THE TRADITIONAL HEALTH PRACTITIONERS ACT 22 OF 2007: A PERSPECTIVE ON SOME OF THE STATUTE'S STRENGTHS AND WEAKNESSES

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ABSTRACT

The Traditional Health Practitioners Act 22 of 2007 was enacted to regulate the traditional health sector in South Africa. With effect from 1 May 2014, a cluster of the Act's sections became effective by promulgation in the Government Gazette. This development made the majority of the sections of this statute binding after the last proclamation in 2008. The current article discusses the key provisions of the Act and the implications it has for the traditional health sector. After presenting these key provisions and highlighting their strengths and weaknesses, the article relates them to other legislative measures in the form of the Intellectual Property Laws Amendment Act 28 of 2013 and the Medicines and Related Substances Amendment Bill (B 6-2014). It then argues that the legislative measures introduced thus far fall short of providing a framework necessary for the protection of the traditional health practice. Thereafter, the article discusses the bias of the Act, evident in the more concern shown about the protection of the public against the practices of traditional health practitioners and less concern about the protection of the traditional health practitioners against the hegemony of Western health practitioners and low respect that the former have been accorded. The main argument is that there could have been more balance in the legislative measures effected to bring about justice in the health care system of South Africa.

Keywords: Traditional healing, health, medicine, intellectual property, legislation, South Africa.

INTRODUCTION

South Africa is a country with many cultures and practices. This often gives rise to unfortunate consequences in a workplace such as, for example, when an employee gets dismissed because she had been absent from work for a considerable period in order to carry out some ancestral ritual or other, the significance of which the employer knows very little about. In Kievits Kroon Country Estate (Pty) Ltd v Mmoledi (2014(1) SA 585 (SCA)), the court referred to an incident like this as a clash of cultures.

The Constitution of the Republic of South Africa, 1996 (the Constitution), has been drafted in such a way that it is accommodative to the diversity of the country's population. To that end it protects, among other things, the right to practise one's culture (sections 30 and 31) and the right to equality (section 9). These rights are consistent with the preamble to the Constitution, which states that:

> "We, the people of South Africa…, believe that South Africa belongs to all who live in it, united in our diversity."

It is this diversity that the Constitution strives to accommodate.

One of the areas in which the diversity of the South African population is acutely pronounced is the field of medicine and medical practice. South Africa has, broadly, two forms of medical systems, namely, the "bio-medical sector", which is the mainstream sector, and the "traditional medicine sector", referred to, in contested terms, as "alternative", "complementary" or "alternative" medicine. The contestation of terms is informed by the low status generally given to the marginalised medicine in contrast to the high esteem normally accorded to mainstream medicine. Traditional health practitioners' commentary on this division indicates that they (the traditional health practitioners) do not want to work in the side-lined sector. They prefer to work in the main mainstream health system instead. Because of this discontent, legislative measures that seek to regulate a "pluralist health care system" (Summerton, 2006: 149) as a reference to the two broad health systems – the bio-medical and traditional health systems – have been introduced. The legal position before the current legislative measures has been captured by Rautenbach (2007: 522-523), who submitted that: "Existing national health legislation does not provide for traditional healers." The incontrovertible reality here is that there is differentiation between the two forms of medical practice in South Africa and that has been criticised as unjustifiable discrimination with some commentators even calling it "medical apartheid" (Viall-Brom, 2014).

Section 9(2) of the Constitution, as stated above, protects everyone's right to equality. However, that is not where it stops: it also allows for the introduction of measures aimed at the fulfilment of this right. The section states:

> "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken."

Moreover, a variety of international, continental and regional organisations have called on their respective Member States to introduce measures that promote and protect indigenous knowledge, including traditional healing (World Health Organization, 1978, 2000, 2013; African Union, 2007; and Southern African Development Community, 2003). Since South Africa is a Member State of the organisations just mentioned, its obligations have been discussed extensively in both the academia (Summerton, 2006; Rautenbach, 2007 and Le Roux-Kemp, 2010) and government circles (Department of Health, 2006 and Department of Health, 2008). South Africa has accepted the obligation, more readily not only because it is a sound one but also because it is in keeping with its constitutional injunction to have the country formulating policy and legislative mechanisms that focus on the development, protection and regulation of the traditional health practice.

It is in this context that the measures introduced in South Africa from as early as the 1990s (Department of Health, 2008) are a reflection of the country's efforts to protect and promote indigenous knowledge, which, in many respects, covers traditional health practice and its various manifestations. Key among the

measures adopted by South Africa are two pieces of legislation, namely, the Traditional Health Practitioners Act 22 of 2007 (THP Act) and the Intellectual Property Laws Amendment Act 28 of 2013 (IPLAA). These Acts are aimed at regulating the traditional health sector and protecting indigenous knowledge, respectively. This article discusses the key provisions of these Acts in terms of the implications they brought about in the traditional health sector.

CONTEXT, LIMITATIONS AND BENEFITS OF THE THP ACT

The first legislation to regulate traditional healing (Traditional Health Practitioners Act 35 of 2004) was introduced in 2005. However, that Act was declared constitutionally invalid by the Constitutional Court (Doctors for Life International v Speaker of the National Assembly and Others 2006(6) SA 416 (CC)) because the necessary consultative procedures had not been followed before it was passed by Parliament. Having declared the legislation constitutionally invalid, the court gave the legislature eighteen months to follow the correct procedures. In line with the Constitutional Court order, Parliament produced the Traditional Health Practitioners Act 22 of 2007. Given that implementation mechanisms had to be put in place, the Act was to be progressively promulgated over time.

The one cluster of sections became effective on 30 April 2008 (Proc. No. 17, GG 31020) and the other on 1 May 2014 (Proc. No. 29, GG 37600), making the majority of the sections of THP Act binding. The nett result of the proclamations is that an Interim Traditional Health Practitioners Council (the Council) has been established having been inaugurated in 2013 (Medical Chronicle, 2013). The Council has authority to run the affairs of the traditional health sector, including the appointment of Council members, the appointment of the registrar and his/her staff, the registration of traditional health practitioners, and attending to incidental matters such as preparing a code of conduct, and handling of complaints.

Benefits

The implementation of the THP Act is a laudable step because, for the first time, it accords some formality to the traditional health sector, a significant show of the acceptance of the importance of traditional healing. The Council, with its general challenges, has been established with the sole mandate of dealing with the affairs of the profession. One of the most significant benefits for both the traditional health practitioner and the clientele in the profession is the legal recognition of medical certificates (generally known as “sick notes”) issued by traditional health practitioners. A great deal of controversy regarding traditional health practice is about this issue. That is understandable because one of the consequences of the lack of legal recognition of traditional health practitioners was their lack of legal authority to issue medical certificates. The contentious nature of the issuing of medical certificates by traditional health practitioners even involved a lengthy court case which went through three courts – right up to the Supreme Court of Appeal in the Kievits case mentioned above. In this case, an

employee had taken time off work in order to undergo initiation as a traditional healer and, when she returned, the employer did not accept the certificate from the traditional health practitioner. She was dismissed. She then approached the Commission for Conciliation, Mediation and Arbitration (CCMA), which decided the case in her favour. Subsequently, the employer took the matter to the Labour Court, where it was unsuccessful (case number JR185/08). Thereafter, the employer took the case to the Labour Appeal Court (case number JA78/10), where it was unsuccessful once again and, eventually, to the Supreme Court of Appeal. While the employee was successful, the result did not automatically elevate the status of certificates issued by traditional health practitioners to the status of certificates issued by biomedical doctors. Contrary to reports that the medical certificate from the traditional healer was found to be valid (e.g. Mail & Guardian, 2008; Mbatha *et al.*, 2012; Narsee, 2013), the court had actually not decided so because it did not see the issue before it as one of deciding on the validity of the employee's medical certificate. Instead, the court had focused on assessing the employee's sincerity concerning her calling to be a traditional healer. In the Labour Appeal Court, Judge Tlaletsi stated in paragraph 22 of the judgment that:

> "It is unfortunate that much emphasis was placed on the fact that the employee claimed to be sick and that the certificate from the traditional healer did not constitute a valid certificate as required by section 23 of the BCEA."

This approach found support in the Supreme Court of Appeal later when Justice Cachalia, in paragraph 27 of the judgment, stated:

> "Our courts are familiar with and equipped to deal with disputes arising from conventional medicine, which are governed by objective standards, whereas questions regarding religious doctrine or cultural practice are not. Courts are therefore unable and not permitted to evaluate the acceptability, logic, consistency or comprehensibility of the belief. They are concerned only with the sincerity of the adherent's belief, and whether it is being invoked for an ulterior purpose. This of necessity involves an investigation on the grounds advanced to demonstrate that the belief exists."

It is the THP Act that makes the certificates legally valid. Section 23 of the Basic Conditions of Employment Act 75 of 1997, to quote the section in full, states that:

> "(1) An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.
>
> (2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.

> (3) If it is not reasonably practicable for an employee who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment in terms of subsection (1) unless the employer provides reasonable assistance to the employee to obtain the certificate."

The establishment of the Council, therefore, fulfils this requirement in respect of a traditional health practitioner who has registered with the Council as stipulated in section 23(2) because the Council has been "established by an Act of Parliament" as it derives its existence and mandate from the THP Act.

Limitations

The THP Act has several limitations which call for attention. A perusal of the Act in its entirety shows very little in terms of protection of the traditional health practitioners because it appears to place emphasis on protecting the public from the traditional health practitioners. This goes against the spirit and rhetoric that supported the introduction of the legislation, namely, the protection and recognition of the traditional health sector. The stated objective/s of the legislation makes its slant clear. It is about regulation and not much about protection of the traditional health practitioners and their medicines. It states:

> "To establish the Interim Traditional Health Practitioners Council of South Africa; 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 formatters connected therewith."

It should be stated that this general slant of the legislation and criticising it for being more about regulation and less about protection should not, in anyway, be construed as suggesting that regulation and stringent enforcement mechanisms are not necessary and desirable in the profession because they undoubtedly are. What is being argued is that the focus on regulation goes against the spirit and purport of the general push that informed and justified the legislative intervention in the first place. This point becomes clearer if one considers that the THP Act is the legislative point of reference in the regulation of the traditional health sector, yet there are a number of important things that it does not address even though they are crucial for its successful implementation. These include the intellectual property rights protection of traditional medicine and, something closely related to it, the identification, testing and registration of traditional medicines. It left this to the intellectual property regime and the medical and related substances control system, respectively. Regarding the protection of traditional medicines, the Intellectual Property Laws Amendment Act, which is discussed below, was enacted. In respect of the recognition and testing of traditional medicines, the Department of Health has introduced the Medicines and Related Substances Amendment Bill (B 6-2014) which, establishes, among its key provisions, the South African Health Products Regulatory Authority which replaces the current Medicines Control Council. The THP Act, thus, leaves a number of issues and

processes outside its fold and, concomitantly, outside the reach of the Interim Traditional Health Practitioners Council with the result that this may limit the development of this profession.

INTELLECTUAL PROPERTY RIGHTS REGULATION AND PROTECTION

The THP Act does not, as mentioned above, deal with the intellectual property rights nor with their protection in the traditional health sector, including traditional medicines. It is generally accepted that the protection of traditional knowledge notoriously presents a challenge to the existing intellectual property legal regime (Bull, 2012). Traditional medicines and practices are no exception. By not putting recognition and protection of traditional medicines and practices within its jurisdiction, the THP Act has left this to other mechanisms to regulate it. There are two legislative measures that have been introduced in this regard, namely, the Intellectual Property Laws Amendment Act 28 of 2013 (IPLAA) and the Medicines and Related Substances Amendment Bill (B 6-2014) (MRSAB).

The IPLAA has a long and controversial history. A Bill was first introduced by the Department of Trade and Industry in 2010, as Bill B 8B-2010, with the aim of amending the current laws relating to intellectual property rights. One of its objectives was to accommodate traditional knowledge. The Bill was eventually passed by Parliament and sent to the President for his signature so that it could become law. The President returned it to Parliament because there had not been sufficient consultation with traditional leaders. That was not the only hurdle in the route of this statute towards its enactment because Wilmot James, MP, introduced the Protection of Traditional Knowledge Bill (PMB – 2013) as a Private Member's Bill, which differed significantly from the Department of Trade and Industry's Bill. Despite the hurdles in the legislative process, the legislation was ultimately signed by the President on 9 December 2013 (GG 37148). In short, this Act amends the laws applicable to the intellectual property regime in order to accommodate indigenous knowledge. The amended statutes are the Copyright Act 98 of 1978, the Designs Act 195 of 1993, the Patent Act of 57 of 1978, the Performers Protection Act 11 of 1967 and the Trade Marks Act 194 of 1993. The nett effect of these amendments has been aptly summed up thus:

> "The Intellectual Property Laws Amendment Act 28 of 2013 (the Act) essentially seeks to include protection and commercialising or licensing of various manifestations of indigenous knowledge (IK) as a species of IP, thereby creating new forms of Intellectual Property (IP) which previously was not afforded any protection in the legislation…" (Burrows, 2014: 1).

What all these statutes had in common before their amendment is the fact that they did not recognise or provide mechanisms that protected indigenous knowledge. The promulgation of IPLAA has resulted in the extension of South Africa's laws related to the recognition and protection of intellectual property rights to indigenous knowledge. This makes traditional medicines and traditional health practice subject to the IPLAA's authority in a considerable way.

This legislation starts from a premise that, rightly, challenges the exclusion of indigenous or traditional knowledge from the mainstream intellectual property rights regime of the country, often resulting in the exploitation of such knowledge (Mukuka, 2010). However, it remains to be seen if this approach is the right solution to traditional knowledge's lack of intellectual property rights protection. For now, the following questions are disconcerting, though: Is the existing intellectual property regime, with the paradigm that supports it, elastic enough to accommodate traditional knowledge in a way that, as the legislation does, simply curves some space and throws it in? Or would it have been better if Parliament had passed the Private Member's Bill proposed by Wilmot James to have a *sui generis* regime that applies to indigenous knowledge?

The questions above come to the fore when one factors in the approach of the MRSAB. The MRSAB adopted an approach similar to IPLAA because, just like the IPLAA, it creates space for traditional medicines within the existing structures of registration and regulation of medicines. It is being opposed by some of the traditional and natural healers for precisely this reason. Furthermore, as the IPLAA does, it seeks to subject traditional medicines to a regulatory regime that was created for different types of medicines and, as a result, it cannot cater sufficiently for the needs of the sector. As Viall-Brom (2014) reported, traditional and natural healers raised their objection about the proposed regulatory dispensation with the Health Portfolio Committee in November 2014. As Viall-Brom (2014) noted, the essence of their objection was summed up by one of the delegates thus:

> "It is incongruous that one medical paradigm – the biomedical one – should be regulating the medicines of all other health systems, many of which had been around for thousands more years."

CONCLUSIONS

The introduction of the THP Act is a welcome step because it gives some sense of regulation to the traditional health sector. Firstly, it has introduced the Council to deal with the affairs of the sector. Members of the public who suffer at the hands of some of the practitioners in this sector now have a body to lodge their complaints with. Secondly, persons registered as traditional health practitioners will now be able to practise without attracting a criminal sanction.

Thirdly, and as a shortcoming, the THP Act only covers the traditional health practitioners themselves and their practices. It does not, however, cover the protection and registration of their medicines. That is a matter left to other pieces of legislation which have not provided sufficient coverage in this regard. IPLAA, for instance, simply added communal elements to the existing intellectual property rights regime and that, as discussed above, seems limited as a mechanism to offer the requisite protection. As the control of traditional medicines was not covered sufficiently by the THP Act, the MRSAB, as proposed, will regulate the testing and registration through the South African Health Products Regulatory Authority which will replace the current Medicines Control Council.

It can be said at this stage, therefore, that – at least on – South Africa has formulated structures and mechanisms that institutionalise traditional healing. Whether this is good enough is another question. There are a number of issues that remain contested even after the introduction of these regulatory mechanisms. Two of those issues are the mechanisms used to recognise and register traditional medicines and to protect the intellectual property rights of the traditional health practitioners and the approach adopted was that of accommodating traditional/indigenous knowledge into the existing intellectual property regime instead of introducing an intellectual property regime that is specific to this type of knowledge – usually referred to as *sui generis*. The advantage of the approach adopted is that it makes the intellectual property regime open to the protection of traditional knowledge and, hopefully, this knowledge will benefit from the mainstream instead of creating something new for it that could be relegated to insignificance or even not get equal support from the mainstream. The disadvantage of the approach is that, for one thing, it seeks to force the regulation of traditional knowledge into a paradigm that was created for a different type of knowledge. As Arihan and Gençler Özkan (2007: 140) observed, intellectual property rights are inadequate and inappropriate for the regulation of traditional knowledge for a number of reasons including that a specific act of invention is required for this regime to apply. While that argument was made in a different context, namely, ecological traditional knowledge, it is equally applicable regarding traditional medicines and practices. For another thing, it is common knowledge that many of the practices in traditional healing are inherited as opposed to being invented and right there lies one of the key challenges, which is: How does one accommodate traditional healing and its practices into the existing intellectual property rights system without compromising either of them? For yet another thing, there is a persuasive argument which holds that the inclusion of traditional knowledge into the existing system affects that system negatively. This argument was articulated by Wilmot James when arguing against the passing of the legislation as follows:

> "This is the Bill that the Department of Science and Technology, the Department of Trade and Industry's Regulatory Impact Assessment and the world's intellectual property rights community say cannot be implemented. The Bill further undermines existing copyright, trademark, patent design... (Parliament, 2013).

As things stand in 2015, the legislature has prescribed laws that govern the traditional health sector. Whether these laws are appropriate and sufficient remains a moot point, given their limitations some of which have been discussed in this article.

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