenous Knowledge Bill[849] and the relevant legislation.[850]

Tangentially to the main thrust of this thesis and possibly of interest for educators to pursue further, Hewson *et al* conducted research into various indigenous knowledge systems in South Africa, seemingly against a background of an earlier revised National Curriculum Statement (cited as 2002 and 2003), which proposed that learners should study science within a societal and cultural context. These authors sought to identify ideas to expand learners' knowledge about traditional medicine and then to elicit responses from teachers of science to those ideas.[851]

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[843] n 838 above, 10.

[844] n 838 above, 14.

[845] n 838 above, 10.

[846] n 838 above, 13.

[847] n 838 above, 15.

[848] n 841 above, 2.

[849] [B-6 - 2016]; Department of Science and Technology Notice 199 of 2016, promulgated in Government Gazette 39910 on 8 April 2016.

[850] Act 6 of 2019.

[851] MG Hewson *et al* 'The indigenous knowledge of African traditional health practitioners and the South African science curriculum' (2009) 13(1) *African Journal of Research in Mathematics, Science and Technology Education* 5.

The conclusion was that practitioners of traditional medicine considered that the following ideas would be appropriate to be taught to learners:

- own cultural heritage, including African indigenous knowledge systems;
- information about biodiversity and sustainable development against the background of the mutual dependence between humans and all species, whether flora or fauna, and with regard to natural resources;
- responsible lifestyle practices to manage and prevent pathologies; and
- responsible sexual behaviour.[852]

In 2005, however, legislation amending the Patents Act[853] preceded the legislative developments relating to indigenous knowledge.

## 8.3 PATENTS AMENDMENT ACT, 2005[854]

The scope of protection of this amendment to the Patents Act[855] provides for the lodging of a statement with every application for a patent, with an indication of whether the invention for which the application for a patent is being made, is based on any indigenous biological or genetic resource, or in terms of any traditional knowledge or usage.[856] Consequences of non-disclosure allow any person to apply for revocation of the patent at any time should there have been a material false statement or representation reasonably known to have been false at the time such was made by the patentee.[857]

[852] n 851 above, 13.

[853] Act 57 of 1978, as amended by Act 76 of 1988, Act 49 of 1996, and Act 38 of 1997.

[854] Act 20 of 2005, promulgated in Government Gazette No 28319 on 9 December 2005.

[855] Act 57 of 1978.

[856] Section 30, Act 20 of 2005.

[857] Section 61(1)(g), Act 20 of 2005.

## 8.4 PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF THE INDIGENOUS KNOWLEDGE BILL, 2016[858]

A report issued by the Traditional and Natural Health Alliance mentions a meeting between the Portfolio Committee on Science and Technology and the Interim Traditional Health Practitioners Council. The latter is reported to have objected to the Bill on the grounds that the Department of Science and Technology, as it was termed then, was neither suited nor equipped to take over any Council statutory functions as provided for in the Act.[859] The Economic Freedom Front[860] political party spokesperson accused the portfolio committee members of attempting to hand over indigenous knowledge to pharmaceutical corporations, describing the provisions of the Bill as the *third grand theft from South Africans* and *evil*.[861]

## 8.5 PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF INDIGENOUS KNOWLEDGE ACT, 2019[862]

This legislation recognises indigenous knowledge as a national asset and that it is in the national interest to protect and promote such through legislation, policy and by means of public and private sector programmes. Furthermore, the wish is expressed in this legislation that use of indigenous knowledge is to be encouraged to see development of novel, socially and economically applicable products and services, against the background *that indigenous innovation is a unique approach to social innovation that informs and underpins the work of indigenous communities*.[863]

The definition of indigenous knowledge is described as knowledge developed within an indigenous community, such then having been assimilated into the cultural and social identity of that community, including knowledge of a functional nature, and knowledge of natural resources and cultural expression, and further defines an

[858] [B-6 - 2016]; Department of Science and Technology Notice 199 of 2016, promulgated in Government Gazette 39910 on 8 April 2016.

[859] Act 22 of 2007.

[860] A registered South African political party.

[861] The Traditional and Natural Health Alliance 'Opposition to indigenous knowledge systems bill mounts', accessed at https://www.tnha.co.za/opposition-to-indigenous-knowledge-systems-bill-mounts/ on 24 November 2017.

[862] Act 6 of 2019, promulgated in Government Gazette 42647 on 19 August 2019.

[863] Preamble, Act 6 of 2019.

indigenous community, indigenous cultural expression and an indigenous knowledge practitioner, among other things.[864]

The objects of this legislation, apart from the protection of *indigenous knowledge from unauthorised use, misappropriation and misuse* and promotion of *public awareness and understanding* of such knowledge, then include: developing and enhancing the potential of the protection of indigenous knowledge; regulation of the *equitable distribution of benefits*; promotion of *commercial use* in developing *new products, services and processes*; and regulating the chronicling of such knowledge and recognising such as *prior art* [865] *under intellectual property laws*.[866]

To achieve these legislative objects and aims, this legislation provides for the establishment of a National Indigenous Systems Office[867] in the Department of Science and Innovation.

## 8.6 CENTRE IN INDIGENOUS KNOWLEDGE SYSTEMS

The homepage of the website of this Centre in Indigenous Knowledge Systems does not refer to the 2019 legislation,[868] but only to the 2004 governmental department policy.[869] Information is offered that this centre is a partnership, together with the Department of Science and Innovation, the National Research Foundation and five institutions of higher education and training, with the hub being the University of KwaZulu-Natal.[870] The other universities are North-West University, the University of Limpopo, the University of South Africa, and the University of Venda.[871]

[864] Section 1, Act 6 of 2019.

[865] Prior art refers to a situation where an invention already exists, is available to the public, and is then sought to be patented.

[866] Sections 3(a) - (h), Act 6 of 2019.

[867] Section 4, Act 6 of 2019.

[868] Act 6 of 2019.

[869] n 838 above.

[870] https://ciks.org.za/, accessed 16 April 2022.

[871] n 841 above.

A call for applications for the certification of competencies of indigenous knowledge practitioners in the *isangoma*, *inyanga*, and *umbelethisi* registration categories in traditional medicine in terms of the Act[872] under a recognition of prior learning pilot programme for the province of KwaZulu-Natal have been made – with a closing date of 28 February 2022.[873] Prior learning pilot programme results or conclusions, if and when published, may prove of interest to any future researcher.

## 8.7 INDIGENOUS KNOWLEDGE SYSTEMS: SOME FURTHER PERSPECTIVES

As introduced beforehand, indigenous societies regard the oral and creative transmission of knowledge – whether in the form of stories, songs, weavings, carvings or dance – as singularly consequential and significant.

Such traditional knowledge systems:

> *… include a level of interpretation that recounts a more interconnected, contextualized, holistic experience in a variety of forms, including proverbs, songs, myths, poems, prayers, and dramatic performances. A large part of this interconnected dynamic is the embodied knowledge of the speaker or artist coming to the community with focused purpose, in response to a particular need. This transmission of knowledge plays a crucial part in keeping culture alive*.[874]

Masango *et al* believe that practitioners of traditional medicine derive an income from using orphic knowledge and that a major challenge and constraint might be that the release of such information would then see a reduction in income,[875] this being confirmed by Freeman and Motsei.[876] This would then militate against the recording and categorisation of an indigenous knowledge system for traditional medicine.

Thornton, as mentioned previously, believes that traditional medicine is not an indigenous knowledge system,[877] quantifying this further by stating that each person

[872] Act 22 of 2007.

[873] https://ciks.org.za/wp-content/uploads/2022/02/English-Call.pdf, accessed 16 April 2022.

[874] Moncada (n 10 above) 12 - 13.

[875] CA Masango *et al* 'International Conference on ICT for Africa 2013, 20 - 23 February, Harare, Zimbabwe' n.p.

[876] M Freeman & M Motsei 'Planning health care in South Africa – is there a role for traditional healers?' (1992) 34(11) *Social Science and Medicine* 1187.

[877] n 2 above, 7.

practises *in a way almost unique to that person and each context, each teacher, each ecology and pharmacopoeia of organic and mineral substances is local*.[878]

Referencing the World Intellectual Property Organization, one of the 15 specialised United Nations agencies, Dountio indicates that traditional knowledge *is traditional only to the extent that its creation and use are part of the cultural traditions of a community, and not necessarily that the knowledge is ancient or static*[879] – citing Holden.[880] Dountio also indicates that traditional knowledge *evolves in response to a changing environment*.[881]

## 8.8 CENSURE OF TRADITIONAL MEDICINE

Louw and Duvenhage, however, in examining traditional medicine, censure the definition of *traditional medicine* as set out in the Act,[882] questioning its secrecy. *Traditional healers'* medical knowledge is viewed as *substandard* and *unscientific*; *products* are designated as *ancient and dangerous*; the development of a traditional medicine pharmacopoeia, over the centuries, is said to be deficient, with the deduction that *traditional healers' pre-modern medicine-making* compromises South African biodiversity and is a danger to the health of the public. These authors posit that the true ownership of traditional medicines in South Africa is held by public and private entities, *including pharmaceutical and scientific institutions, totally outside the domain of the South African traditional healing fraternity*, but any understanding of the role played by practitioners of traditional medicine by these authors is inopportune in the view of the author of this thesis.[883]

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[878] n 2 above, 17.

[879] As cited: WIPO 'Intellectual property and traditional knowledge' 8 Booklet No 2, http://wipo.int/freepublications/en/tk/920/wipo_pub_920/pdf, accessed 17 October 2010.

[880] As cited: J Holden 'Genetic resources, traditional knowledge and folklore' (2008), http://www.america.gov/st/business-english/2008/April/20080429221258myleen0.8259349html, accessed 21 October 2020.

[881] J Dountio 'The protection of traditional knowledge: Challenges and possibilities arising from the protection of biodiversity in South Africa' (2011) 26(1) *SAJAH* 10.

[882] Act 22 of 2007.

[883] G Louw & A Duvenhage 'True ownership of traditional medicines in South Africa' (2017) 10(4) *Australasian Medical Journal* 254. The tone of this article is, in the view of the author of this thesis, distasteful and lacks academic rigour.

## 8.9 CONCLUSION

The recognition of indigenous knowledge as a national asset and the reality of development in regulation and attainment of rights in the traditional medicine paradigm should be an ongoing process – the hope is expressed that the provisions of the relevant act[884] will see speedy accomplishment of the objects of this legislation.

[884] Protection, Promotion, Development and Management of Indigenous Knowledge Act, Act 6 of 2019.

# CHAPTER 9
# EXTRATERRITORIAL REGULATION OF AFRICAN TRADITIONAL MEDICINE IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY[885]

## 9.1 INTRODUCTION

For this thesis, an offering of extraterritorial legislation limited to members of this regional community is presented, not necessarily definitive as such, but rather as an introduction to regulation in this region and more specifically as a resource, possibly incomplete, for interest to any reader of this thesis and for use by any future researcher. Research challenges include the lack of proper distinction in the terminology between traditional medicine as a practice and particularly traditional medicine as a phytotherapeutic substance. The adoption of systems of medicine such as homeopathy, Ayurveda or Chinese medicine as 'traditional' in the African context are further research challenges.

## 9.2 AFRICAN TRADITIONAL MEDICINE AS A MAJOR SYSTEM OF MEDICINE

Abrams *et al* believe that African traditional medicine is one of the major systems of traditional medicine together with traditional Chinese medicine and acupuncture, and Ayurveda, which has its historical roots in the Indian subcontinent – these authors indicate that the regulation of traditional medicine and practitioners in this paradigm is limited worldwide, this also then being the case among members of the Southern African Development Community. [886]

Contrary to the traditional Chinese medicine and acupuncture, and Ayurveda systems of traditional medicine for which written transcripts and armamentaria exist, African traditional medicine is largely an oral tradition, which complicates the transfer of skills and knowledge from generation to generation.[887]

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[885] https://www.sadc.int/about-sadc, accessed 18 April 2022: Established in 1992, the Southern African Development Community (SADC) is a regional economic community comprising 16 member states: Angola, Botswana, Comoros, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

[886] AL Abrams *et al* 'Legislative landscape for traditional health practitioners in Southern African Development Community countries: A scoping review' (2020) 10(1) *BMJ Open* 2.

[887] World Health Organisation (n 21 above) 33.

## 9.3 PRACTITIONERS OF TRADITIONAL MEDICINE: AN AFRICAN DEFINITION

The Southern African Development Community has adopted a definition for traditional health practitioners, and as meaning:

> *… 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.*[888]

## 9.4 REGULATION OF TRADITIONAL MEDICINE WITHIN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

A brief overview is as follows:

### 9.4.1 REPUBLIC OF ZIMBABWE, UNITED REPUBLIC OF TANZANIA, AND THE REPUBLICS OF SOUTH AFRICA AND NAMIBIA

According to Abrams *et* al, only four of these southern African countries have enacted legislation regulating traditional health practitioners, these being the Republic of Zimbabwe, the United Republic of Tanzania, and the Republics of South Africa and Namibia. The dates and purpose of the relevant legislation for these countries are:

- Zimbabwe: 1982 legislation[889] establishing a statutory health council with the power to recognise a traditional health practitioner, with specific categories of practice not defined nor with any definition of a traditional health practitioner;
- Tanzania: 2002 legislation[890] establishing a statutory health council, defining a traditional health practitioner, but not providing any categories of practice;
- South Africa: 2007 legislation[891] establishing an interim statutory health council, with categories for persons practising as a diviner, herbalist, traditional birth

[888] The definition itself is unreferenced: see Abrams *et al* (n 886 above) 2 - 3, and for specific wording of the definition: Box 2 on page 3.

[889] Traditional Medical Practitioners Act, Act 38 of 1981.

[890] Traditional and Alternative Medicines Act, Act 23 of 2002.

[891] Act 22 of 2007.

attendant, traditional surgeon, and traditional tutor, including a category for a speciality in any one of these categories and for a student; and

- Namibia: parliamentary bill tabled in 2014[892] outlining specific categories of practice, namely specialist herbalist, faith herbalist, faith healer, diviner herbalist, diviner, and traditional birth attendant, but not with any definitions.[893]

Abrams *et al* indicate that operationalisation and registration of traditional health practitioners is not yet an actuality in either Zimbabwe or South Africa; in Namibia promulgation of a legislative instrument has yet to occur.[894]

Latif, in earlier research in 2010, omitting data concerning Tanzania, presents information suggesting that traditional medicine is promoted in Zimbabwe and South Africa, stating that *attempts are being made to make it part of the National Health System*.[895]

Research into the legal regulation of traditional medicine of the remaining regional community countries follows, with some countries regulating traditional medicine, seemingly then with the research by Abrams *et al* [896] being incomplete or possibly with some legislation having been enacted after completion of the research.

### 9.4.2 REPUBLIC OF ANGOLA

According to a media report, the National Policy of Traditional and Complementary Medicine was approved in 2020, this policy being said to ensure the safe and sustainable practice of traditional and complementary medicine.[897]

[892] Traditional Health Practitioners Bill, [B2-2014].

[893] Abrams *et al* (n 886 above) 1, 4 - 7.

[894] n 886 above, 1,4.

[895] n 293 above, 62.

[896] n 886 above, 1.

[897] 'Angola: Government approves national policy of traditional medicine' *Allafrica* 27 August 2020, accessed at https://allafrica.com/stories/202008280166.html on 19 April 2022.

### 9.4.3 REPUBLIC OF BOTSWANA

Letlhogile *et al* recommend the regulation of traditional medicine practices and the incorporation of traditional medicine into education and training for graduate nurses;[898] the conclusion is thus drawn that there is no regulation for traditional medicine practices.

### 9.4.4 REPUBLIC OF COMOROS

Research efforts were inconclusive, and the assumption is made that the 2001 World Health Organization report reflects the current position, which is that there is no regulation of traditional medicine in this archipelago state.[899]

### 9.4.5 KINGDOM OF ESWATINI

Research efforts were inconclusive, and the assumption is made that the 2001 World Health Organization report reflects the current position, which is that there is no regulation of the practice of traditional medicine in this kingdom.[900] The Medicines and Related Substances Act enacted in this kingdom, however, provides for a definition of complementary medicine as being for use in (emphasis added):

> *… (b) restoring, correcting or modifying any somatic, psychic or organic function in humans or animals, in accordance with the principles of– … (ii)* ***traditional*** *or alternative medicinal practices; …*[901]

[898] K Letlhogile *et al* ' Complementary and alternative medicine in Botswana: Insights from practitioners and clients' (2020) 11(2) *Lonaka Journal of Learning and Teaching* 7.

[899] World Health Organisation *Legal status of traditional medicine and complementary/alternative medicine: A worldwide review* (2001) 11, accessed at https://apps.who.int/iris/bitstream/handle/10665/42452/WHO_EDM_TRM_2001.2_eng.pdf?sequence=1&isAllowed=y on 19 April 2022.

[900] n 899 above, 35 - 36.

[901] Section 1, Act 9 of 2016.

### 9.4.6 KINGDOM OF LESOTHO

Latif refers to Lesotho where 1978 legislation[902] established a council to control the activities of traditional medicine practitioners and for skills improvement.[903]

### 9.4.7 REPUBLIC OF MADAGASCAR

Traditional medicine was legalised by ministerial decree in 2007.[904]

### 9.4.8 REPUBLIC OF MALAWI

A Traditional Medicine Policy was adopted by the government of Malawi in 2013, institutionalising African traditional medicine into its healthcare delivery system.[905]

### 9.4.9 REPUBLIC OF MAURITIUS

Research efforts were inconclusive, and the assumption is made that the 2001 World Health Organization report reflects the current position, which is that there is no regulation of African traditional medicine in this island state, except that traditional medicine that is regulated is defined as Ayurveda, homeopathy and Chinese medicine.[906]

### 9.4.10 REPUBLIC OF MOZAMBIQUE

Research efforts were inconclusive, and the assumption is made that the 2001 World Health Organization report reflects the current position, which is that there is no regulation of African traditional medicine except to state that the report indicates that

[902] Lesotho Universal Medicine Men and Herbalists Council Act, 1978.

[903] n 293 above, 64 - 65.

[904] C Pierlovski & L Pourchev 'Traditional medicine in Madagascar - current situation and the institutional context of promotion' (2014) 7(1) *Health, Culture and Society* 22, accessed at file:///C:/Users/louis/Downloads/Traditional_Medicine_in_Madagascar_-_Current_Situa.pdf on 19 April 2022.

[905] Malawi National Digital Repository, accessed at http://www.ndr.mw:8080/xmlui/handle/123456789/868 on 19 April 2022.

[906] n 899 above, 25.

collaborative programmes are in place under oversight of the department of health in this state.[907]

### 9.4.11 REPUBLIC OF SEYCHELLES

Research efforts were inconclusive, and the assumption is made that the 2001 World Health Organization report reflects the current position, which is that there is no regulation of African traditional medicine.[908]

### 9.4.12 REPUBLIC OF ZAMBIA

Abrams *et al* indicate that although there is no legal framework in place in this country for regulating traditional health practitioners, existing legislation proscribes any intervention by such practitioners in conducting abortions, for example.[909]

## 9.5 VIOLATION OF CORPSES FOR USE IN TRADITIONAL MEDICINE

This topic was already considered in a previously published thesis by the author of this thesis, entitled: *A comparative study of the criminalisation of the violation of a corpse in context of traditional medicine in subequatorial Africa, including consideration of customary law*.[910]

It was concluded that in South Africa it is a common-law crime,[911] but that any barbaric acts against a corpse or the profaning of a cadaver were proscribed in terms of the penal codes of the Republics of Angola, Botswana, Malawi and the United Republic of Tanzania.

No reference to the violation of a corpse was found for the Kingdoms of Lesotho and eSwatini, or for the Republics of Madagascar, Mozambique, Namibia, Zambia and

[907] n 899 above, 27.

[908] n 899 above, 32.

[909] n 886 above, 8.

[910] Mullinder (n 3 above).

[911] Christison & Hoctor (n 194 above) 23.

Zimbabwe.[912] The question of the violation of a corpse for use in traditional medicine in the Indian island nations of the Republics of the Comoros, Mauritius and the Seychelles was not researched for this thesis.

## 9.6 CONCLUSION

At best, there are seemingly only intermittent attempts at government regulation over the practice of traditional medicine with the Community, the reasons for which may be researched further by any interested party.

[912] Mullinder (n 3 above) 35.

# CHAPTER 10
# DIVINATION AND INFORMED CONSENT

## 10.1 INTRODUCTION

The requirements in law in terms of duty to the patient to gain informed consent prior to any treatment flow from the limited constitutional rights of freedom and security of the person – in particular security in and control over the body[913] and the limited constitutional rights of dignity[914] and privacy.[915] These requirements, as set out in the National Health Act, provide for any user of a healthcare service to have full knowledge, and consent to any procedure or treatment, to participate in decisions and not be subjected to any healthcare service without giving consent, with certain exceptions.[916]

The Act regulating the practice of traditional medicine is silent on the question of informed consent.[917]

## 10.2 CONTRACT BETWEEN HEALTHCARE PRACTITIONER AND PATIENT

Regarding the law relating to the contract between healthcare practitioner and patient, Carstens and Pearmain believe that:

> *… the law is only relevant in context and if law is to be meaningful the context in which it is applied must inform and if needs be modify the broad general principles in order to ensure that justice is done.*[918]

## 10.3 DIVINATION AND INFORMED CONSENT

The act of divination or power of clairvoyance was elucidated previously, but it is an integral part of traditional medicine to determine the cause of illness relating to an

[913] Section 12(2)(b), the Constitution.

[914] Section 10, the Constitution.

[915] Section 14, the Constitution.

[916] Sections 6 - 9, Act 61 of 2003.

[917] Act 22 of 2007.

[918] n 482 above, 484.

individual, or any other cause of a malady, physical or otherwise. The three techniques of divination, namely that utilised by an *isangoma sekhanda*, a 'head' or 'ecstatic' diviner; the *isangoma esichitha amathambo*, a 'bone thrower'; or that used by a diviner possessed of great ancestors, the *amakhosi amakhulu*, were discussed previously.[919]

Also as introduced previously, the observation of the way the *ugobela* receives a patient and uses *inhlolo*, described as *instruments used during divination*, which include bones, dominoes or seashells, among other things, is cardinal for the neophyte during the initiation period or *ukuthwasa*.[920]

## 10.4 INFORMED CONSENT: A WESTERN NOTION FOR INDIVIDUALISM?

Akpa-Inyang and Chima state that informed consent is based on a Western notion derived from libertarian rights-based autonomy, essentially not concerned with communalism, customary beliefs, spirituality and relational autonomy which are predominant in most African countries.[921]

The question of the African worldview or *ubuntu* has also been addressed previously and Chuwa, citing other authors, posits that any person suffering from an illness or from a disability is an obligation greater than just the responsibility of society, albeit from the immediately contiguous society members. It is an obligation towards that person until that person recovers or dies. This obligation flows from being human, the company of humans, empathy in situations of misfortune and the spirit of commonality and harmony in the immediately contiguous society.[922]

Akpa-Inyang and Chima, in confirming the view of Chuwa and others, state that African communitarian ethics then relate to the *collective whole or community* and not to strongly expressed individualism, and this *apparent conflict may impact informed*

[919] n 67 above, 103.

[920] Mokgethi (n 146 above) 77.

[921] F Akpa-Inyang & SC Chima 'South African traditional values and beliefs regarding informed consent and limitations of the principle of respect for autonomy in African communities: A cross-cultural qualitative study' (2021) 22(111) *BMC Med Ethics* 1.

[922] n 57 above, 22.

*consent practice* and also *that language, poverty and cultural beliefs are barriers to obtaining proper informed consent in African communities*.[923]

Osuji posits that that gods, spirits and ancestors influence matters on the earthly plane, including then health or illness. The cause of disease may sometimes be attributed to *mystical forces or spirits*[924] and, citing Dime, offers the reason … *the traditional medicine doctor employs divination in the diagnostic process to discover the mystic forces involved* in the causation of the illness, and that individuals make no decision of their own accord.[925] Osuji also believes that no patient will give final consent, except with consensus reached by the community.[926] For the informed consent requirement of understanding, this author then posits that the accompaniment of any patient by any member of the community to help with the granting of consent is an added advantage over Western medicine, given that the understanding process for treatment is not limited to the individual.[927]

## 10.5 INFORMED CONSENT: KWAZULU-NATAL RESEARCH STATISTICS FOR TRADITIONAL MEDICINE

Akpa *et al* confirm the constitutional protection afforded individual rights to bodily integrity and well-being through the granting of informed consent. In a research study conducted in KwaZulu-Natal in 2022 with 129 isiZulu-speaking participants in contemporary traditional medicine practices throughout the province, the following statistics were indicated:

- 58.9% of participants were informed about their diagnosis;
- 79.8% of the participants were informed about their treatment benefits and recommended treatment;
- 36.4% of the participants were informed about their treatment risks;
- 3.1% of the participants were informed about the right to refusal; and

[923] n 921 above, 1

[924] P Osuji 'Informed consent in Western (USA) medicine and in African (Igbo) traditional medicine: A comparison' (2012) *Bulletin of Ecumenical Theology* 129 - 161.

[925] As cited: Dime *African traditional medicine* 74.

[926] n 924 above, 150.

[927] Osuji (n 924 above)153.

- 0.8% of the participants were informed about the risks of refusing recommended treatment.[928]

Furthermore, these authors report that 76.7% of participants indicated satisfaction with the information disclosed by the traditional healthcare practitioners, that consent was obtained verbally,[929] and that *the majority of participants sought surrogate assistance when consulting* traditional healthcare practitioners, with 81.4% indicating that they preferred to be informed about all risks and also preferred involvement in the decisions about healthcare.[930]

These authors then conclude that most of the patients in this study were aware of the right to have information disclosed to them, as well as the requirement to have agreed before any treatment procedures were initiated and *that some key elements* of informed consent *are currently being applied* during traditional medicine practice in South Africa.[931]

It is noted, however, that this study was conducted among persons who had consulted traditional healthcare practitioners in the spheres of *herbalism, bone-setting and midwifery*.[932] For the purposes of this thesis, the term *herbalism* is deemed imprecise: both *izangoma* and *izinyanga* use phytotherapeutic medicines in treatment procedures and, as set out previously, Ngubane cites examples of specialised skills including *izinyanga* who prepare snake-bite antidotes, dental medicines, and those *izinyanga* who treat fractures (an *inyanga yomhlabelo*) or bone-setting, with persons practising midwifery known as *ababelethisi*.[933]

Given the imprecision then, in the Akpa *et al* study[934] in which the categories of healthcare practitioners were not categorised in terms of the categories envisaged in

[928] F Akpa-Inyang *et al* 'Patients' experience on practice and applicability of informed consent in traditional medical practice in KwaZulu-Natal Province, South Africa' (2022) *Evid Based Complement Alternat Med* 1.

[929] Thesis author's note: unspecified, presumably oral consent; the use of 'verbally' in common parlance means spoken.

[930] Akpa *et al* (n 928 above) 1.

[931] Akpa *et al* (n 928 above) 1.

[932] Akpa *et al* (n 928 above) 2.

[933] n 67 above, 105 - 106.

[934] n 928 above, 2.

the Act,[935] it would be inappropriate to make any assumption about the nature of the manner in which any diagnoses were made in the context of informed consent, ostensibly granted.

## 10.6 CONCLUSION

Legal deliberations about whether the lack of explicitly given informed consent might then be tacit (a consensual tacit or imputed tacit term)[936] or otherwise, or any philosophical considerations as to the compatibility in law of the legal requirement of informed consent in questions of diagnosis by divination, should be a matter for further research, also then for further research into the question of the raising of any cultural defence in legal issues in the medico-legal paradigm in this sphere,[937] particularly in light of the views expressed by Carstens:

> … a cultural defence should have particular significance in a hybrid system such as South Africa where the new constitution (as a value-driven legal dispensation in which human rights are entrenched), is often in conflict with principles of customary law.[938]

[935] Act 22 of 2007.

[936] J Kotze 'What is meant with a "tacit or implied term" in a legal agreement?' https://serr.co.za/what-is-meant-with-a-tacit-or-implied-term-in-a-legal-agreement, accessed 31 May 2022.

[937] n 675 above: In what may be regarded as a seminal *oeuvre* relating to the interaction of law and culture, Renteln examines the importance of culture within the parameters of justice and conflicts in various court proceedings and argues for maximum compromise or understanding of cultural matters when examining legal questions but does not seemingly examine this question.[937]

[938] n 191 above, 1 - 2.

# CHAPTER 11
# CONVENTIONAL MIDWIFERY, TRADITIONAL BIRTH ATTENDANTS AND POTENTIAL CONFLICTS IN NURSING

## 11.1 INTRODUCTION

Various aspects concerning traditional birth attendants or *ababelethisi*, from being a category of persons practising traditional medicine to statistics and prevalence of consultation, were introduced previously. This chapter serves to present, briefly, some information on possible conflicts within the nursing profession arising from challenges in differences between conventional and traditional nursing and midwifery.

## 11.2 NURSING COUNCIL REGISTERED MIDWIVES LACK OF KNOWLEDGE OF TRADITIONAL POSTNATAL CARE

Ngunyulu *et al* indicate that it is cardinal for midwives to appreciate that indigenous practices for assistance to women during pregnancy, labour and childbirth prior to the advent of modern medicine, include isolation of the mother after giving birth and her child for six weeks to help protect them from evil spirits, but also to promote emotional and spiritual comfort of the mother, and that:

- this isolation may hinder any clinic visits;
- potential complications may thus remain unchecked;
- there is then an obligation on the part of the midwives to be aware of the impact that the lack of visits to clinics may have on the mother and child;
- isolation also serves to preclude sexual activity and prevent any concomitant infection by any partner; and
- no participation in household activity takes place during this period to allow care by traditional birth attendants in order to ensure mother and child recuperation.[939]

[939] RN Ngunyulu, FM Mulaudzi & MD Peu 'Perceptions of midwives regarding the role of traditional birth attendants during postnatal care in South Africa' (2016) 18(1) *Africa Journal of Nursing and Midwifery* 47.

Ngubane, as indicated previously, states that situations of *umnyama* or pollution, in various degrees of severity, are found in newly delivered mothers and nursing mothers and their infants. In these circumstances, this *umnyama* is the most highly intensified of all cases of pollution.[940]

According to Ngubane, the newly delivered mother:

- is dangerous not only to herself, but to the newborn child and to males whose virility may be affected not only from any contact, but from eating food cooked by her or by sharing eating utensils;
- may not leave the house for the first three days at all and the husband may not enter these premises until the cord *drops off from the baby*;
- when leaving the house after three days, must be covered in a blanket;
- when leaving the house after the three-day period, does not have to wear a blanket;
- after ten days these premises are cleaned and the floor is covered with freshly smeared cow dung, and the mother must also
- smear red ochre on her exposed body to protect her when visiting the shops, collecting firewood or fetching water.[941]

Ngunyulu *et al* conclude after conducting a study in Limpopo that midwives hold more negative perceptions than positive ones about traditional birth attendants, meaning that there are only a few midwives who are willing to cooperate with traditional birth attendants. This results in privation of mutual recognition, trust and cooperation, potentially leading to placing the health of newly delivered mothers and infants at risk of complications and possibly even death.[942]

The Ngunyulu study is unclear whether the research parameters were whether the midwives' visits took place after a hospital or clinic birth, or whether these visits were part of a community outreach programme. Nonetheless, this study[943] and the

[940] n 67 above, 78.

[941] n 67 above, 78.

[942] Ngunyulu *et al* (n 939 above) 49.

[943] n 939 above, 49.

contribution by Ngubane[944] draw attention to post-partum practices, presumably more prominent in rural areas, and Ngunyulu *et al*, citing Thwala *et al*,[945] conclude that the inadequacy of *midwives' knowledge regarding the indigenous postnatal care practices might result in serious health discrepancies during the provision of postnatal care*.[946]

## 11.3 DUAL PROFESSION AS NURSE AND *ISANGOMA*

Naidu and Darong, in a 2015 study in KwaZulu-Natal with five participants who were employed as nurses within a conventional medical paradigm, but were also *izangoma*, recommended that nursing programmes should include aspects of traditional healing practices as part of the conventional education and training, and concluded:

> *… adopting a 'cultural pedagogy' and factoring in perspectives or even an entire model on cultural understandings can only enhance both curricular* (sic) *and training, as well as health care practices. It can also aid in affording respect and value to people's cultural understandings and quite possibly, reciprocally, aid in medical adherence and mutual trust in Western medicine and practices.*[947]

## 11.4 TRADITIONAL MEDICINE CONSTRUCT INFLUENCE ON NURSING CARE

Naidu and Darong also highlight the dilemmas faced by nurses who, in addition to recognising and applying the tenets of the biomedical system, also believe that traditional values could play a role in a holistic treatment approach to the patient. The dilemma exists between *a constructed understanding of illness and the expected biomedical understanding of illness*.[948] Beneficial clinical judgement, according to these authors, citing Tenner,[949] requires inclusion of not only the pathophysiological and diagnostic aspect of any patient's condition, but also the actual and material illness

[944] n 67 above, 78.

[945] As cited: SBP Thwala, E Holroyd & LK Jones 'Health belief dualism in the postnatal practices of rural Swazi women: An ethnographic account' (2011) 25(4) *International Journal of Nursing Practice* 68 - 74.

[946] Ngunyulu *et al* (n 939 above) 49.

[947] M Naidu & G Darong 'Illness and health as constructions: Narratives of *sangoma* nurses' (2015) 9(3) *Ethno Med* 294.

[948] M Naidu & G Darong 'The ancestors have caused this: isiZulu-speaking nurses' understandings of illness and patient care' (2015) 21(2) *Anthropological Notebooks* 27 - 40.

[949] Citation: (Tenner 2006: 2005); no exact reference provided in the bibliography.

experience of not only the patient, but also that of the family, together with any physical or social needs.[950] The conclusion of Naidu and Darong, as set out in the preceding paragraph of this subsection, is reiterated, but sees additional contextualisation in terms of cultural and traditional medicine beliefs as set out previously in this thesis.[951]

## 11.5 CONCLUSION

It is suggested that in addition to recognising and applying the tenets of the biomedical system, traditional values could play a role in a holistic treatment approach to the patient.

[950] Naidu & Darong (n 948 above) 38.

[951] M Naidu & G Darong 'When illness is more than just a sick body: Probing how isiZulu- speaking nurses' construct illnesses and healing' (2015) 15(1) *The Oriental Anthropologist* 91 108.

# SECTION D:

# SOUTH AFRICAN TRADITIONAL MEDICINE:

# STAKEHOLDER INTERACTION

# CHAPTER 1
# INTERACTION WITH *IZANGOMA*, *IZINYANGA* AND *ABATHANDAZI* WITH REGARD TO ACTS SPECIALLY PERTAINING TO THE PROFESSIONS OF TRADITIONAL MEDICINE

## 1.1 INTRODUCTION

The critique in anthropology, in particular the call for the redress of colonial perspectives and the ostensible insouciance on the part of African anthropologists resisting engagement in considering interaction between humans, ancestors and non-human agents, has been noted previously.[952] The originality of the contribution to research lies in the multi-dimensional approach to the subject matter of this thesis. The garnering of views of practitioners of traditional medicine is principal for an overall approach to the subject matter of this thesis – the possible reluctance to engage in the discussion of traditional medicine for the purposes of this thesis, given that some practices are said to occupy metaphysical, occult or orphic realms, has also been mentioned previously. This chapter presents the engagement with some *izangoma*, *izinyanga* and *abathandazi* pursuant to personal discussions between the author of this thesis and these practitioners.

## 1.2 BACKGROUND: TRADITIONAL HEALER ENGAGEMENT IN BENONI, GAUTENG

The table below relates to certain personal information gleaned from engagement with two *izangoma* who practised *esichitha amathambo* or divination by means of 'bone-throwing' in public at a monthly market in Benoni, Gauteng.[953] Members of the public were able to consult these *izangoma* and the author of this thesis took the opportunity to engage with these *izangoma*, who, although wishing to remain anonymous, indicated that they belonged to the Traditional Healers Association.[954]

This engagement was mentioned previously in the traditional medicine approach to the treatment of ulcers, in particular the treatment of diabetic ulcers.[955]

[952] Nyamnjoh (n 5 above) 63.

[953] n 352 above.

[954] https://www.facebook.com/traditionalhealth/, accessed 10 July 2022.

[955] n 352 above.

**TABLE 1: INTERVIEWS: *IZANGOMA* / *UMTHANDAZI*: BENONI, GAUTENG**

| INTERVIEWEE [956] | 1 | 2 [957] |
|---|---|---|
| LAST NAME | ANONYMOUS | ANONYMOUS |
| FIRST NAME | ANONYMOUS | ANONYMOUS |
| AGE | 65 | 54 |
| GENDER | FEMALE | FEMALE |
| ASSOCIATION | TRADITIONAL HEALERS ORGANISATION | TRADITIONAL HEALERS ORGANISATION |
| PROFESSION | *ISANGOMA* | *ISANGOMA* *UMTHANDAZI* |
| DIAGNOSIS | *ESICHITHA AMATHAMBO* | *ESICHITHA AMATHAMBO* |
| LEGEND | | |
| *ISANGOMA* | | DIVINER |
| *ISANGOMA ESICHITHA AMATHAMBO* | | BONE THROWER |
| *UMTHANDAZI* | | FAITH HEALER |

Other information gleaned from this engagement is discussed subsequently, but in order to widen the engagement pool, it was decided to engage more formally in the traditional healthcare paradigm as described below.

## 1.3 BACKGROUND: TRADITIONAL HEALER ENGAGEMENT IN KWAZULU-NATAL

In seeking a purposeful approach[958] to conducting interviews among traditional health practitioners to verify acts pertaining to the professions envisaged by the regulator, a request was made to the Khula Natural Health Centre directors for assistance.

This centre was approved as an education and training site by the Allied Health Professions Council of South Africa for final-year students towards the completion of the clinical requirements for the Master's degree in Homeopathy, as well as towards

[956] Permissions for identities to be used in this thesis were not granted by these interviewees.

[957] The author of this thesis was informed in June 2022 that this *isangoma* had passed away.

[958] LA Palinkas *et al* 'Purposeful sampling for qualitative data collection and analysis in mixed method implementation research' 2015 42(5) *Administration and Policy in Mental Health and Mental Health Services Research* 533; J Bantjes *et al* '"Our lifestyle is a mix-match": Traditional healers talk about suicide and suicide prevention in South Africa' 2018 (55)(1) *Transcultural Psychiatry* 77.

clinical requirements for the homeopathy internship; the centre therefore falls within its regulatory oversight.[959]

This centre was established in 2017 at Khula Village in rural KwaZulu-Natal and is situated within the Mtubatuba municipal boundary between the towns of Mtubatuba and St Lucia and

> *… is a charitable, non-profit, community upliftment project in close collaboration with the community and the induna (Zulu chief) of Khula Village, the government clinic, the University of Johannesburg and a local NGO, African Impact, which provides home-based care in the area.*[960]

The assistance sought was based on, among other things, the knowledge among the personnel of the rural environs and of healthcare practitioners – complementary, alternative or otherwise – in this rural area in KwaZulu-Natal.

Also important were their expertise and experience in the health challenges faced in the rural area where it operates, which were experienced first-hand on several occasions by the author of this thesis. A Khula Natural Health Centre director and a staff member, a translator, were instrumental in finding a purposeful sample comprising four *izangoma*, an *inyanga*, and an *umthandazi*.[961]

The preliminary procedure that needed to be followed was initial personal contact by the translator with both the President and Chairperson of the Vukuzenzele Traditional

[959] As indicated previously, the author of this thesis has been the Registrar of the Allied Health Professions Council from 2009 to 2022. Interaction with this health centre forms part of this statutory health council's regulatory oversight, which was then being a logical choice for requesting assistance in this research given the understanding of the centre's function within a healthcare paradigm, and its rural setting also being a consideration. The Khula Natural Health Centre is registered as a South African non-profit organisation as *Khula Nomathiya Health Centre and Orphanage Home* under registration No K2017/212617/08.

[960] http://www.khula.org/about.html, accessed 8 July 2022.

[961] The author of this thesis is deeply and profoundly grateful to Dr Nicoliene Potgieter-Steiner, Khula Natural Health Centre director, and particularly to Ms Thandi Nxumalo, isiZulu-English translator, for the initial effort undertaken in this regard, without which these interviews would have been impossible.

Healers Association.[962] The Chairperson of this organisation (acting under approval by the president of the organisation), then provided the name of an *isangoma,* who (then acting under the express authority of the Chairperson) subsequently provided the names of a further three *izangoma*, an *inyanga* and, although not requested, the name of an *umthandazi* or faith healer.

The translator visited all six persons requesting acquiescence and availability to be interviewed. Two of the persons approached were members of another professional organisation, the National Unitary Professional Association for African Traditional Health Practitioners of South Africa[963] and were not members of the Vukuzenzele Traditional Healers Association.

Interviews took place from 13 to 17 May 2022, in the following areas in the province of KwaZulu-Natal:

- Enkolokotho, Mtubatuba, uMkhanyakude District Municipality;
- Endlangubo, Empangeni, King Cetshwayo District Municipality;
- KwaSomkhele (Thandanani), Mtubatuba, uMkhanyakude District Municipality;
- KwaSomkhele (KwaMdolomba), Mtubatuba, uMkhanyakude District Municipality;
- Esigqogqogqweni (Somkhele), Mtubatuba, uMkhanyakude District Municipality; and
- Nongoma, Zululand District Municipality.

The author of this thesis conducted the interviews, with the assistance of the translator.

Certain personal details are listed in the following two tables:

[962] Registered as a non-profit organisation in South Africa as *Vukuzenzele Traditional Healers Association* under registration No K2021582204, incorporated on 3 May 2021. See https://b2bhint.com/en/company/za/vukuzenzele-traditional-healers-association--K2021582204,accessed on 7 July 2022.

[963] No Non-profit organisation documents found: https://dokumen.tips/documents/national-unitary-professional-association-for-african-traditional-health-practitioners.html, accessed 12 July 2022.

**TABLE 2: INTERVIEWS: *IZANGOMA* / *UMTHANDAZI*: KWAZULU-NATAL**

| INTERVIEWEE[964] | 1 | 2 | 3 | 4 |
|---|---|---|---|---|
| LAST NAME | XHAKAZA | XHAKAZA | MDLETSHE | MLUNGWANA |
| FIRST NAME | BUZEBONA | MANDLENKOSI | PHILA | ZANDILE |
| AGE | 65 | 49 | 35 | 34 |
| GENDER | MALE | MALE | MALE | FEMALE |
| ASSOCIATION | VUKUZENZELE | NUPAATHPSA | VUKUZENZELE | VUKUZENZELE |
| PROFESSION | *ISANGOMA* | *ISANGOMA* | *ISANGOMA* | *ISANGOMA* |
| | *UGOBELA* | *UGOBELA* | *UGOBELA* | |
| | | | *UMTHANDAZI* | |
| LINEAGE SPECIALITY | DENTAL | | DENTAL | DENTAL |
| | BONE SETTING | | | |
| SPECIALITY (OTHER) | STROKE | STROKE | STROKE | FIBROIDS |
| | HEADACHE | HEADACHE | HEADACHE | HEADACHE |
| | | | | ARTHRITIS |
| DIAGNOSIS | *SEKHANDA* AND | *SEKHANDA* | *SEKHANDA* AND | *SEKHANDA* |
| | *ESICHITHA* | | *ESICHITHA* | |
| | *AMATHAMBO* | | *AMATHAMBO* | |

| LEGEND | |
|---|---|
| *ISANGOMA* | DIVINER |
| *ISANGOMA SEKHANDA* | ECSTATIC DIVINER |
| *ISANGOMA ESICHITHA AMATHAMBO* | BONE THROWER |
| *INYANGA YOMHLABELO* | LINEAGE SPECIALITY: TREATMENT: FRACTURED BONES |
| *UGOBELA* | *ITHWASA* MASTER / INSTRUCTOR / TUTOR |
| DENTAL | *INYANGA* LINEAGE SPECIALITY: DENTAL TREATMENT |
| *UMTHANDAZI* | FAITH HEALER |

**TABLE 3: INTERVIEWS: *UMTHANDAZI* / *INYANGA*: KWAZULU-NATAL**

| INTERVIEWEE[965] | 1 | 2 |
|---|---|---|
| LAST NAME | LUKHELE | MADONDO |
| FIRST NAME | KHULEKANI | CASHI |
| AGE | 37 | UNKNOWN |
| GENDER | MALE | MALE |
| ASSOCIATION | NUPAATHPSA | NONE |
| PROFESSION | *UMTHANDAZI* | *INYANGA* |
| | *INYANGA* | |
| SPECIALITY | | SNAKE BITE |

| LEGEND | |
|---|---|
| *INYANGA* | HERBALIST |
| *UMTHANDAZI* | FAITH HEALER |

[964] Permissions were granted by these interviewees for their identities to be used in this thesis.

[965] Permissions were granted by these interviewees for their identities to be used in this thesis.

## 1.4 CONFLATION OF PROFESSIONS WITHIN THE CONSTRUCT OF TRADITIONAL MEDICINE: *IZANGOMA* AND *ABATHANDAZI*

As reflected by the data in all three tables in this chapter, as set out above, the interviews revealed that there is a conflation of professions among three of the interviewees – two *izangoma* also use faith healing when treating patients, practising therefore as *abathandazi*, whereas the *umthandazi* also practises as an *inyanga*.

As addressed previously, for the purpose of this thesis faith healing should be considered in terms of religion, rather than in terms of the practice of medicine, and this then brings about added considerations to legal scopes of practice delineations which are not addressed in the Act,[966] which is seemingly then possibly an omission since the Allied Health Professions Act, for example, proscribes the performance of any act which does not fall within a legal scope of practice.[967]

It remains an open question, however, in the view of the author of this thesis, whether this would be of any legal consequence in any legal scope of practice, since the belief is in divination and the healing that may ensue – appeasement of the ancestors, whether by faith healing or otherwise and the belief of the person consulting would be the cardinal issue. Of interest, and worth reiterating here, is that there is debate, particularly about Paul of Tarsus's first letter to the Christians of Corinth in respect of whether this passage authorises traditional healing by spirits, given that the *izangoma* are said to speak in the tongues of the *amadlozi* or the ancestors. Thornton avers *that in many cases prophets are izangoma and izangoma are prophets*, although often in different contexts.[968]

In the case of the *umthandazi* also practising as an *inyanga*, it is believed that the matter is less convoluted in the legal scope of practice delineation. Any *umthandazi* also practising as an *inyanga* would be required to register in the *inyanga* category envisaged by the regulator in order to practise such legally.

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[966] Act 22 of 2007.

[967] Act 63 of 1982; see section 32 (1)(b) (emphasis added): *Offences by practitioners and students, and penalties (1) A practitioner or a student ... may not- (a) …; or (b)* ***perform any act which does not fall within his or her prescribed scope of practice****.*

[968] n 2 above, 167.

## 1.5 *IZANGOMA*: CONFIRMATION OF METHODS OF DIVINATION

As reflected by the data in the first two tables in this chapter, confirmation was received that two acts of divination, namely that utilised by:

- an *isangoma sekhanda*, a 'head' or 'ecstatic' diviner, who practises divination by communing with the ancestors directly and who uses no material objects; and
- an *isangoma esichitha amathambo*, the 'bone thrower',[969]

were the acts of divination used in the traditional medicine paradigm. The data reflects that some *izangoma* used both techniques, whereas some used the 'bone-throwing' technique of divination only.

As mentioned previously, Ngubane indicates that persons consulting *izangoma* are expected to engage in the consultation process by indicating either concordance with the diviner's message or rejection of that message by the loud or soft clapping of hands, or by spoken concordance such as 'I agree, I agree, I agree': *ngiyavuma, ngiyavuma, ngiyavuma*, the degree of enthusiasm indicating concordance with or rejection of the message.[970] The author of this thesis was directed to indicate concordance during a particular *sekhanda* consultation (although this divination consultation was conducted by an *ithwasa* and not by his *ugobela*) by using the isiZulu term *thokoza* or 'thank-you' after each advice given, if in agreement with the advice or message.

As indicated previously, the description of the concordance technique elucidated by Krige, referring to a study first published in 1936[971] and citing Callaway,[972] discusses

[969] Ngubane (n 67 above) 103.

[970] n 67 above, 102.

[971] n 96 above, 300.

[972] As cited by Krige (n 96 above) 300: H Callaway 'Divination and analogous phenomena among natives of Natal' (1872) (1) *The Journal of the Anthropological Institute of Great Britain and Ireland* 163 - 185.

*izinyanga zesithupha*,[973] the thumb diviners, as well as the concordance process of the divining process by the *amabukulazinti*, who divine *by means of three or more pieces of stick a foot long, which jump about to indicate the answers*.[974] These practices were not mentioned by any of the interviewees as being a part of any contemporary divination practice, however.

The act of divination as utilised by a diviner possessed of the great ancestors, the *abalozi amakhosi amakhulu* or whistling-ancestors, as discussed previously and queried by Ngubane,[975] was discounted by all interviewees as never having been encountered or even heard of as being practised. Rather, it was something discussed only in literary sources or pertaining to oral folklore from a bygone era and was not a feature of the modern traditional medicine paradigm.

## 1.6 *UKUTHWASA*: *UGOBELA* AND *ITHWASA* TEACHING RELATIONSHIP

As described by Thornton above, intrinsic to the *ukuthwasa* process – the process of becoming an *isangoma* – is the teaching relationship between the *ugobela*, the teacher of the arts and knowledge of *bungoma*, the neophyte, *ithwasa,* the initiation school, *mpandze,* and the systems of transmission of knowledge.[976] As reflected by the data in the second table in this chapter, three *izangoma* are involved in a teaching relationship with the *amathwasa* or initiates; the Act defines such a person, the *ugobela*, as a *traditional tutor*.[977]

Observed interaction between the *amathwasa* and the *ugobela* verified, also as described previously, that the initiates were part of the household engaged in various duties and responsibilities which were part of the activities of the household and that they were accepted into the life and activities of the household of the *ugobela*.[978]

[973] Note: as queried previously, *izinyanga* do not divine; the phrase should possibly have been drafted as *izangoma zesithupha*?

[974] n 96 above, 300.

[975] n 67 above, 103.

[976] n 2 above, 12.

[977] Section 1, Act 22 of 2007.

[978] Thornton (n 2 above) 12.

Notably, extreme deference was shown by the *amathwasa* to the *ugobela* to the extent of continuous prostration when in the presence of the *ugobela*.

In contrast to the opinion offered previously that there are persons who may act as an assistant to an *inyanga* in identifying the locality of the *imithi and* gathering such,[979] the *izangoma* interviewed indicated that this formed part of the duties of the *amathwasa*; alternatively, *imithi* could be procured at special markets.[980]

The time frame of the initiation process among *amathwasa* differed according to individual abilities, the *ukuthwasa* progress and the ability of the *ithwasa*, parents or family to remunerate the *ugobela* the fees levied for *ukuthwasa* – the sum of which was not disclosed by any of the *izangoma*. According to one of the *ugobela* interviewed, *ukuthwasa* could be completed within a time frame of no longer than three months, which may have been a translation misunderstanding, but which seems to contradict the view that *ukuthwasa* is severely demanding and of long duration.[981]

[979] Personal discussion with the Registrar of the Interim Traditional Health Practitioners Council, 7 November 2017.

[980] n 965 above: The *inyanga* Madondo Cashi, identified in this table, conducts his practice in Nongoma, Zululand District Municipality, within the environs of such a market.

[981] Bührmann (n 143 above) 37.

## 1.7 AFFIRMATION OR DENIAL: ACTS SPECIALLY RELATING TO THE PROFESSIONS OF *IZANGOMA* IN GAUTENG AND KWAZULU-NATAL

The *izangoma* interviewed affirmed or denied that the scope of practice included the following acts specially relating to the profession, as follows:

**TABLE 4: INTERVIEWS: AFFIRMATION OR DENIAL OF ACTS SPECIALLY RELATING TO THE PROFESSION: *IZANGOMA* IN GAUTENG AND KWAZULU-NATAL**

| ACT SPECIALLY RELATING TO THE PROFESSION | *IZANGOMA* GAUTENG | *IZANGOMA* KWAZULU-NATAL |
|---|---|---|
| RITUAL SPIRITUAL PROTECTION | AFFIRMED | AFFIRMED |
| ANIMAL SACRIFICE FOR CLEANSING / *UKUTHWASA* | AFFIRMED | AFFIRMED |
| SPIRITUAL CLEANSING | AFFIRMED | AFFIRMED |
| ANCESTOR APPEASEMENT | AFFIRMED | AFFIRMED |
| EXORCISM | AFFIRMED | AFFIRMED |
| LIBATION | AFFIRMED | AFFIRMED |
| *UKUGCABA*[982] | DENIED | AFFIRMED |
| DIABETIC ULCER TREATMENT | AFFIRMED | AFFIRMED |
| DIABETIC ULCER EXCISION | AFFIRMED | DENIED |
| SALIVA TRANSMISSION | DENIED | DENIED |
| USE OF SEMEN | DENIED | DENIED |
| USE OF VAGINAL FLUIDS | DENIED | DENIED |
| BLOODLETTING | DENIED | DENIED, BAR ONE CASE |
| *UKULUMEKA* (BLOOD-CUPPING) [983] | DENIED | DENIED |
| FEMALE GENITAL MUTILATION / CIRCUMCISION | DENIED | DENIED |
| HUMAN BODY PART USAGE / TRAFFICKING | DENIED | DENIED |
| BIODIVERSITY DESTRUCTION THROUGH HARVESTING OF *IMITHI* | AFFIRMED | AFFIRMED |
| **LEGEND** | | |
| *IZANGOMA* | DIVINERS | |
| *UKUTHWASA* | PROCESS OF INITIATION; USE OF ANIMAL BLOOD AND BILE | |
| *UKUGCABA* | SKIN INCISIONS OVER JOINTS TO INTRODUCE *IMITHI* | |
| *UKULUMEKA* | BLOOD-CUPPING | |

[982] See above: Section B, Chapter 4.10, setting out the practice of *ukugcaba*.

[983] This practice was also discounted by all interviewees as having never been encountered or even heard of as being practised. Rather, it as something that had been discussed only in literary sources or pertaining to oral folklore in a bygone era and was not a feature of the modern traditional medicine paradigm, as was the case of diviners being possessed of the great ancestors, the *abalozi, amakhosi, amakhulu* or whistling-ancestors.

## 1.8 AFFIRMATION OR DENIAL: ACTS SPECIALLY RELATING TO THE PROFESSIONS OF *IZINYANGA* AND THE *UMTHANDAZI* IN KWAZULU-NATAL

The *inyanga and umthandazi* in KwaZulu-Natal indicated that, apart from the methods of divination by *izangoma* which were not utilised by them, the acts relating to the professions that they exercised were essentially the same as those listed in Table 4 for the *izangoma* in KwaZulu-Natal.

In the case of the *umthandazi*, faith healing was the basis of his practice, but with the use of herbal *imithi* as and when considered necessary. As indicated previously, it is believed that the matter is less complex in any legal scope of practice delineation for the regulator than in other cases of conflation of the professions or practices. Any *umthandazi* also practising as an *inyanga* could simply be required to register in the *inyanga* category envisaged by the regulator in order to practise such legally; compliance could however be a challenge for the regulator.

## 1.9 AFFIRMATION OR DENIAL: THE PRACTICE OF UKUGCABA, BLOODLETTING AND ULCER INCISION BY *IZANGOMA* AND *IZINYANGA* IN GAUTENG AND KWAZULU-NATAL

The practice of *ukugcaba* is regarded by the author of this thesis as extremely concerning, given especially the conclusions drawn by various researchers as set out previously.[984]

Although this practice was stated by the two *izangoma* interviewed in Gauteng as not being used in this province, it was confirmed as being an act specially related to the profession by the *izangoma* interviewed in KwaZulu-Natal, and also in the case of the *inyanga*. This was not however confirmed as part of the treatment regimen of the *umthandazi*.

The practice of Zulu traditional health practitioners ostensibly making incisions in and around the genital area, as reported by Scorgie *et al*, was denied by the

[984] See above: Section B, Chapter 4.10, setting out the practice of *ukugcaba*.

interviewees.[985] These authors posit that since southern Africa is not an area in which genital mutilation is traditionally practised, this variant of *ukugcaba* has not been considered by researchers in the field of genital mutilation. The practice of bloodletting was denied as being an act specially relating to the profession, except in the case of one *isangoma*, and the question of the excision of ulcers seen by the Gauteng *isangoma*, who wished to remain anonymous, was not affirmed by any of the persons interviewed in KwaZulu-Natal. The *isangoma* described the practice as being both therapeutic and preventative given her view that any admission to hospital for treating such ulcers would result in the death of the patient.[986] The treatment regimen indicated by her in KwaZulu-Natal was the application of a poultice, but there was also a referral to a conventional medical treatment facility if necessary.

## 1.10 *AMAKHAMBI* OR HERBAL MEDICINES ADMINISTERED OR PRESCRIBED WITHOUT RITUAL

The *izangoma* and *izinyanga* (when the *umthandazi* also practises as an *inyanga*) interviewed affirmed or denied the methods of delivery of *amakhambi* as follows:

**TABLE 5: INTERVIEWS: METHODS OF DELIVERY OF *AMAKHAMBI* OR HERBAL MEDICINES ADMINISTERED OR PRESCRIBED WITHOUT RITUAL**

| METHOD OF DELIVERY | *IZANGOMA* GAUTENG | *IZANGOMA / IZINYANGA* KWAZULU-NATAL |
|---|---|---|
| PER MOUTH | AFFIRMED | AFFIRMED |
| PURGATIVE | AFFIRMED | AFFIRMED |
| EMETIC | AFFIRMED | AFFIRMED |
| SUPPOSITORY (PER ANUM) | AFFIRMED | AFFIRMED |
| NEBULISATION | AFFIRMED | AFFIRMED |
| ENEMA (PER ANUM) | AFFIRMED | AFFIRMED |
| SUPPOSITORY (PER VAGINAM) | DENIED | AFFIRMED: ONE *ISANGOMA* AND THE *INYANGA* |
| TONGUE APPLICATION | AFFIRMED | AFFIRMED |
| SKIN APPLICATION | AFFIRMED | AFFIRMED |
| STEAM BATHS | AFFIRMED | AFFIRMED |
| LEGEND | | |
| *IZANGOMA* | DIVINERS | |
| *INYANGA* | HERBALIST | |

[985] n 343 above, 64 - 65.

[986] Stakeholder consultation, 7 March 2021.

The methods of delivery of *amakhambi* are those which might be expected in any medical discipline, complementary or otherwise.

The practice of the introduction of a suppository *per vaginam*, however, albeit only by a minority of interviewees, requires further research, particularly as to the exact *amakhambi* used, in terms of safety, quality and efficacy of the phytotherapeutic substance and for which conditions, medical or otherwise.

## 1.11 *AMAKHUBALO* OR MEDICINES ADMINISTERED OR PRESCRIBED WITH RITUAL

As opposed to medicines prescribed or administered for somatic conditions, certain medicines in traditional medicine are administered in a ritual context according to their symbolic significance. These *imithi* are known as *amakhubalo*, which comprise principally phytotherapeutic substances; medicines derived from wild animals, known as *izinyamazane*, may also be used.[987]

For a more comprehensive explanation of the use of symbolic medicine, refer to the exposition on this subject made previously,[988] but, as indicated previously, Ngubane states that these *imithi* may be classified in terms of three colours:

- black medicines *(imithi emnyama*);
- red medicines (*imithi ebomvu*); and
- white medicines (*imithi emhlophe*),[989]

and that *the symbolism is related on the one hand to the cosmic order of day and night, and on the other to the bodily functions of eating and defecating*,[990] essentially white versus black and red. Red represents dusk or dawn, without which there can be no day or night, but this colour also represents blood.[991] Ngubane stresses that the

[987] Ngubane (n 67 above) 109.

[988] See above: Section A, Chapter 9.3, setting out the use of symbolic medicine.

[989] n 67 above, 109.

[990] n 67 above, 114.

[991] n 67 above, 115.

use of these medicines is black, followed by red, followed by white, serially and in that order only – rigidly and never reversed.[992]

As posited previously, it is believed that persons who wish to use sorcery will employ *imithi* that represent the forces of the dark. Healing with *amakhubalo* then encompasses the use of medicines to move a person from the spectrum of darkness, through the red spectrum, and into the light towards healing.[993]

All *izangoma* interviewed confirmed the use of *amakhubalo* in their practices, with only one *isangoma* indicating unequivocally that *izinyamazane*, or medicines derived from wild animals, were never part of *amakhubalo*, but notably, all *izangoma* confirmed the use of *amakhubalo* as the treatment regimen to counter the effects of sorcery or witchcraft.

## 1.12 THE HARVESTING OF *IMITHI*: *AMAKHAMBI* OR *AMAKHUBALO*

Interviewees affirmed that the harvesting of *imithi* was leading to biodiversity destruction and, as indicated previously, the objectives of the Biodiversity Act[994] include providing for using indigenous resources in a sustainable manner within the management and conservation of biological diversity, together with *the fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources*.[995] Certain provisions include protection of threatened or protected ecosystems, protection of threatened or protected species and the regulation of trade in threatened or protected species.[996] The objectives as set out in this legislation fall within the legislative framework of the National Environmental Management Act.[997]

[992] n 67 above, 113.

[993] See above: Section A, Chapter 9.3, setting out the use of symbolic medicine.

[994] Act 10 of 2004.

[995] Section 2(a), Act 10 of 2004.

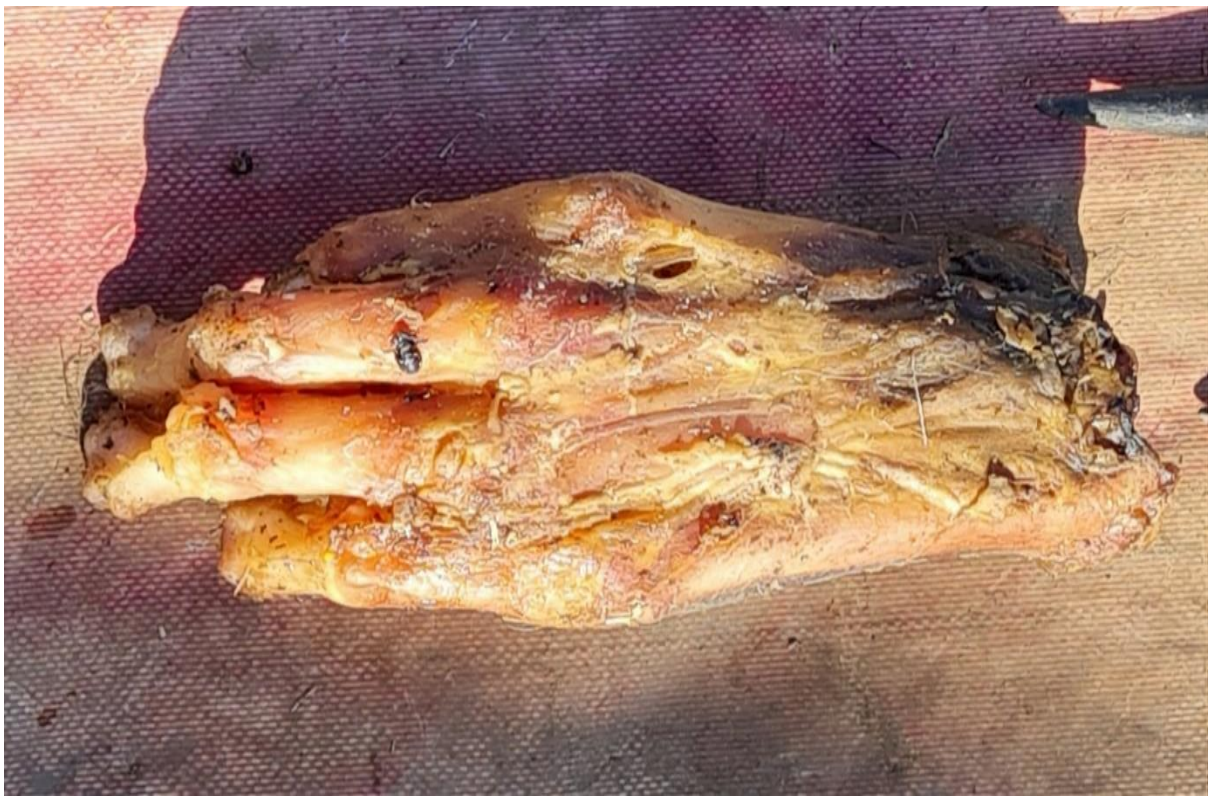
[996] Sections 51 - 62, Act 10 of 2004.

[997] Act 107 of 1998.

## 1.13 VISIT TO MONA MARKET, NONGOMA, ZULULAND DISTRICT MUNICIPALITY

As alluded to previously, the *izangoma* interviewed indicated that the collection and preparation of *imithi* formed part of the duties of the *amathwasa*, or alternatively *imithi* could be procured at special markets. Such a market for procuring *imithi*, whether *amakhambi* or *amakhubalo*, including *izinyamazane* or not, exists at Nongoma in northern KwaZulu-Natal and is renowned throughout KwaZulu-Natal as ostensibly being unsurpassed of its kind. The *inyanga* interviewed practises his profession within the precincts of this *imithi* market,[998] and the opportunity was also taken to appraise the market itself. The following photographs (Photographs 1 – 7) offer a general impression of this market and the items on sale, but do not capture the exact nature of the market itself, deemed inexpressible by the author of this thesis.[999]

**PHOTOGRAPH 1: *INYAMAZANE* FOR SALE: STATED AS BEING PART OF THE PAW OF A LION, *PANTHERA LEO***



[998] n 965 above, the *inyanga*, Madondo Cashi.

[999] Permissions granted to take photographs by stallholders; the author of this thesis was profoundly disturbed at the sight of the *izinyamazane* for sale.

**PHOTOGRAPH 2: *IZINYAMAZANE* FOR SALE**

**PHOTOGRAPH 3: *IZINYAMAZANE* FOR SALE**

**PHOTOGRAPHS 4 AND 5: *AMAKHAMBI* IN RAW AND PREPARED STATES FOR SALE**

**PHOTOGRAPH 6: *IZINYAMAZANE* FOR SALE**

**PHOTOGRAPH 7: GENERAL VIEW OF MONA MARKET WITH *AMAKHAMBI* AND *IZINYAMAZANE* FOR SALE**

## 1.14 *IMITHI* MARKETS AND ZOONOSIS

Zoonosis is the spread of a naturally transmissible infection from vertebrate animals to human beings, with the pathogen being a parasite, a bacterium or a virus and subsequently infecting human beings through direct contact by means of the use of fomites or through the environment.[1000]

[1000] World Health Organisation Zoonoses: Fact Sheet (2020) Geneva, https://www.who.int/news-room/fact-sheets/detail/zoonoses#:~:text=A%20zoonosis%20is%20an%20infectious,food%2C%20water%20or%20the%20environment, accessed on 22 July 2022.

Zoonosis is not the subject of this thesis, but in light of the Covid-19 pandemic and the current debate about the origin of the disease, whether zoonotic or not,[1001] and even though no live animal was seen to be for sale at the Mona Market at Nongoma, the most recent opinion on the Covid-19 pandemic indicates that:

> *While … exact circumstances remain obscure, our analyses indicate that emergence of SARS-CoV-2 occurred via the live wildlife trade in China, and show that the Huanan market was the epicenter of the COVID-19 pandemic.*[1002]

## 1.15 SYNOPSIS OF FINDINGS

Information and research findings presented previously about certain clinical practices or acts within the practice of traditional medicine led to the view by the author of this thesis at that juncture within this thesis that regulation might need to be applied more strenuously, rather than otherwise, given that they were considered cause for extreme concern in view of being deleterious to the health of the public, but that a conclusion would only be reached after stakeholder engagement; affirmation or denial by practitioners of traditional medicine regarding these clinical practices or acts has seen now engagement and are as follows:

- **AFFIRMATION: CLINICAL PRACTICES OR ACTS WITHIN TRADITIONAL MEDICINE**

  Affirmation has been given that the following acts are carried out within the paradigm of traditional medicine:

  - diagnosis by divination as either an *isangoma sekhanda* or an *isangoma esichitha amathambo*;
  - ritual spiritual protection;
  - animal sacrifice;
  - ancestor appeasement, exorcism and libation;

[1001] N Haider *et al* 'COVID-19-zoonosis or emerging infectious disease?' 2020 (8) *Front Public Health* 1 - 8.

[1002] M Worobey *et al* 'The Huanan seafood wholesale market in Wuhan was the early epicenter of the COVID-19 pandemic' *Science* n.p. https://doi.org/10.1126/science.abp8715, accessed 27 July 2022.

- *ukugcaba* or incising the skin to introduce *imithi*;
- diabetic ulcer treatment and incisions; and
- biodiversity destruction was of increasing concern.

- **DENIAL: CLINICAL PRACTICES OR ACTS WITHIN TRADITIONAL MEDICINE**

That the following acts are carried out within the paradigm of traditional medicine, was denied:

- transmission of human semen, saliva or vaginal fluid;
- bloodletting and blood-cupping;
- female genital mutilation or female circumcision;
- *ukugcaba* or incising the skin to introduce *imithi* into the *izingcabo* on the head, abdomen, breasts and joints, but also in the genital area near the labia, to attract men and sustain their sexual satisfaction; and
- human body part usage or trafficking of human beings.

- **OTHER FINDINGS**

Other findings include that:

- there is a conflation of professions of *inyanga* and *abathandazi*; and
- there is confirmation of the active education and training in the master-discipline model; and that
- the sale of *izinyamazane* at special *imithi* markets, such as that observed at Nongoma, is deleterious to the health of the public from a zoonotic perspective as well as contributing to biodiversity destruction.

## 1.16 CONCLUSION

Given the above, the conclusion now reached in consideration of the research question is that regulation is not only essential, but requires strengthening and enforcing. The cardinal feature of the original contribution to research around traditional medicine, in light of this conclusion, namely proposed changes to the extant legislative precepts, including the presentation of a legal scope of practice

recommending either prescribing, or proscribing, as the case may be, the armamentaria, or range of clinical practices, medicines and equipment, used within this system of medicine, currently not a feature of extant regulation, will be presented subsequently.

# CHAPTER 2
# OTHER STAKEHOLDERS

## 2.1 INTRODUCTION

Information relating to other stakeholders in the traditional medicine healthcare paradigm, their roles and some pertinent comments regarding their functions follow below.

## 2.2 NATIONAL DEPARTMENT OF HEALTH: THE EXPERT WORKING GROUP ON TRADITIONAL MEDICINE

Appointments to this expert working group were made by the Minister of Health in November 2021. The purpose of this group, according to the letter of appointment,[1003] being:

> *… to assist the national department of health by providing technical advice and support on matters related to traditional medicine as they emanate from activities and engagement with partners both local and international organizations like the WHO*, *BRICS*,[1004] *IBSA*,[1005] *SADC*,[1006] *etc.*[1007]

[1003] Neither the letter of appointment received from the Minister of Health, nor any correspondence received from the Chairperson of the group, contain any legal disclaimer that either the establishment and composition of the group or the aims and objectives of this committee, or the workings of the group, are confidential – thereby excluding or legally preventing disclosure of any matter relating to this group.

[1004] A grouping of five nations – Brazil, Russia, India, China and South Africa – with the aim of promoting peace, security, development and cooperation; https://www.google.com/search?q=BRICS&oq=BRICS&aqs=chrome.0.69i59j69i57j69i59l2j0i271l2j69i60l2.1447j0j7&sourceid=chrome&ie=UTF-8, accessed 23 July 2022.

[1005] The IBSA is a forum comprising India, Brazil and South Africa for consultation and coordination on global and regional political issues, as well as trilateral cooperation on identified projects and providing assistance to other developing countries through an IBSA fund; https://www.ibsa-trilateral.org/, accessed 23 July 2022.

[1006] n 885 above.

[1007] Letter of appointment issued to the author of this thesis in his *ex officio* capacity as the Registrar of the Allied Health Professions Council of South Africa by Dr MJ Phaahla, MP, Minister of Health, dated 30 November 2021.

Representatives from the National Department of Health, the Allied Health Professions Council, the Interim Council,[1008] knowledge holders, the South African Health Products Regulatory Authority, traditional medicine researchers, relevant government departments and academia would be participants.[1009]

Objectives of the working group include:

- regulatory and legal framework trends for traditional medicine;
- institutionalisation of traditional medicine in a national healthcare system;
- intellectual property protection;
- regulation of education and training;
- the practice of traditional medicine;
- the use of systems to preserve and codify this system of medicine, including the use of any pharmacopoeia; and
- the evaluation of the existence of this system of medicine against other systems of medicine.

The objectives, as set out above, have yet to be considered in any detail.

## 2.3 THE INTERIM TRADITIONAL HEALTH PRACTITIONERS COUNCIL OF SOUTH AFRICA

As indicated previously, as far as the author of this thesis is aware, the Interim Council is yet to be formally constituted, registration procedures have yet to commence, and no funding has been made available by parliament.[1010] The result is that the Interim Council Registrar occupies a position in the National Department of Health.[1011] No response has been received from requests to the Registrar of this interim authority to

[1008] An objection was raised that participation by any member of this statutory health council was impossible, since the Interim Council was not yet operational, which was seemingly then accepted by the Chairperson to the subsequent exclusion of the Registrar of that statutory health council.

[1009] Draft terms of reference for this expert working group as circulated by email to group members on 29 October 2021 from Mr B Mbedzi, Director of the Department of Health.

[1010] Section 16(1)(a), Act 22 of 2007.

[1011] Mullinder (n 541 above).

discuss developments, legal or otherwise, concerning the operational activity of the Interim Council from those recorded earlier in this thesis.

## 2.4 THE SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY

Section 47(j) of the Traditional Health Practitioners Act empowers the Minister, after consultation with the Interim Council, to make regulations relating to *traditional medicines in order to protect the public and to ensure safety of use, administration or application*[1012] – this against the apparent exclusion of the legal powers of the South African Health Products Regulatory Authority and the Medicines and Related Substances Act.[1013]

Thembo, in confirming the views of Gower as specified previously,[1014] indicated that an expert working group or committee[1015] is currently developing a framework for the regulation of traditional medicines with a view to recommending proposals to the board of this regulatory authority for engagement with the Minister of Health for the future regulation of traditional medicines by this regulatory authority.[1016] Whether this group is considering proprietary or non-proprietary medicines requires clarification.

## 2.5 THE SOUTH AFRICAN NURSING COUNCIL AND *ABABELETHISI*

Mokgobi sees this category of traditional health practitioner, the traditional birth attendant, as being in decline given the increased choice by parents to have children delivered in public healthcare facilities,[1017] but Peltzer cites both a decrease in the use of such services, but also an increase among younger women in the Eastern Cape.[1018]

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[1012] Act 22 of 2007.

[1013] Act 101 of 1965.

[1014] n 603 above.

[1015] Believed to be under the Chairpersonship of Professor Motlalepula Matsabisa, Professor of Pharmacology of the University of the Free State, who is also a member of the Complementary Medicines Committee of the South African Health Products Regulatory Authority; this working group/committee is not a component of the Complementary Medicines Committee, however.

[1016] Personal discussion, Dr Kaizer Thembo, Member: Complementary Medicines Committee, South African Health Products Regulatory Authority, on 22 July 2022.

[1017] n 105 above, 28.

[1018] n 296 above, 179.

The South African Nursing Council has indicated that once the registration category for this profession becomes operational, consideration will be given to interaction with the Interim Council with regard to midwifery legislation, together with any other matters which might relate to the nursing profession as regulated by this statutory health council.[1019]

## 2.6 TRADITIONAL HEALER ASSOCIATIONS

The *izangoma*, *izinyanga* and *abathandazi* in Gauteng and KwaZulu-Natal indicated membership of one of three professional associations. These were the:

- Traditional Healers Organisation;
- Vukuzenzele Traditional Healers Association;[1020] and
- National Unitary Professional Association for African Traditional Health Practitioners of South Africa.[1021]

The Gauteng-based *izangoma*, one of whom is now deceased, indicated opposition to national government regulation – both indicated that self-regulation of a traditional or cultural practice was preferable. The KwaZulu-Natal *izangoma* and *abathandazi* all welcomed national government regulation, but the impression gleaned was that this would then lead to financial grants from government to practitioners.

A further internet-based search offered some other associations:

- African National Healers Association;[1022]
- South African Healers Association;[1023]
- South African National Traditional Healer Association;[1024] and

[1019] Personal discussion, Ms Sizo Mchunu, Registrar, South African Nursing Council, on 5 August 2022.

[1020] n 962 above.

[1021] n 963 above.

[1022] Registered as a non-profit organisation in South Africa under registration number 89/0529/08: https://www.africannationalhealersassociation.org/, accessed 3 August 2022.

[1023] No non-profit organisation registration documentation found: https://umsamo.org.za/, accessed 3 August 2022.

[1024] No non-profit organisation registration documentation found: https://santha.co.za/, accessed 4 August 2022.

- African Dingaka Association.[1025]

Further research, including willingness to be regulated by government,[1026] is required because of the lack of detail on the number of professional associations and number of members, the debate and dispute about statistics involving numbers of persons practising within the traditional health paradigm and its use by members of the public, in order to affirm these associations as representative stakeholders in any future consultation process.[1027]

## 2.7 CONCLUSION

In any future regulation, the stakeholders mentioned above will require consultation; in the case of the apparent exclusion of the South African Health Products Regulatory Authority from the regulation of *imithi* used within the traditional medicine healthcare paradigm, clarification is required.

[1025] Seemingly inactive, however: https://b2bhint.com/en/company/za/african-dingaka-association-of-s-a--M1969004489, accessed 4 August 2022.

[1026] http://www.npo.gov.za/, accessed 3 August 2022.

[1027] See above: Section B, Chapters 3.2 and 3.3, setting out statistics and the prevalence of consultation.

# SECTION E:

# SOUTH AFRICAN TRADITIONAL MEDICINE – CONCLUSIONS AND RECOMMENDATIONS

# CHAPTER 1
# CONCLUSIONS

## 1.1 INTRODUCTION

The reluctance to engage with the author in the discussion of traditional medicine for the purposes of this thesis, given that some practices are said to occupy metaphysical, occult or orphic realms, could not be discounted. Nevertheless, the seemingly forthright and candid, but above all, convivial and genial reception afforded the author of this thesis by the *izangoma*, in the capacity of an *ugobela* or an *isangoma* or both, the *izinyanga*, and the *abathandazi* during the visit to KwaZulu-Natal, was noteworthy.

The affirmed tenet that this thesis would not validate, denounce or rebut this paradigm of medicine remains valid. The cogent and consistent reality is that traditional medicine is actively practised in South Africa and is, moreover, believed by many South Africans to be a persuasive and compelling system of medicine – regardless of the debate and the dispute about statistics involving its use.[1028]

As indicated in the preface, the research question is primarily to draw conclusions and make recommendations about any future legal regulation of the practice of traditional medicine in South Africa, and if so found that regulation is still required, or requires strengthening, then a cardinal feature of the originality of the research contribution would be the presentation of a legal scope of practice; that this thesis would also provide any interested person with a single resource overview of the South African traditional medicine paradigm, functionally and purposefully referenced and having been drawn from such sources as are currently available and accessible, and for future use, even if only a brief allusion to any particular aspect had been made, is also a feature of the originality of the contribution to research regarding the traditional medicine healthcare paradigm in South Africa.

It has consistently been a fundamental principle in the view of the author of this thesis, both professionally and personally, that it is both axiomatic and manifest that the health of the public can only be safeguarded by regulation – with regulation also furthermore

[1028] See above: Section B, Chapters 3.2 and 3.3, setting out statistics and the prevalence of consultation.

serving the purpose and aim of enhancing any health profession, ultimately then to the benefit of the health of the public. A further element to consider at any juncture of the process leading to regulation is that proscription may simply be inexpedient and imprudent to advise, since it may lead to latent and covert practice or use.

## 1.2 CAVEAT: THE TRADITIONAL HEALTH PRACTITIONERS ACT[1029]

The efficacy and relevance of any legislative precept in law, with concomitant benefit to society at large, namely whether it is fit for purpose, may only be judged against its implementation, application and enforcement. As this is not currently the case, as has been stated previously, this may very well militate against explicit and definite conclusions and recommendations, and these will follow subsequently.

## 1.3 THESIS CONCLUSIONS

The following is a synopsis or summation of all conclusions reached during the compilation of this thesis, after both literature research and stakeholder engagement, and these have been categorised and combined, where appropriate to the particular conclusions made previously, and, for ease of reference, distilled into individual conclusions since the same topic has seen discussion at several junctures within this thesis, and as follows:

### 1.3.1 NON-FUNCTIONALITY OF THE INTERIM COUNCIL IN CONTEXT OF THE PRACTICE OF TRADITIONAL MEDICINE

The fact that registration categories are not yet open, and the fact that the Interim Council is not yet operational appear to reinforce the notion that there is little political will to bring about effective regulation of traditional medicine in South Africa.

The reality is that the protection of the health of the public is being compromised.

If this medico-legal paradigm were not intended to be regulated, enactment of relevant regulatory precepts would not have taken place and whether the ostensible

[1029] Act 22 of 2007.

indifference can be ascribed to a lack of political will, disregard for a system of medicine other than conventional medicine, an inability to engage meaningfully with stakeholders, or for any other reason, remains unclear.

Notwithstanding the ostensible decline in the practice of traditional medicine, it is actively extant in South Africa, in whatever statistical significance. The general perception remains that Black South Africans consult persons practising traditional medicine as a primary approach to healthcare, rather than conventional or other health practitioners and it is concluded that it will be incumbent on the regulators to achieve proper statistics to ensure concomitant proper regulation – the sample of persons practising traditional medicine indicated a wish to be regulated, but it is concluded that more research is required to confirm this position.

### 1.3.2 DRAFT POLICY ON AFRICAN TRADITIONAL MEDICINE FOR SOUTH AFRICA

Questions about the length of time taken to bring this finalise this policy given that the draft policy regarding African traditional medicine is now some 14 years in the making, can only be answered in a similar manner to the conclusion in the previous section.

### 1.3.3 APPOINTMENT OF VARIOUS PERSONS TO THE INTERIM COUNCIL[1030] AND TO THE EXECUTIVE COMMITTEE OF THE INTERIM COUNCIL[1031]

Appointments such as pharmacists or an employee in the service of the Department of Health to the executive committee of the Interim Council might be perceived as militating against the autonomy of any statutory health council and have the potential to lead to conflict – that an employee of the National Department of Health is then required to be appointed to the executive committee of the Interim Council might be perceived as having the potential to lead to a conflict of interest. Other appointments to the Interim Council, such as community representatives, with no definition as to who might qualify for such appointment, may equally prove debateable since practitioners of complementary or alternative medicine understand the actualities of the

[1030] Sections 7(g) and (h), Act 22 of 2007.

[1031] Sections 13(f) and (g), referencing sections 7(d) and (g), Act 22 of 2007.

conventional medico-legal paradigm since they are involved in such in their daily living, but the reverse is seldom the case.[1032] It is concluded that various provisions in this legislation are potentially unworkable, or may potentially cause friction between the members of the Interim Council and the Minister of Health.

### 1.3.4 MINISTER OF HEALTH CONSULTATION WITH THE INTERIM COUNCIL

The Interim Council is obliged *to implement the health policies determined by the Minister concerning traditional health practice*,[1033] seemingly then without consultation in this circumstance, although consultation with the Interim Council is prescribed in other instances.[1034] Furthermore, the consultation requirement differs in the respective statutory health councils' legislation. In the Health Professions Act and the Nursing Act no consultation is required, but it is required by the Dental Technicians Act, the Pharmacy Act and by the Allied Health Professions Act.[1035] This is potentially cause for a disjunct between the Minster of Health and the Interim Council.

### 1.3.5 TRADITIONAL MEDICINE: A HEALING PARADIGM

A distinction exists between the practice of traditional medicine within a healing paradigm and the practice of witchcraft – the healing acts or clinical practices pertaining to the various professions are used to bring about healing to those persons whose belief encompasses the various causes of illness, but traditional medicine notwithstanding recognises that a person may believe that a witchcraft affliction is also a cause of illness within traditional medicine and is accepted as a valid belief system within the healthcare construct, it is concluded.

[1032] Mullinder (n 541 above).

[1033] Section 6(2)(b), Act 22 of 2007.

[1034] Section 6(2)(f), Act 22 of 2007.

[1035] Act 56 of 1974, Act 33 of 2005, Act 19 of 1979, Act 53 of 1974 and Act 63 of 1982, respectively.

### 1.3.6 TRADITIONAL MEDICINE: PHILOSOPHICAL BACKGROUND

The practice of traditional medicine, integral to *bungoma*, the philosophy of the drum, in which drums are believed to be a means of direct communication with the ancestors for the acquisition of knowledge to practice traditional medicine and for use in accompanying rituals to redress causes of illness, is a valid belief system within the healthcare construct. Ancestors are viewed as the most intimate of the divinities and keepers of morality primarily maintaining harmony between the physical and spiritual planes and withdrawal of protection by them is seen as inducing susceptibility to illness and misfortune. This is accepted as a valid cause of illness within this paradigm and is a valid belief system within the healthcare construct, with diagnosis by divination taking place as either an *isangoma sekhanda* or an *isangoma esichitha amathambo*. It is concluded that in any further appraisal of traditional medicine, these beliefs must be taken into account.

The debate as to whether there is rather a conflation of medical systems, traditional and conventional, in use in South Africa, rather than the adoption of any one system 'parallel' to another, is concluded not to be of any consequence in achieving the essentiality of the research question, namely whether regulation of this profession is to be continued, and possibly strengthened, or not. The assertion that traditional medicine is nothing more than apotropaic magic, seen against the differentiation between the treatment of somatic conditions and other, is rejected and leads to the conclusion that traditional medicine cannot be categorised in such simple terms, but this it is also concluded that it is not believed to be of any consequence in achieving the essentiality of the research question, namely whether regulation of this profession is to be continued, and possibly strengthened, or not.

The philosophy of *ubuntu* underpins the practice of traditional medicine is recognised, but it is concluded that any specific reference to this philosophy in any future legal precept, be it policy or legislation, might be regarded as being in conflict with constitutional values – in particular against the equality clause.[1036]

[1036] Section 9, the Constitution.

While practitioners of both traditional and complementary health are excluded from the South African public healthcare paradigm by National Department of Health policy, ostensibly against the background of the progressive realisation of the constitutional right of access to health against available resources, the limited right to practise traditional medicine is constitutional and to consult a practitioner within this healthcare construct remains a valid choice, also that it is a valid belief system within the healthcare construct for many South Africans.

### 1.3.7 INDIGENOUS KNOWLEDGE SYSTEMS

This facet within this thesis was previously elucidated and the amendments to the Patents Act,[1037] together with the promulgation of the Protection, Promotion, Development and Management of Indigenous Knowledge Act[1038] are welcomed.

A call for applications for the certification of competencies of indigenous knowledge practitioners in the *isangoma*, *inyanga*, and *umbelethisi* registration categories in traditional medicine in terms of this Act under a recognition of prior learning pilot programme for the province of KwaZulu-Natal are also welcomed.[1039] Prior learning pilot programme results or conclusions, if and when published, may prove of interest to any future researcher. The positing that the true ownership of traditional medicines in South Africa is held by public and private entities, *including pharmaceutical and scientific institutions, totally outside the domain of the South African traditional healing fraternity*[1040] is rejected.

It is hoped that the recognition of indigenous knowledge as a national asset and the reality of development in the regulation and realisation of rights in the traditional medicine paradigm will be ongoing, as it should also be in the complementary or alternative medicine paradigm. As stated, any oral tradition relating to traditional medicine must be recorded.

[1037] Act 57 of 1978.

[1038] Act 6 of 2019.

[1039] n 873 above.

[1040] Louw & Duvenhage (n 883 above) 254.

### 1.3.8 ECOSYSTEMS, ANIMALS AND PLANTS AND *IMITHI* MARKETS

It is trite that there are ecosystems and species of animals or plants that are threatened and should be protected, and that there is trade in threatened or protected species.

While animal sentience may not formally be recognised in law or policy in South Africa, cruelty towards domestic animals, as well as wild animals, birds and reptiles in captivity, or under the control of human beings, is prohibited. Certain practices are cause for concern, in particular the use of wild animals or animal parts as *imithi*, known as *izinyamazane*, available from special *imithi* markets, together with animal sacrifice according to traditional medicine rituals. This are *lacunae* in law which require further consideration.

The question of the sale of *imithi* sourced from wild animals or *izinyamazane* at special *imithi* markets, such as that observed at Nongoma,[1041] is concluded to be a matter of critical concern.

### 1.3.9 EDUCATION AND TRAINING

The master-discipline model, or the individual teaching relationship between an *ugobela* and *ithwasa*, it is concluded, must be considered against the possibility of the non-attainment of a national standard and therefore possibly leading to the dilution of required standards of competency to enter the profession as may be required or envisaged by the regulator. Education and training in the broader sense, whether in the accreditation of any institution of education and training and any system of continuing education, seen against the nature of formalised training against the highly individualised practice of certain practices within the paradigm, will see specific challenges by regulators who perform duties in an overwhelmingly conventional medicine milieu.

[1041] See above: Section D, Chapter 1.9: visit to Nongoma *imithi* market.

### 1.3.10 UNIVERSAL HEALTH COVERAGE FOR ALL AS ENVISAGED BY THE NATIONAL HEALTH INSURANCE BILL[1042]

No guarantee exists at this stage, it is concluded from engagement with regulators, that the services of all registered healthcare practitioners in the traditional medicine paradigm or otherwise will be made available to all South Africans under the proposed universal healthcare system as envisaged in terms of this draft legislation.

### 1.3.11 CIRCUMCISION, FEMALE GENITAL MUTILATION AND VIRGINITY TESTING

Issues surrounding initiation practices such as: circumcision, female genital mutilation and virginity testing are now subject to the provisions of the Customary Initiation Act,[1043] and it is accepted that the promulgation of this legislation is in recognition that proper safeguarding of persons undergoing circumcision is exigent; it cannot be concluded that this legislation will now ensure proper safeguarding of persons undergoing any initiation practices however – the statistics and debate surrounding the number of deaths, penile amputations and disfigurement resulting from male circumcision, in particular, require no further elucidation as the nature of the ineffable deleterious effect on the health of initiates – since proper enforcement is required.

Female genital mutilation, including female circumcision, is posited as not being practised generally in southern Africa, but such practices are reported to take place in Venda and among the Basotho baTlokwa peoples, respectively, which are believed to be part of initiation rituals, although they do not resort within the traditional medicine paradigm; these require further scrutiny and investigation.

### 1.3.12 CLINICAL PRACTICES OR ACTS SPECIALLY RELATING TO THE PROFESSION OF TRADITIONAL MEDICINE

Certain clinical practices, acts or treatment practices within the practice of traditional medicine including the transmission of human semen, saliva or vaginal fluid,

[1042] B 11 – 2019, explanatory summary of Bill and prior notice of its introduction published in Government Gazette no 42598 on 26 July 2019. See above: Section C, Chapter 6, setting out the question of universal health coverage as envisaged under the National Health Insurance Bill.

[1043] Act 2 of 2021.

bloodletting, blood-cupping and *ukugcaba* or incising the skin to introduce *imithi*, including also mercury, together with treatment of diabetic ulcers, are considered cause for extreme concern – of equal concern, although denied, is the introduction of *imithi* into the *izingcabo* on the head, abdomen, breasts and joints, but also in the genital area near the labia, to attract men and sustain their sexual satisfaction.

It is concluded that these clinical practices or acts are deleterious to the health of the public, unequivocally so.

It is therefore concluded, in answer to the research question, that it is essential that regulation ought now to be applied more strenuously rather than otherwise.

### 1.3.13 HIV AND AIDS

The South African government has acknowledged that HIV, AIDS, tuberculosis, significant maternal and child rates of mortality, and non-communicable diseases, such as diabetes, together with malaria and STDs, are neither detected nor treated in a timely manner and that this affects disease progression, and it is concluded that these clinical practices are seemingly a contributing factor towards the spread of HIV, AIDS and STDs.

The practice of *ukugcaba* or incising the skin to introduce *imithi*, has been demonstrated to a direct cause in the transmission of HIV, and, as stated previously it is concluded that such clinical practices or acts are deleterious to the health of the public, unequivocally so.

### 1.3.14 THE PHARMACOPOEIA OR MATERIA MEDICA

Even though the Minister may make regulations, after consultation with the Interim Council, relating to *traditional medicines in order to protect the public and to ensure safety of use, administration or application*,[1044] questions about not only the safety and efficacy, but also the quality of traditional medicines and the apparent exclusion of the

[1044] Section 47(j), Act 22 of 2007.

legal powers of the South African Health Products Regulatory Authority and the Medicines and Related Substances Act,[1045] are causes for concern.

Any current progress made by an expert working group or committee ostensibly developing a framework for the regulation of traditional medicines, whether proprietary or non-proprietary medicines or both, remains outside of the public domain. It is concluded that there is a lack of transparency, if only then to the terms of reference of this group or committee, to gain an understanding of the functioning of this group or committee.[1046]

It is concluded that investigation by expert researchers and governmental agencies into whether the extant materia medica, in whatever form and from whichever usage perspective in traditional medicine, should now see incisive scrutiny from various perspectives with a view to either proscription in terms of extant legislation or regulation acquiescence in terms of extant or future legislation; in light of the research evidence, that serious consideration should be also given to the possible pharmacodynamic interaction of *imithi*, especially in the treatment of HIV given the potential of these *imithi* to interact with anti-retroviral therapy.

### 1.3.15 THE USE OF BODY PARTS IN TRADITIONAL MEDICINE

There is minimal evidence or data reportage at which stage body parts are removed for use as *imithi* from the living or from the dead, if at all, and despite denial by practitioners of traditional medicine, similarly regarding the issue of trafficking of persons for the use of body parts in traditional medicine, proscription requires stricter enforcement.

### 1.3.16 DIVINATION AND INFORMED CONSENT

The lack of explicitly given informed consent, it is concluded, might then be tacit (a consensual tacit or imputed tacit term)[1047] or otherwise, and any philosophical

[1045] Act 101 of 1965.

[1046] See above: Section D, Chapter 3, setting out information regarding this working group or committee.

[1047] n 936 above.

considerations as to the compatibility in law of the legal requirement of informed consent in questions of diagnosis by divination, should be a matter for further research.

### 1.3.17 CULTURAL DEFENCE

Carstens indicates unequivocally that *a denial of the cultural defence erodes the notion of justice in the African cultural context*, warning also that the application of any such defence, required to be free from preconception, prejudices and be heard with objectivity, might certainly be a challenge going forward.[1048]

### 1.3.18 CATEGORIES OF REGISTRATION

Given that one of the *umthandazi* interviewed in KwaZulu-Natal also practised as an *inyanga*, with a conflation of two professions,[1049] conflation of professions occurs. It is concluded that the category of *umthandazi*, or faith healer, might very well be seen as being part of traditional medicine by relevant stakeholders, or not, as the case may be. In Namibia, the expressed intention, although currently only in the form a Bill,[1050] outlines specific categories of practice, namely specialist herbalist, faith herbalist, faith healer, diviner herbalist, diviner and traditional birth attendant, although not with any definitions provided.

## 1.4 ESSENTIAL CONCLUSION TO THE RESEARCH QUESTION

The essential conclusion of this research endeavour is that not only is continued regulation essential, but that it requires strengthening in certain respects. In keeping with the original contribution to research in this field and a cardinal feature of this original contribution to research around traditional medicine will be proposed changes to the extant legislative precepts, including the presentation of a legal scope of practice recommending either prescribing, or proscribing, as the case may be, the armamentaria, or range of clinical practices, medicines and equipment, used within this system of medicine, currently not a feature of extant regulation.

[1048] n 191 above, 22.

[1049] See above: Section D, Chapter 1.3, setting out the conflation of the two professions.

[1050] Traditional Health Practitioners Bill, [B2-2014].

# CHAPTER 2
# RECOMMENDATIONS

## 2.1 INTRODUCTION

The findings, conclusions and recommendations may not necessarily resonate with practitioners within this medico-legal paradigm, politicians, government officials or other stakeholders. They are, nevertheless, intended to be seen to be both constructive and reasonable in order to identify for consideration the closing of any regulatory *lacunae*, or for the improvement of, or change in, any legalities – principally for the benefit of the health of the persons who choose to consult practitioners of traditional medicine.

Recommendations made follow the same order in which the conclusions drawn are presented in the immediately preceding chapter.

## 2.2 NON-FUNCTIONALITY OF THE INTERIM COUNCIL IN CONTEXT OF THE PRACTICE OF TRADITIONAL MEDICINE

The timeline relating to the amendment of the colonial Natal Code of Zulu Law[1051] by the KwaZulu Act on the Code of Zulu Law,[1052] the latter as amended by the Amakhosi and Iziphakanyiswa Act,[1053] [1054] and the promulgation of the 2004 Traditional Health Practitioners Act[1055] together with the current Act,[1056] spans a period of 37 years covering both the apartheid and democratic eras.

The status quo is that the Interim Council has yet to be formally constituted in order to become legally fully operational, registration procedures have not commenced, the

[1051] n 222 above.

[1052] Act 16 of 1985.

[1053] Act 9 of 1990.

[1054] Bennett & Pillay (n 224 above) 217: these authors believe that these legislative precepts are unlikely to survive constitutional scrutiny and should be repealed.

[1055] Act 35 of 2004.

[1056] Act 22 of 2007, promulgated on 10 January 2008.

Interim Council Registrar occupies a position in the National Department of Health;[1057] no funding has been made available by parliament.[1058]

It is recommended that political will now be exercised with urgency in order to materialise this component of the South African medico-legal paradigm, given that it is essentially currently regulated in principle only.

## 2.3 DRAFT POLICY ON AFRICAN TRADITIONAL MEDICINE FOR SOUTH AFRICA

The draft policy was published for comment in 2008, some 14 years ago, but as indicated above, the Chairperson of the Expert Working Group on Traditional Medicine, an advisory body to the National Department of Health, indicated that this policy was soon to be finalised and adopted.[1059]

It is recommended that any explicit reference to *ubuntu*, encompassed in the draft policy, or any other philosophy, should be examined as to whether such might be in conflict with constitutional values – in particular against the equality clause,[1060] as posited by Rautenbach.[1061]

## 2.4 APPOINTMENT OF VARIOUS PERSONS TO THE INTERIM COUNCIL[1062] AND TO THE EXECUTIVE COMMITTEE OF THE INTERIM COUNCIL[1063]

Given the potential for conflict as set out in the immediately preceding chapter regarding appointments to the Interim Council, the recommendation is that persons in specialist fields are rather appointed to the Interim Council, such as experts in

[1057] Mullinder (n 541 above).

[1058] Section 16(1)(a), Act 22 of 2007.

[1059] n 244 above.

[1060] Section 9, the Constitution.

[1061] n 509 above, 43.

[1062] Sections 7(g) and (h), Act 22 of 2007.

[1063] Sections 13(f) and (g), referencing sections 7(d) and (g), Act 22 of 2007.

pharmacognosy[1064] and biodiversity[1065] against the background of the aims and objectives of the Biodiversity Act,[1066] and the Department of Environmental Affairs *National Biodiversity Strategy and Action Plan 2015 – 2025*,[1067] among other, and as may periodically be identified as being required.

## 2.5 MINISTER OF HEALTH CONSULTATION WITH THE INTERIM COUNCIL

It is recommended that the provision relating to the implementation of health policies without being consulted[1068] be revisited and that there be consistency in the legislation relating to all statutory health councils.

## 2.6 TRADITIONAL MEDICINE: A HEALING PARADIGM

It is recommended that the Act[1069] and any other regulations which may be promulgated encompass this concept so as to counter the widespread notion that traditional medicine is nothing other than witchcraft.

## 2.7 TRADITIONAL MEDICINE: PHILOSOPHICAL BACKGROUND

It is recommended that the Act[1070] and any other regulations which may be promulgated encompass introduce this concept so as to counter the widespread notion that traditional medicine is nothing other than witchcraft.

## 2.8 INDIGENOUS KNOWLEDGE SYSTEMS

The recognition of indigenous knowledge as a national asset and the reality of development in regulation and realisation of rights in the traditional medicine paradigm, it is recommended, should be an ongoing process – it is further

[1064] A branch of knowledge regarding medicines obtained from plants or other natural sources.

[1065] See above: Section C, Chapter 7, setting out issues of biodiversity, safety of traditional medicines and the pharmacopoeia or materia medica.

[1066] Act 10 of 2004.

[1067] n 750 above.

[1068] Section 6(2)(b), Act 22 of 2007.

[1069] Act 22 of 2007.

[1070] Act 22 of 2007.

recommended that political will be exercised to ensure the speedy accomplishment of the objects of this legislation and other provisions of the relevant act.[1071]

It is further recommended that any oral knowledge relating to traditional medicine, in whatever form, be recorded before it is lost and as a matter of extreme urgency.

## 2.9 ECOSYSTEMS, ANIMALS, PLANTS AND *IMITHI* MARKETS

Attention to the following issues is regarded as being imperative:

- the spread of disease from live vertebrate animals to humans, known as zoonosis, whether to one individual only or to an entire population group;[1072]
- the spread of disease from ingestion or application onto the human body of *izinyamazane*, or the intentional use of such as *imikhondo* for perpetrating harm to others;
- the notion that *izinyamazane* may be used as a prophylaxis, even cure, against witchcraft[1073] or for use in bringing good fortune;[1074] and whether *animals are sentient beings that are capable of suffering and experiencing pain* [1075] [1076] [1077]

[1071] Protection, Promotion, Development and Management of Indigenous Knowledge Act, Act 2 of 2019.

[1072] World Health Organisation Zoonoses: Fact Sheet (2020) Geneva; https://www.who.int/news-room/fact-sheets/detail/zoonoses#:~:text=A%20zoonosis%20is%20an%20infectious,food%2C%20water%20or%20the%20environment, accessed 22 July 2022.

[1073] See above: Section D, Chapter 1.10: as stated: *Notably, all izangoma confirmed the use of amakhubalo as the treatment regimen to counter the effects of sorcery or witchcraft. All izangoma interviewed confirmed the use of amakhubalo in their practices, with only one isangoma indicating unequivocally that izinyamazane, or medicines derived from wild animals, were never part of amakhubalo.*

[1074] See above: Section C, Chapter 7.6, setting out a management plan for *Gypaetus barbatus meridionalis*, the bearded vulture.

[1075] n 397 above: as cited: Footnote 148: See para 38.

[1076] n 398 above: proposed United Kingdom legislation: The Animal Welfare (Sentience) Bill: https://bills.parliament.uk/publications/41515/documents/260, accessed 9 August 2021.

[1077] In the Lemthongathai case [2014 ZASCA 131], Navsa ADP indicated: … *the duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general.*

> that deserve to be free from cruelty and wanton carnage of life and habitat for nefarious purposes.[1078]

It is recommended that urgent action by the executive and legislative branches of government in South Africa be taken, not only from the perspective of potential zoonoses, but also from the other perspectives mentioned above – especially animal sentience.

No mention is made in the Department of Environmental Affairs 2014 Biodiversity Management Plan of the Interim Council plan of the Interim Council or the Act,[1079] but there are ecosystems and species of animals or plants that are threatened and should be protected, and there is trade in threatened or protected species. It is recommended that attention be given to the possible destruction of any ecosystem by overharvesting for use of plants or animals as *imithi*.

## 2.10 EDUCATION AND TRAINING

Standardisation of education and training in the People's Republic of China in Chinese medicine and acupuncture commenced in about 1956 – the master-discipline model, equivalent to the teaching relationship between an *ugobela* and *ithwasa*, was abolished:

> *The gradual changes adopted in university teaching since 1956 have led to the replacement of the master-discipline model with selectivity in the materials handed down and an abandonment of the reading and study of medical classics in favour of manuals produced for a new regimen.*[1080]

Against the conclusion drawn previously, the recommendation would be that the concept of such a standardisation model should at least be entertained, if only for initial academic or research purposes with a view to fuller understanding whether the current informal system of training is coherent throughout South Africa. Naturally, an

[1078] Author's personal views.

[1079] Act 22 of 2007.

[1080] F Obringer 'Chinese medicine and the enticement of heritage status' 2011(3) *China Perspectives* n.p.; https://journals.openedition.org/chinaperspectives/1095, accessed 30 July 2022.

achievement such as that in the People's Republic of China would be fundamentally more challenging in a constitutional democracy, and probably unattainable.

Education and training regulated by the Allied Health Professions Council of South Africa for practitioners and therapists of complementary medicine requires that such also include education and training in a conventional biomedical approach, with emphasis on the need to refer to practitioners of conventional medicine where the complementary paradigm is not suitable for treatment of a particular condition or pathology. Such an approach is also suggested for the traditional medicine paradigm, but is likely to be rejected for being untraditional,[1081] but is none the less recommended.

## 2.11 UNIVERSAL HEALTH COVERAGE FOR ALL AS ENVISAGED BY THE NATIONAL HEALTH INSURANCE BILL[1082]

Against the background and ongoing actuarial debate that the system itself is unaffordable for South Africa given its narrow direct tax-base income, it is recommended that clarity be given as to which services will be made available under this proposed system of healthcare, even though this may be seen as politically inexpedient.

## 2.12 INITIATION PRACTICES: MALES AND CIRCUMCISION; FEMALE GENITAL MUTILATION AND VIRGINITY TESTING

The promulgation of the Customary Initiation Act[1083] is welcomed, but as stated previously, the efficacy and relevance of any legislative precept in law, with concomitant benefit to society at large, namely whether it is fit for purpose, may only be judged against its implementation, application and enforcement. It is recommended that relevant authorities, including the national and provincial oversight regulatory bodies, together with the relevant law enforcement authorities and other stakeholders,

[1081] Mullinder (n 541 above).

[1082] B 11 – 2019, explanatory summary of Bill and prior notice of its introduction published in Government Gazette no 42598 on 26 July 2019. See above: Section C, Chapter 6, setting out the question of universal health coverage as envisaged under the National Health Insurance Bill.

[1083] Act 2 of 2021.

seek to ensure and enforce the provisions of this legislative instrument to the benefit of the initiates, thus obviating any further fatalities.

The alleged cultural practices in the Basotho baTlokwa people, including female genital circumcision,[1084] require further urgent investigation – with appropriate action by law enforcement agencies if any proscribed practice is contravened.

## 2.13 CLINICAL PRACTICES OR ACTS SPECIALLY RELATING TO THE PROFESSION OF TRADITIONAL MEDICINE

Some of the clinical practices or acts specially relating to the profession are considered extremely deleterious to the health of the public and the recommendations that follow are briefly contextualised for ease of reference.

### 2.13.1 TRANSMISSION OF SEMEN, SALIVA OR VAGINAL FLUID

These acts were denied as being part of the traditional medicine treatment regimen; the view was again offered that this was part of witchcraft.

It is nevertheless recommended that such acts be considered for proscription in any legal scope of practice.

### 2.13.2 BLOODLETTING, BLOOD-DRIPPING AND BLOOD-CUPPING

While bloodletting was denied, except in one case, blood-dripping and blood-cupping were denied as being part of the traditional medicine regimen.

It is nevertheless recommended that such acts be considered for proscription in any legal scope of practice.

[1084] n 704 above.

### 2.13.3 *UKUGCABA* OR INCISING THE SKIN TO INTRODUCE *IMITHI*[1085]

The practice of incising the skin, usually over the joints, to introduce *imithi* to redress any evil that may have entered the body for whatever reason, was denied by the Gauteng *izangoma* as being part of the traditional medicine treatment regimen, but was confirmed as being used by the *izangoma* in KwaZulu-Natal; the *inyanga* in this province also confirmed its use in his practice.[1086]

The extent to which this practice is widespread requires urgent consideration, but simply by taking into consideration:

- the explanation of the practice by Ngubane;[1087]
- the research by Scorgie *et al* of the introduction of *imithi* into the incisions, known as *izingcabo*, on the head, abdomen, breasts and joints, but also near the labia to attract men sexually;[1088] [1089]
- the research by Audet *et al* in Mozambique that 75% of the study group had carried out the practice on at least four patients in the month preceding the study;[1090]
- the subsequent research by Audet *et al* in Bushbuckridge, Mpumalanga, which concluded that the traditional healthcare practitioner study group is reported to

[1085] See above: Section B, Chapter 4.10, setting out the practice of *ukugcaba*.

[1086] See above: Section D, Chapter 1.6: Table 4: affirmation or denial of acts specifically relating to the profession: *izangoma* in Gauteng and KwaZulu-Natal.

[1087] n 67 above, 26.

[1088] n 343 above, 64 - 65.

[1089] Scorgie *et al* cite Chersich *et al* and Hilber *et al*, and indicate that these practices have been linked with increased transmission of STDs, including HIV: MF Chersich *et al* 'Association between intravaginal practices and HIV acquisition in women: Individual patient data meta-analysis of cohort studies in sub-Saharan Africa': Abstract number: TUAC 204, 5th International AIDS Society Conference on HIV Pathogenesis, Treatment and Prevention, July 2009; AM Hilber *et al* 'Intravaginal practices, vaginal infections and HIV acquisition: Systematic review and meta-analysis' (2010) 5(2) *PloS One* e9119.

[1090] n 344 above, 1476 - 147: these authors report that a new razor was used on average three times, but that practitioners *almost never used gloves* and most traditional health practitioners were exposed to patient blood repeatedly, and since there was a high prevalence of HIV, hepatitis B and C and other blood-borne agents, the practice of *ukugcaba* was an occupational hazard and the re-use of razors was a risk to patient health.

be infected with HIV *at a prevalence of 30% compared to 19% in the general population*[1091] and

- confirmation that the practice was part of the traditional medicine treatment regimen in KwaZulu-Natal;

seen together with:

- the inadequate use of personal protective equipment, thus presenting a danger to the practitioner and patient as reported by Audet *et al*;[1092]

there is cause for extreme concern and apprehension regarding the health of practitioner and patient – including unborn children.

As stated earlier, a further element to consider at any juncture of the process leading to regulation is that proscription may simply be inexpedient and imprudent to advise, since it may simply lead to latent and covert practice or use.

It is thus recommended that the national and provincial departments of health launch an urgent action plan to inform all persons practising *ukugcaba* of the dangers inherent in the practice, namely the increased risk of transmission of HIV, and hepatitis B and C, together with other blood-borne agents – as indicated in the research by Audet *et al*.[1093]

It is further recommended that any *isangoma* or *inyanga* who wishes to treat patients using *ukugcaba* be required to undergo a supplementary education and training course through an approved institution of education and training, as may be approved by the Minister of Health, to ensure the safety of both practitioner and patient.

[1091] n 345 above, 659: these authors report that 90% of the traditional health practitioners reported the use of items such as latex gloves, but the use of such was not regular and where latex gloves were not available, items such as plastic shopping bags, bread bags, paper, and even sticks were used to prevent exposure to patient body fluids, with the integrity of the items used also then compromised.

[1092] n 345 above, 659.

[1093] n 344 above, 1476 - 1477.

### 2.13.4 ULCER INCISION

The incision of ulcers, diabetic or otherwise, was addressed previously and this practice was denied by the *izangoma* in KwaZulu-Natal as being part of the treatment regimen for traditional medicine, unlike the *izangoma* in Gauteng. This procedure and the extent to which it may be practised in traditional medicine requires national and provincial departments of health to launch an urgent action plan to inform all persons of the dangers inherent in such a procedure.

A further recommendation is that such a procedure be proscribed for practitioners of traditional medicine.

### 2.13.5 PRESCRIPTION OR ADMINISTRATION: MERCURY

As addressed previously, mercury is a naturally occurring metal which exists in elemental, inorganic and organic forms and is a toxic and tenacious pollutant. It is clearly deleterious to human health.

Street *et al* conducted a study to determine the prevalence of the use of mercury among traditional health practitioners – only 1% of the study group reported using mercury in the performance of rituals in the protection of houses, ironically toxic to the locus and persons within it. This may be an outlier result, however, and extrapolation within a larger analytic subset of a statistical population is recommended.[1094]

The practice of *ukugcaba* itself has been considered above discretely in this chapter but the above authors also report that 59% of the same study group indicated that mercury was used as an *umuthi* in the practice of *ukugcaba*, with this neurotoxic metal then introduced directly into the incisions, known as *izingcabo*. Some 90% of the study group indicated that its use was for childbirth, not however indicating for which purpose it would be administered during childbirth, for example, inducement of labour or pain relief, an easier birthing process, or other issues. Elemental mercury readily crosses

[1094] n 123 above, 72.

the placental barrier and may also be present in breast milk, thus being deleterious to the foetus and the suckling child.[1095]

Street *et al* also report that another ostensible application of mercury administered by *ukugcaba* is protection from harm caused by weapons used by persons involved in the local minibus taxi industry, and although the study involves a non-random sample, the assumption was made that this indicated an established cultural practice.[1096]

The sale, purchase or use of elemental mercury for ostensible use in any clinical practice purposes is required to be proscribed, it is recommended.

## 2.14 HIV AND AIDS

As indicated above, which bears repetition, it is recommended that the national and provincial departments of health launch an urgent action plan to inform all persons practising *ukugcaba* of the dangers inherent in the practice, namely the increased risk of transmission of HIV, and hepatitis B and C, together with other blood-borne agents – as indicated in the research by Audet *et al*.[1097]

## 2.15 THE PHARMACOPOEIA OR MATERIA MEDICA

The apparent exclusion of the legal powers of the South African Health Products Regulatory Authority and the Medicines and Related Substances Act,[1098] requires explanation and the current progress made by the expert working group or committee ostensibly developing a framework for the regulation of traditional medicines, whether proprietary or non-proprietary medicines or both, remains outside of the public domain. Transparency, if only referring to the terms of reference of this group or committee, to gain an understanding of the functioning of this group or committee, is required.[1099]

[1095] Street *et al* (n 123 above) 71 - 72.

[1096] n 123 above, 71 – 72.

[1097] n 344 above, 1476 - 1477.

[1098] Act 101 of 1965.

[1099] See above: Section D, Chapter 3, setting out information regarding this working group or committee.

The proposition set out previously, namely the compilation of a pharmacopoeia or materia medica for traditional medicine, bears reiteration[1100] and is proposed as a recommendation of this research.

The appropriate focus should however rather be an decisive investigation by expert researchers and governmental agencies into whether the extant materia medica, in whatever form and from whichever usage perspective in traditional medicine, should rather see incisive scrutiny. This scrutiny with a view to proscription in terms of extant legislation or regulation acquiescence in terms of extant or future legislation by considering:

- any deleterious effects on the biodiversity;[1101]
- any deleterious effect on the health of the public or on animals; and
- any pharmacodynamic interaction between conventional medicines and traditional medicine *imithi*: this is possible within a range, from potentiation or increasing the effect of conventional medicines, to an antagonistic reduction of the effects of those medicines leading possibly to even a nullification or neutralisation of conventional medicine benefits.[1102]

Consideration parameters may then include, but may not necessarily be limited to:

- those *imithi* which have recognised medicinal properties;
- those *imithi* which may have medicinal properties and require further research;
- those *imithi* which may potentiate or antagonise conventional medicine benefits; and
- those *imithi* which should continue to be used in a ritual sense only, with no deleterious usage effects, such as in apotropaic magic applications or other categorisation applications.

[1100] See above: Section B, Chapter 7, setting out views on a pharmacopoeia or materia medica for traditional medicine.

[1101] See above: Section C, Chapter 7.6, setting out a management plan for *Gypaetus barbatus meridionalis*, the bearded vulture.

[1102] See above: Section C, Chapter 7.5, setting out issues of possible interaction of medicines, conventional and otherwise, at a biochemical level.

### 2.15.1 PRESCRIPTION OR ADMINISTRATION: *AMAKHUBALO* IN THE CONTEXT OF WITCHCRAFT

Witchcraft or sorcery have been considered for contextualisation in the communities in which traditional medicine is practised, and the concepts as a cause of illness in traditional medicine have both been addressed before. During the visit to KwaZulu-Natal, the use of *amakhubalo* as the treatment regimen to counter the effects of sorcery or witchcraft was confirmed, as addressed previously.[1103]

The willingness to engage in such a treatment regimen and the professed insouciance of the acceptance of witchcraft or sorcery as a cause of illness in traditional medicine, was profoundly disquieting.[1104]

Equally and profoundly disturbing was the point made that when speciality interviewing took place, such as in cases of cerebral infarctions or transient ischaemic attacks, diagnosis by divination would take place first. This would indicate whether the pathology was attributable to causes of illness in traditional medicine, such as ancestor disharmony or other causes of illness, and that traditional treatment would then ensue prior to referral to any conventional medical facility, such as a clinic or hospital. A recommendation was made previously about education and training in the conventional biomedical approach, with the emphasis on the need to refer to practitioners of conventional medicine where the complementary paradigm is not suitable for treatment of a particular condition or pathology.

It is thus recommended that much further and deeper research is required, particularly in terms of causes of illness,[1105] the sources of healing power and the treatment of disease[1106] – in particular with a recommendation that such research seeks to reach

[1103] See above: Section D, Chapter 1: views of *izangoma*, *izinyanga* and *abathandazi.*

[1104] The author of this thesis is, however, not qualified to comment on any belief system which suggests that the health or fortunes of a person can be negatively affected by witchcraft or sorcery.

[1105] See above: Section A, Chapter 7, setting out the discussion about the causes of illness as recognised in the traditional medicine paradigm.

[1106] See above: Section A, Chapter 9, setting out the discussion about the sources of healing power and the treatment of disease in the traditional medicine paradigm.

a fundamental distinction between causes of illness due to biological factors and other causes, as well as between empirical sources of healing power and other treatments of disease.

Such a distinction, it is believed, would be invaluable for reaching a goal of understanding the distinction between the biomedical model and other causes of illness and treatment of diseases as encompassed within the belief system of traditional medicine, with a view to drafting a definitive legal scope of practice at any stage in the future.

The point was made, however, albeit somewhat cynically and after the visits, that where such a diagnosis is made the treatment regimen would encompass the serial use of black medicines (*imithi emnyama*), red medicines (*imithi ebomvu*), and white medicines (*imithi emhlophe*),[1107] always serially and in that order. This would very strongly benefit the practitioner given that multiple visits to the practitioner would be required, with multiple *imithi* prescriptions for the patient also required[1108] – all requiring a vast financial outlay resulting in severe financial hardship to the patient.

Any recommendation about the changing of a belief system would be inappropriate unless initiated by someone regarded as competent and endorsed to do so, but this is none the less recommended.

## 2.16 TRAFFICKING – THE USE OF BODY PARTS IN TRADITIONAL MEDICINE

All *izangoma* interviewed in Gauteng and KwaZulu-Natal denied using body parts or trafficking human beings for traditional medicine purposes,[1109] stating that such practices were part of witchcraft. Behrens reports that most traditional healers do not condone the use of body parts in traditional medicine,[1110] and the then Chairperson of

[1107] n 67 above, 109.

[1108] The perception is that questions of probable over-servicing arise because of taking advantage of belief systems.

[1109] See above: Section B, Chapter 6: trafficking of human beings, body parts and traditional medicine; Section A, Chapter 9.4: the use of body parts in traditional medicine; and Section D, Chapter 1.6: Table 4: affirmation or denial of acts specifically relating to the profession: *izangoma* in Gauteng and KwaZulu-Natal.

[1110] n 192 above, 9.

the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic communities has affirmed that genuine traditional healers will never use body parts in traditional medicine.[1111]

None the less, a recent news report informs that three people, including an *isangoma*, were arrested after they were allegedly found digging up graves in Mabopane, Tshwane, seeking to harvest bones of deceased person for use as *imithi*.[1112]

Trafficking and the use of body parts in traditional medicine were previously considered in this thesis, but also in a published thesis by the author of this thesis: *A comparative study of the criminalisation of the violation of a corpse in context of traditional medicine in subequatorial Africa, including consideration of customary law*.[1113]

The conclusions and recommendations made regarding the use of body parts in traditional medicine remain valid:

> *… research has discovered only a paucity of case law relating to the crime of violating a corpse in traditional medicine. It has not been possible to ascertain whether such use is widespread within traditional medicine, or is confined to specific instances only …* [and] *… it is submitted that the legal position of the crime of violating a corpse for the use of body parts in traditional medicine … should preferably provide purposely for clarification of all legal precepts relating to the specificity of this crime and to oppose any perception of such practices and beliefs in traditional medicine as being justified in any manner.*

The question of end-user liability for the use of body parts requires legislative review.[1114]

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[1111] Ms Togo Mkhwanazi Galuba: *We look at the abuse of people's cultural belief systems by traditional healers*: the forum @8 radio interview broadcast on 19 July 2017.

[1112] B Molosankwe 'Sangoma, two others arrested for digging up graves, looking for dead people's bones' *News24* 23 July 2022, https://www.news24.com/news24/southafrica/news/sangoma-two-others-arrested-for-digging-up-graves-looking-for-dead-peoples-bones-20220723, accessed 23 July 2022.

[1113] Mullinder (n 3 above) 61: conclusions and recommendations.

[1114] Mullinder (n 3 above) 53.

## 2.17 DIVINATION AND INFORMED CONSENT

The lack of explicitly given informed consent, it is concluded, might then be tacit (a consensual tacit or imputed tacit term)[1115] or otherwise, and any philosophical considerations as to the compatibility in law of the legal requirement of informed consent in questions of diagnosis by divination, should be a matter for further consideration, it is recommended.

## 2.18 CULTURAL DEFENCE

In light of the conclusion by Carstens who indicates unequivocally that *a denial of the cultural defence erodes the notion of justice in the African cultural context*, warning also that the application of any such defence, required to be free from preconception, prejudices and be heard with objectivity, might certainly be a challenge going forward,[1116] further consideration of this matter is recommended.

For any interested parties, it is recommended that regard should be given to what may be regarded as a seminal *oeuvre* relating to the interaction of law and culture by Renteln, who examines the importance of culture within the parameters of justice and conflicts in various court proceedings and argues for maximum compromise or understanding of cultural matters when examining legal questions.[1117]

## 2.19 CATEGORIES OF REGISTRATION

It is recommended that the category of *umthandazi*, or faith healer, be considered for incorporation into the categories that require registration, given that one of the *umthandazi* interviewed in KwaZulu-Natal also practised as an *inyanga*, with a conflation of the professions.[1118]

[1115] n 936 above.

[1116] n 191 above, 22.

[1117] Renteln (n 675 above).

[1118] See above: Section D, Chapter 1.3, setting out the conflation of the two professions.

In Namibia, the expressed intention, although currently only in the form a Bill,[1119] outlines specific categories of practice, namely specialist herbalist, faith herbalist, faith healer, diviner herbalist, diviner and traditional birth attendant, although not with any definitions provided and it is recommended that due regard be given to the debate surrounding these categories for possible application in South Africa.

[1119] Traditional Health Practitioners Bill, [B2-2014].

# CHAPTER 3
# CARDINAL RECOMMENDATION OF THE ORIGINALITY OF THE CONTRIBUTION TO RESEARCH IN THE TRADITIONAL MEDICINE PARADIGM

## 3.1 INTRODUCTION

As set out previously, the essential conclusion of this research endeavour is that not only is continued regulation essential, but that it requires strengthening in certain respects. In keeping with the original contribution to research in this field, a cardinal feature of this original contribution to research around traditional medicine will be proposed changes to the extant legislative precepts, including the presentation of a legal scope of practice recommending either prescribing, or proscribing, as the case may be, the armamentaria, or range of clinical practices, medicines and equipment, used within this system of medicine, currently not a feature of extant regulation.

## 3.2 BACKGROUND TO PROPOSED CHANGES TO THE LEGAL SCOPE OF PRACTICE

Taking into consideration all conclusions and recommendations as set out previously, any prescription or administration or treatment in any traditional medicine practice of any of the following require incisive attention by the regulators and are accordingly recommended for proscription:

- mercury, formerly known as hydrargyrum, also known as quicksilver, a liquid metal classified under Group 12 of the periodic table or any chemical compounds thereof;[1120]
- human semen, saliva or vaginal fluids or secretions;
- bloodletting, blood-dripping or blood-cupping, known as *ukulumeka*;
- incision of any ulcers and the application into such incised ulcer with any *imithi*; and
- body parts of whatsoever nature or in whichever state, decayed or derived from any corpse or living human being.

[1120] As with the current polemic about the sale of stolen metal cabling, copper or otherwise, the question arises as to where mercury might be bought – the sale of which should then also be proscribed.

## 3.3 PROPOSED LEGAL SCOPE OF PRACTICE: CARDINAL RECOMMENDATION OF THE ORIGINALITY OF THE CONTRIBUTION TO RESEARCH IN THE TRADITIONAL MEDICINE PARADIGM

Accordingly, then, draft regulations in the formulation of a legal scope of practice for *izangoma* could, for example, include some of the following traditional medicine concepts and read as follows:[1121] [1122]

**TRADITIONAL HEALTH PRACTITIONERS ACT, 2007[1123]**

**DRAFT REGULATIONS RELATING TO THE CONDITIONS UNDER WHICH A PERSON MAY PRACTISE IN THE REGISTRATION CATEGORY OF AN *ISANGOMA***

**The Minister of Health intends, in terms of section 47(d) of the Traditional Health Practitioners Act, 2007 (Act No 22 of 2007), after consultation with the Interim Traditional Health Practitioners Council, to promulgate regulations specially relating to the profession of an *isangoma* and to make the regulations as set out in the Schedule.**

**Interested persons are invited to submit substantiated comments or representations in writing on the proposed draft regulations, to the Director-General: Health, Private Bag X828, Pretoria, 0001 (for the attention of the [insert name and email address details] within three months of the date of publication of this notice.**

[1121] Permission to be used as an example for the purposes of this thesis was granted by the Chairperson of the Allied Health Professions Council of South Africa, Dr Christopher Yelverton, on 8 August 2022. Input into the original drafting of other legal scopes of practice was also provided by the author of this thesis in his *ex officio* capacity as Registrar of this statutory health council from 2009 to 2022.

[1122] The author of this thesis is not claiming, in any sense, to be proficient in the drafting of legislation and this example is offered as simple advice on the inclusion of certain terms, concepts or procedures for technical expert legal drafting consideration. A similar legal scope of practice would be applicable for *izinyanga* but would also require technical legal specificity for the profession of traditional surgeons and *umbelethisi*.

[1123] Act 22 of 2007.

**SCHEDULE**

**Definitions**

**1. In this Schedule any expression defined in the Act bears that meaning and, unless the context otherwise indicates –**

**"a*makhambi*" means herbal medicines;**

**"*amakhubalo*" means symbolic medicines;**

**"basic substance" in relation to the pharmacopeia of an *isangoma* means any substance from which or out of which a dilution or mixture is prepared or manufactured, or any stronger concentration of such substance for the purposes of making a medicine, specifically *umuthi wendabuko* (traditional medicine), including, but not limited to *amakhambi*, *amakhubalo*, or *imithi* classified as *ebomvu*, *emhlophe* or *emnyama,* or *imithi yenyamazane*, but only for the purposes of making an *umuthi wokwelapha* (medicine for healing), and specifically excluding the making of any *umuthi wokubulala* (medicine for killing);**

**"Biodiversity Act" means the Biodiversity Act, 2004 (Act 10 of 2004) and includes the regulations made thereunder;**

**"blood-dripping" means the insertion of *insekane* into the vagina towards the cervix in any female person to induce bleeding;**

**"bloodletting" means the removal of blood from a patient for whatsoever purpose by whatsoever means, except in the case of the procedure of "*ukugcaba*";**

**"compound" means the combining or mixing of any basic substances to create an *umuthi wokwelapha* used in the profession of an *isangoma*;**

**"council-accepted" or "accepted by the council" means that the recommendations of the Interim Council have been accepted by way of due process;**

**"dispense" means the issuing, interpretation and evaluation of a prescription, or the selection, manipulation, preparation, recording or compounding of an *umuthi wokwelapha* used in the profession of an *isangoma* for therapeutic purposes, the labelling and supplying of such an *umuthi wokwelapha* or substance in an appropriate container and the provision of information and instructions to ensure its safe and effective use by a patient;**

**"formulate" for the purpose of making an *umuthi wokwelapha*, whether used alone or in combination, means to calculate or determine any *umuthi* or substances and the quantities and strengths of such *umuthi wokwelapha*, including the process of preparing or combining such *umuthi wokwelapha*, and the calculation or determination of the dosage of such *umuthi wokwelapha* or substances;**

**"*herbal monograph*" means an Interim Council-accepted reference standard that is compiled in order to define identity, quality and safety criteria, as well as therapeutic information on any particular *umuthi wokwelapha*;**

**"*imithi ebomvu*" are red medicines;**

**"*imithi emhlophe*" are white medicines;**

**"*imithi emnyama*" are black medicines;**

***"imithi yenyamazane*" are medicines derived from wild animals;**

**"*isangoma*" means a person who is a practitioner registered as such under the Act;**

**"*isangoma esichitha amathambo*" means an *isangoma* who diagnoses using the**

**'throwing of the bones";**

**"*isangoma sekhanda*" means an *isangoma* who is a 'head' or 'ecstatic diviner';**

**"*materia medica*" means any Interim Council-accepted publication in which the properties or the physical character of an *umuthi wokwelapha*, the natural history of the effect of *umuthi wokwelapha* on the body in health and disease, the collective symptoms obtained from experimental study of an *umuthi wokwelapha* or the therapeutics relating to the application of an *umuthi wokwelapha* in disease, are described;**

**"Medicines and Related Substances Act" means the Medicines and Related Substances Act, 1965 (Act No 101 of 1965) and includes the regulations made thereunder;**

**"prepare" means any act pertaining to the making or changing or adaptation or manipulation of an *umuthi wokwelapha*, substances or ingredients and the preparation of substances or *imithi* for the purposes of compounding, formulating or dispensing;**

**"substance" means anything which, whether used alone or in combination in either its original or natural state or in compounded, manipulated or prepared form, constitutes an *umuthi wendabuko* or forms part of an *umuthi wendabuko* or which is a basic substance;**

**"the Act" means the Traditional Health Practitioners Act, 2007 (Act No 22 of 2007);**

**"*ukugcaba*" means the procedure where incisions are made into the skin over joints in order to introduce *imithi* directly into points where the body is believed to be most at risk;**

**"*ukulumeka*" means the process of blood-cupping;**

**"*umuthi wendabuko*" or traditional medicine is a principal class of medicine used in the process that involves the diagnosis or treatment of a physical or mental defect, illness, disease, deficiency or abnormality in any person, or in the promotion and maintenance of health by the administration or in the prescription of an *umuthi wokwelapha*, substance or preparation, which may be prepared, manipulated, formulated, or compounded and dispensed by an *isangoma*;**

**"*umuthi wokubulala*" is medicine used for killing; and**

***"umuthi wokwelapha*" is medicine used for healing;**

**Acts specially Pertaining to the Profession of an *isangoma***

**2. The following are Acts specially pertaining to the profession of an *isangoma*–**

**(a) The diagnosis of any defect, illness, disease or deficiency in any person by divination by any person who has undergone *ukuthwasa* and is recognised after this process as either an *isangoma esichitha amathambo* or an *isangoma sekhanda*;**

**(b) The treatment or prevention of any defect, illness, disease or deficiency in any person by means of:**

**(i) any *umuthi wokwelapha* or substance in accordance with and based on traditional medicine principles or procedures or any other symbolic means of treatment without the use of an *umuthi wokwelapha*;**

**(ii) any other *umuthi wokwelapha* or substance permitted to any *isangoma* in terms of any applicable legislation;**

**(iii) health promotion and preventative interventions, including but not limited to nutritional and lifestyle advice; and**

**(iv) advising any person on his or her physical or mental health;**

**but excluding:**

**(I) blood-dripping;**

**(ii) bloodletting;**

**(iii) *ukulumeka* or blood-cupping;**

**(iv) the practice of *ukugcaba* unless the *isangoma* has undergone a supplementary course of education and training through an approved institute of education and training as may be approved by the Minister from time to time by publication in the Government Gazette; or**

**(v) any other act as may be proscribed by the Minister from time to time by publication in the Government Gazette.**

**3. Subject to the provisions of the Medicines and Related Substances Act, 1965 (Act No 101 of 1965) and the Biodiversity Act 2004 (Act No 10 of 2004), a practitioner registered as an *isangoma* may, for the purposes of his or her practice–**

**(a) possess or have under his or her control –**

**(i) any *umuthi wokwelapha*, substance or preparation pertaining thereto;**

**(ii) substances that are not scheduled or scheduled under the Medicines Act No. 101 of 1965, or substances listed in any Annexure to these regulations;**

**(iii) substances that are not proscribed for purpose under the Biodiversity Act No. 10 of 2004 or substances listed in any Annexure to these regulations;**

**(iv) substances, including scheduled substances, that are used as basic substances in the preparation, formulation, compounding and dispensing of *umuthi wokwelapha*, substances or preparations;**

**(v) those scheduled substances which are recorded in a council-accepted herbal monograph, herbal *materia medica*, herbal pharmacopoeia or in any other equivalent *umuthi wokwelapha* standard, in quantities and**

**concentrations that do not exceed what is reasonably necessary for this purpose;**

**(vi) such scheduled substances, other than those contemplated in subparagraph (iv), as are determined to be necessary for the practice of *umuthi wokwelapha* by the Council, at the recommendations of the professional board, and published in the *Gazette*;**

**(vii) ethanol, glycerol or other permitted solvents used in the preparation of *umuthi wokwelapha*; and**

**(b) prescribe for, administer to, or dispense to, a patient –**

**(i) any *umuthi wokwelapha*, or preparation or mixture of substances, or *imithi* or substances containing *umuthi wokwelapha* substances, in any *umuthi wokwelapha* dosage;**

**(ii) basic substances and preparations or mixtures of *umuthi wokwelapha* substances whether they include scheduled substances or substances not scheduled under the Medicines and Related Substances Act No. 101 of 1965;**

**(iii) other medicines, substances, preparations and mixtures of substances that are scheduled or unscheduled substances including any other scheduled substance or medicine that may be prescribed for the purpose identified in the Schedule.**

**(c) formulate, prepare, manipulate or compound and dispense –**

**(i) any substance, preparations and mixtures of substances that are recorded in a council-accepted herbal monograph, *materia medica* or *umuthi wokwelapha* pharmacopoeia or any unscheduled substance for the purpose of making an *umuthi***

***wokwelapha*;**

**(ii) substances referred to in paragraph (a) (i) – (vi);**

**(iii) substances referred to in paragraph (b) (i), (ii) and (iii);**

**and**

**(iv) any *umuthi wokwelapha* or a preparation or mixture of substances containing an *umuthi wokwelapha*, in any *umuthi wokwelapha* dose or strength.**

## 3.4 EPILOGUE

The above specific research conclusions and recommendations aside, that the originality of this research lies in the anticipation that this thesis would also provide any interested person with a single resource overview of the South African traditional medicine paradigm – functionally and purposefully referenced and drawn from such sources as are currently available and accessible for future use by any interested party, even if only a brief allusion to any particular aspect has had been made – has, it is believed, been achieved.

It is trusted that the amalgam of beliefs and opinions, views, conclusions and recommendations presented in this thesis will contribute to an enhanced understanding of traditional medicine in examining the question of future legal regulation, or not, as the case may be.

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