

# REVIEW ON A NEW LEGISLATIVE FRAMEWORK FOR TRADITIONAL HEALERS IN SOUTH AFRICA\*

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## SUMMARY

Although traditional healers have been consulted by a large proportion of the South African population for many years, they enjoyed no official recognition until very recently. However, the situation is changing. The Traditional Health Practitioners Act 35 of 2004 was placed on the statute-book in 2004, but before its effect could be tested, the Constitutional Court found the Act invalid in *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC), on 17 August 2006, because sufficient participation was lacking during the consideration of the Act. The government was thus obliged to publish the Traditional Health Practitioners Bill (B20/2007). The content of this draft bill is virtually in agreement with the provisions of its predecessor. In this article an exposition is given of the events preceding the commencement and the contents of the Traditional Health Practitioners Act. Following this, the decision of the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* and the effect thereof will be discussed before concluding with a few remarks on the legal position and future of traditional healers in South Africa.

## 1 INTRODUCTION

A traditional healer is defined as “an educated or lay person who claims an ability or a healing power to cure ailments, or a particular skill to treat specific types of complaints or afflictions and who might have gained a reputation in his own community or elsewhere”.<sup>1</sup> On estimation, there are more than 200 000 traditional healers in South Africa and almost 70%-80%

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\* Adapted paper delivered at the Inaugural Conference on World Law and World Health, 22-24 March 2007, World Law Institute of Emory University, Atlanta, Georgia, the USA. I wish to express my gratitude to the anonymous reviewers for their comments on an earlier draft of this article. However, the author takes full responsibility for any possible errors and opinions.

<sup>1</sup> See <http://www.emro.who.int/Publications/EMHJ/0501/13.htm> (accessed on 2007-08-01), as well as par 3 2 below. See also Hassim, Heywood and Berger *Health and Democracy: a Guide to Human Rights, Health Law and Policy in Post Apartheid South Africa* (2007) 203.

of the population consult them.<sup>2</sup> Although official figures are not available, it is believed that the majority of them are female.<sup>3</sup> In the absence of official recognition, they currently operate without licences. Nevertheless, they do work under a pseudo-structure: some under the auspices of the Traditional Healers Organisation,<sup>4</sup> others under unofficial organisations and yet others totally independently.<sup>5</sup>

Over the years both popular South African and international media have, at times quite justifiably, criticised the methods traditional healers employ in their art and the very concept of traditional healing.<sup>6</sup> The media have often brought to light some of the malpractices of traditional healers, their horrendous consequences, including the immense suffering victims of the malpractices have had to endure.<sup>7</sup> Not all media reports have been negative. Some reports<sup>8</sup> have affirmed the undoubtedly constructive role traditional healers have played and continue to play in creating a just society based on human dignity, equality and freedom.<sup>9</sup>

<sup>2</sup> Official statistics do not exist in this regard. In her speech at the official opening of the Conference on Traditional Medicine at Kopaneng on 30 March 2004, the Minister of Health estimated that there are approximately 200 000 traditional healers in South Africa <http://www.doh.gov.za/docs/sp/2004> (accessed 2007-03-05). Anon "Healers Licensed in South Africa" 2004-09-08 *BBC News* <http://news.bbc.co.uk/1/hi/world/africa/3640270.stm> (accessed 2005-08-29); Cartillier "Licensed to Heal: South Africa Moves to Recognize Traditional Healers" 2004-09-08 *Agence France-Presse* <http://www.aegis.com/news/afp/2004/AF040920.html> (accessed 2005-08-29); and Anon "Traditional Healers Recognised by South African Lawmakers" 2005-08-29 *Afrol News* <http://www.afrol.com/articles/13912> (accessed 2005-08-29).

<sup>3</sup> Telephonic discussion with Mr Ohemile of the Traditional Healers Organisation on 19 January 2007.

<sup>4</sup> The Traditional Healers Organisation represents approximately 70 000 traditional healers in South Africa. See Cartillier 2004-09-08 *Agence France-Presse* <http://www.aegis.com/news/afp/2004/AF040920.html> (accessed 2005-08-29).

<sup>5</sup> Peltzer "A Community Survey of Traditional Healers in South Africa (Northern Province)" 1998(4) *South African Journal of Ethnology* 192.

<sup>6</sup> The negative publicity is mostly associated with so-called "muti" murders. "Muti" (meaning medicine) murders are killings to obtain body parts for supposedly potent traditional cures. Although official statistics are not available, estimates range between 15-300 murders per year. Anon "Grisly Killings Supply S. African Body Parts Demand" 2003-08-14 *Shanghai Star* <http://app1.chinadaily.com.cn/star/2003/0814/fe21-2.html> (accessed 2005-08-29); Holland *African Magic: Traditional Ideas that Heal a Continent* (2003) 12; Minnaar "Legislative and Legal Challenges to Combating Witch Purging and Muti Murder in South Africa" in Hund (ed) *Witchcraft Violence and the Law in South Africa* (2003) 86-91; and Khumalo and Loubser "Die Seuntjie wat Nooit 'n Meisie kon word nie" 1996-12-12 *Huisgenoot* 118-119.

<sup>7</sup> A mother alleged that her husband, a traditional healer, forced her to kill her own child for body parts. Although her husband was sentenced to life imprisonment, the mother was acquitted. Every day she was confronted with the realities of a society who would not accept her innocence. See Anon "I was Forced to Kill my Baby" 2002-04-02 *BBC News* <http://news.bbc.co.uk/1/hi/uk/1899609.stm> (accessed 2005-08-29). In another story a young girl alleges that she was licked by a giant snake during a cleansing ritual, and is now HIV positive and pregnant – Reporter 2005-09-12 *Daily Sun* 1.

<sup>8</sup> Nevin "Trading Places" August 2005 *Men's Health Magazine* 140-146.

<sup>9</sup> S 7 of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") reaffirms the state's responsibility to respect, promote and fulfil the rights of all in South Africa. The ever-increasing popular media reports illustrate the society's interest in traditional healing. The Aidslawproject (ALP) is an organisation in South Africa who has

Although traditional and western health systems have operated concurrently since early times,<sup>10</sup> western healing has enjoyed far greater official acceptance. Successive governments have had more confidence in the western health system because it is based on “scientific and rational knowledge”, whilst traditional healing is perceived to be based on “mystical religious beliefs”.<sup>11</sup> As a result, the greater part of state and private funding has been invested in developing western healing as opposed to its traditional counterpart. The countless investments have made the western health system more expensive. This in turn has led to evident societal divisions where those who can afford it enjoy among the best of medical services one can find, while those who cannot afford it, particularly those in rural areas,<sup>12</sup> are serviced by poorly resourced health institutions. Currently, western healing is too expensive for the majority of the South African rural population;<sup>13</sup> consequently this majority still find the traditional healing system more appealing.<sup>14</sup>

For the majority of the rural population, traditional healing is popular. The inaccessibility of western healing, its high cost and the more holistic approach<sup>15</sup> traditional healers follow contribute to its popularity.<sup>16</sup> Traditional

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examined traditional and alternative health care extensively. Their results are published in Chapter 9 of Hassim, Heywood and Berger 202-225.

- <sup>10</sup> Muller and Steyn “Culture and the Feasibility of a Partnership between Westernized Medical Practitioners and Traditional Healers” 1999(2) *Society in Transition* 143.
- <sup>11</sup> Peltzer “An Investigation into the Practices of Traditional and Faith Healers in an Urban Setting in South Africa” 2001(2) *Health SA* 4. There are also reports of a “white” traditional healer – see Clark “The Doctor of Port St Johns” 1998-03-30 *Dispatch Online* <http://www.dispatch.co.za/1998/03/30/editoria/HERBMAN.HTM> (accessed 2005-08-26); and Van Zyl “Ons eie Sangoma” June 1992 *Publico* 4-6.
- <sup>12</sup> Research has also established that traditional healers also operate in an urban setting – see Peltzer 2001(2) *Health SA* 3-11; Morgan and Reid “‘I’ve Got Two Men and One Woman’: Ancestors, Sexuality and Identity among Same-sex Identified Women Traditional Healers in South Africa” 2003(5) *Culture, Health and Society* 381.
- <sup>13</sup> Hopa, Simbayi and Du Toit “Perceptions on Integration of Traditional and Western Healing in the new South Africa” 1998(1) *South African Journal of Psychology* 8. See also Xaba “Marginalised Medical Practice. The Marginalisation and Transformation of Indigenous Medicines in South Africa” <http://www.ces.fe.uc.pt/emancipa/research/en/ft/triunfo.html> (accessed 2005-08-30) who argues that the marginalisation of traditional healing had a socio-cultural impact on African medical practices.
- <sup>14</sup> On estimation, approximately 80% of South Africans use traditional healers, and traditional birth attendants deliver approximately 60% of South African babies. See speech by the Minister of Health at the official opening of the Conference on Traditional Medicine at Kopaneng <http://www.doh.gov.za/docs/sp/2004>; and Phila “Public Hearings on Traditional Healers, 1997” 1997 *Summary Brief* 23 1 [http://www.healthlink.org.za/pphc/Phila/summary/vol3\\_no23.html](http://www.healthlink.org.za/pphc/Phila/summary/vol3_no23.html) (accessed 2007-01-19).
- <sup>15</sup> Their role is that of physician, counsellor, psychiatrist and priest – Hewson “Traditional Healers in Southern Africa” 1998(12) *Annals of Internal Medicine* 1030. See also Zungu “Traditional Healers in the Work Situation” July 1992 *People Dynamics* 23-25.
- <sup>16</sup> Hopa, Simbayi and Du Toit 1998(1) *South African Journal of Psychology* 8-13. The authors have identified the urgent need to reduce the ignorance, prejudice and suspicion among western and traditional healers about one another. According to them, these obstacles might stand between the successful integration of the two systems. They recommend joint workshops, seminars and conferences at national and international level in order to address the problem. See also the research done by Mabunda “Perceptions of Disease, Illness and

healers are mostly the first healthcare providers to be consulted by traditional communities. Government has realised that traditional healing is so deeply interwoven with the fabric of cultural and spiritual life of many South Africans that they have decided to enact legislation to recognise and regulate traditional healthcare services.<sup>17</sup> However, the aspirations of government have been met with some resistance from certain sectors of the health community, and after months of legal battles which ended by the judgement delivered by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly*<sup>18</sup> the “new” legal framework for traditional healers is far from being sorted out.

In this article, an appraisal of the events leading up to the enactment of the Traditional Health Practitioners Act (THP Act), its contents and its implications for the traditional healthcare services will be made.<sup>19</sup> Secondly, the judgement of the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* and its influence on the THP Act will be discussed.<sup>20</sup> Thirdly, remarks on the legal processes following the judgement of the Constitutional Court will be made, before a conclusion with brief comments on the legal position of traditional healers in South Africa will be given.<sup>21</sup> In stating the outline of this article, it should be clear that it is not its purpose to comment on the policy issues pertaining to the constitutionality or recognition of traditional healers or traditional medicine in South African context. My intention is merely to provide a review of the legal position of traditional healers in South Africa, especially considering the fact that not much has been written in legal journals about the legislative framework for traditional healers over the years.<sup>22</sup>

## 2 REGULATORY OVERVIEW: THE POSITION BEFORE THE THP ACT

A regulatory overview of the system of traditional healing preceding the enactment of the THP Act is necessary in order to provide the context in which the THP Act was enacted.<sup>23</sup> Suffice to say that traditional healers and

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Healing among selected Black Communities in the Northern Province, South Africa” 2001(1) *South African Journal of Ethnology* 11-16.

<sup>17</sup> The result was the enactment of the Traditional Health Practitioners Act 35 of 2004 (hereinafter “the THP Act”). See par 3 below. See also the speech by the Minister of Health during the signing of a memorandum of understanding between the Indigenous Healers of KwaZulu-Natal and the Nelson R Mandela School of Medicine on 22 October 2003 <http://www.doh.gov.za/docs/sp/2003/sp1022.html> (accessed 2005-08-25) and also her speech at the official opening of the Conference on Traditional Medicine in Kopaneng.

<sup>18</sup> [2006] JOL 18085 (CC); 2006 6 SA 416 (CC). Hereinafter “the *Doctors for Life* case”.

<sup>19</sup> See par 2 below.

<sup>20</sup> See par 4 below.

<sup>21</sup> See par 6 below.

<sup>22</sup> It is sometimes necessary to state what the law is and not only what the law should be. For a discussion on the constitutional position of traditional healers, see Hassim, Heywood and Berger 203-211.

<sup>23</sup> The THP Act was assented to on 7 February 2005. Ss 7, 10, 11(3), 12-15, 47, 48 and 50 came into operation on 13 January 2006. All these provisions have bearing on the council

medicine have been part of South Africa's history for a very long time. Their position remained largely unregulated and free of legislative interference. Over the years there have been calls for the recognition and regulation of traditional healers and medicines, but to date their recognition and regulation have been sporadic, insufficient and controversial.

Existing national health legislation does not provide a legal framework for traditional healers. The Allied Health Professions Act<sup>24</sup> sets up a registration and licensing scheme to control the practice of allied health professions. Traditional healers are clearly not included in the definition provided for the "allied health profession".<sup>25</sup> Furthermore, in terms of section 17 of the Health Professions Act,<sup>26</sup> registration is a prerequisite for practising as a medical practitioner. Registration is, however, only allowed in terms of the Nursing Act,<sup>27</sup> the Chiropractors, Homeopaths and Allied Health Service Professions Act<sup>28</sup> and the Pharmacy Act.<sup>29</sup> A concurrent reading of these Acts makes it clear that traditional healers cannot register as medical practitioners; therefore they will be unable to practise as medical practitioners in terms of these Acts.<sup>30</sup>

One exception, though, is the KwaZulu Act on the Code of Zulu Law,<sup>31</sup> which applies only to KwaZulu-Natal Province.<sup>32</sup> 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.

Another Act that relates indirectly to traditional healers is the Witchcraft Suppression Act.<sup>33</sup> The Act makes provision for the suppression of practices related to witchcraft and has been subject to severe criticism. One of the main objections against the Act is the fact that it contributed to unfounded

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and its doings. See par 3 3 below for some observations on certain notices published by the Minister of Health.

<sup>24</sup> 63 of 1982.

<sup>25</sup> In terms of s 1 of the Act, it means the "profession of ayurveda, Chinese medicine and acupuncture, chiropractic, homeopathy, naturopathy, osteopathy, phytotherapy, therapeutic aromatherapy, therapeutic massage therapy or therapeutic reflexology".

<sup>26</sup> 56 of 1974.

<sup>27</sup> 50 of 1978.

<sup>28</sup> 63 of 1982.

<sup>29</sup> 53 of 1974.

<sup>30</sup> S 33 of the Health Professions Act makes provision for the registration of health professions other than the ones listed in the above-mentioned acts, but to date this provision has not been utilised to gain recognition for traditional healers.

<sup>31</sup> 16 of 1985.

<sup>32</sup> S 41 of the Allied Health Professions Act makes provision for this exception by laying down that the provisions of this Act and the Health Professions Act "shall not be construed as derogating from the right which an herbalist contemplated in the Code of Zulu Law may have to practice his or her profession".

<sup>33</sup> 3 of 1957.

accusations of witchcraft with dire results.<sup>34</sup> In the early 1990s, witchcraft-related crimes escalated quite dramatically in the Northern Province. As a result, the Executive Council of the Northern Province appointed a Commission of Inquiry, which was later to be known as the Ralushai Commission. The Commission recommended that the Witchcraft Suppression Act be repealed and that new legislation for the control of traditional healers be adopted.<sup>35</sup> To date the Act has not been repealed, neither has it been amended by the THP Act dealing with the regulation of traditional healers.<sup>36</sup>

Although the traditional healing system has escaped absolute governmental regulation for a very long time, it has not been completely free of regulation of some kind or another. Various unofficial organisations dealing with the education and registration of traditional healers exist. One example is the Traditional Healers' Organisation, which is an umbrella body representing more than 69 000 traditional healers in Southern Africa.<sup>37</sup> To qualify as a traditional healer one has to fulfil certain requirements, including the completion of an apprenticeship of between one and five years and be well known to the members of the community and other traditional healers. After obtaining the required qualification as a traditional healer, it is possible to become a registered member of the organisation.<sup>38</sup> Another organisation is the African Herbal Doctors' Association. A registered member of this organisation has to complete a course of instruction in herbalism and divination and has to obtain practical experience of at least six years as an herbal doctor before a certificate will be issued.<sup>39</sup> Although a number of organisations dealing with issues related to traditional healers are in

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<sup>34</sup> Niehaus "Witchcraft in the New South Africa: A Critical Overview of the Ralushai Commission Report" in Hund (ed) *Witchcraft Violence and the Law in South Africa* (2003) 97-98.

<sup>35</sup> Ralushai "Summary of the Ralushai Commission Report" in Hund (ed) *Witchcraft Violence and the Law in South Africa* (2003) 124-130. The various publications emanating from the South African Commission on Gender Equality's 1998 National Conference on Witchcraft Violence in South Africa have been published in Hund (ed) *Witchcraft Violence and the Law in South Africa* (2003) 5. When reading the material, it is not always easy to distinguish between a traditional healer and a witch. Both deal with supernatural and mystical powers. However, a detailed discussion of the difference (or similarities) between a traditional healer and a witch falls beyond the scope of this article. See Hund *Witchcraft Violence and the Law in South Africa* (2003) 14 *et seq* for more information on the relevant issues. See also Holland 9 *et seq*.

<sup>36</sup> See par 3 below. The South African Traditional Healers Healthcare Group is another example of a body of traditional healers. See Richter *Traditional Medicines and Traditional Healers in South Africa* (2003) (discussion paper prepared for the Treatment Action Campaign and AIDS Law Project) 12.

<sup>37</sup> Richter 11. However, in another source it is stated to be 180 000, see Hess "Traditional Healers in South Africa" 1998(37) *HST Update* 6; World Health Organisation *Legal Status of Traditional Medicine and Complementary/Alternative Medicine: A Worldwide View* (2001) 33.

<sup>38</sup> Members of the Traditional Healers Organisation have to pay annual membership fees. Hess *HST Update* 6.

<sup>39</sup> Information and documents supplied by Seithati Mongodi, a practising traditional healer in the small town of Rammolutsi, Viljoenskroon. Official figures pertaining to the membership figures of the organisation are not available.

existence, no common code of conduct or standards for training has been set, and each organisation has its own code of conduct and training methods.<sup>40</sup>

The existence of organisations of traditional healers may hamper the efforts of government to regulate the affairs of traditional healers. At this moment, the training and membership of traditional leaders are being regulated by some of the organisations themselves, and there may be conflicting interests and issues that have the potential of causing a tug-of-war between the government and the traditional healer organisations. It is of the utmost importance that these institutions be included in future deliberations on the THP Act and other legislation dealing with traditional healers.

### **3 NEW LEGISLATIVE FRAMEWORK: THE THP ACT**

#### **3 1 Background**

Recent years have seen a surge of interest in traditional healers and medicines world-wide. The World Health Organisation has called for the recognition of traditional healers and medicine.<sup>41</sup>

At local level, the Department of Health's White Paper for the Transformation of the Health System in South Africa<sup>42</sup> recognises the importance of traditional healers in the broader primary healthcare team, but indicated that they should not form part of the public health service at that stage. However, the policy document did emphasise that their regulation and control should be investigated for their legal empowerment and that it was important to develop criteria outlining standards of practice and an ethical code of conduct to facilitate their registration. In circumstances where traditional birth attendants are utilised, they should be educated and supported by the public health sector.<sup>43</sup>

The White Paper was followed by a request that public hearing should take place in the various provinces. They were organised by the provincial legislatures with the purpose to receive comments on three issues, namely:<sup>44</sup>

- Statutory council for traditional healers.<sup>45</sup>
- Issuing of medical certificates by traditional healers.<sup>46</sup>

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<sup>40</sup> Phila 1997 *Summary Brief* 23 2.

<sup>41</sup> Phila 1997 *Summary Brief* 23 1.

<sup>42</sup> Published by the Department of Health in April 1997 <http://www.info.gov.za/whitepapers/1997/health.htm>.

<sup>43</sup> See par 4.1.2(a)(vii) of the White Paper.

<sup>44</sup> Phila 1997 *Summary Brief* 23 3.

<sup>45</sup> The Traditional Health Practitioners Council is to be established in terms of the THP Act. See par 3 3 below.

<sup>46</sup> See par 3 3 below with regard to medical certificates.

- Medical aid coverage of care provided by traditional healers.<sup>47</sup>

The National Council of Provinces (NCOP) received reports from seven of the nine provinces and issued a summary report that had been submitted to the National Assembly Portfolio Committee on Health.<sup>48</sup> After various meetings, the Portfolio Committee on Health produced a Traditional Health Practitioners Bill (THP Bill),<sup>49</sup> which was eventually passed and signed by the president on 7 February 2005. The result was the THP Act, which partly came into operation on 13 January 2006. However, the Constitutional Court recently found the legislative processes to be flawed and declared the THP Act invalid, although the declaration of invalidity was postponed for a period of 18 months. The consequences of this decision will be dealt with later.<sup>50</sup>

### 3 2 Defining traditional healers

Although both form part of the traditional healing system, a distinction is drawn between traditional healers and traditional medicine. In this article, I will only deal with traditional healers and not the traditional medicines they use during their practices.

There is a pervading lexical confusion over the correct terminology for a traditional healer.<sup>51</sup> Some of the confusion may be attributed to the conflicting accounts of academic writers, and others by the differences between the various culture groups in South Africa. For example, the Zulus have different classes of traditional healers who are occasionally collectively labelled as “witchdoctors”<sup>52</sup> – a term traditional healers have earned from their function (or ability) to counter curses put on people by witches.

The Zulu culture distinguishes between the following classes of traditional healers: *nyanga*,<sup>53</sup> *sangoma*,<sup>54</sup> *sanusi*<sup>55</sup> and *thwasa*.<sup>56</sup> There is yet another

<sup>47</sup> See par 3 3 below with regard to medical aids.

<sup>48</sup> Phila 1997 *Summary Brief* 23 3. The Constitutional Court found these public hearings to be insufficient. See par 4 below.

<sup>49</sup> B66-2003 (hereinafter “the THP Bill”). As introduced in the National Assembly as a bill in terms of s 76 of the Constitution of the Republic of South Africa, 1996. An explanatory summary of the THP Bill was published in GG 24751 of 2003-04-14 <http://www.info.gov.za/gazette/bills/2003/b66-03.pdf>.

<sup>50</sup> See par 4 below.

<sup>51</sup> Hund “African Witchcraft and Western Law – Psychological and Cultural Issues” in Hund *Witchcraft Violence and the Law in South Africa* (2003) 12-17.

<sup>52</sup> Holland 11 indicates that conservative whites mainly use the term; therefore traditional healers loathe it.

<sup>53</sup> Herbalist or diviner. See Hund 13.

<sup>54</sup> Spiritualist who has received “a call” from the ancestral spirits. See Hund 13.

<sup>55</sup> Spiritualist and lore-master that is higher in ranking than the *nyanga* and *sangoma*. See Hund 13.

<sup>56</sup> During the training period, a *sangoma* is referred to as a *thwasa*. See Hund 13. In 2001-08-02 *Huisgenoot* 108-111, Holland gives her account of the caves near Ficksburg in the Free State Province where the training of some of these “learners” is conducted. The rituals seem to be an infusion of traditional and Christian values and usages. The caves are referred to as a university and the faculties represent the various directions of traditional healing.



distinction<sup>57</sup> between a *sangoma* (diviner-medium)<sup>58</sup> and an *inyanga* (herbalist).<sup>59</sup> Some writers use the terms “diviners” and “traditional healers” interchangeably as if the two are synonymous.<sup>60</sup> So-called *abathandazi* or Christian diviners counter-developed as a result of anti-witchcraft legislation. They felt it safer to infuse traditional healing practices with Christian values and rituals, under the protective umbrella of the church.<sup>61</sup>

Research also indicates that the difference between the various classes of traditional healers have been blurred as a result of effecting colonial powers and structures which played a role in changing the setting of traditional healing.<sup>62</sup> Legislation, such as the Witchcraft Suppression Act,<sup>63</sup> distorted the difference between diviners and herbalists even more by prohibiting diviners from practising their trade. Research further indicates that most traditional healers prefer the more generic term “traditional healer” to others, such as “sangoma”, because the word “sangoma” also refers to someone who does harm to others.<sup>64</sup> Some literature suggests that the categorisation of traditional healers is a mere academic exercise, and that the profession itself does not likewise distinguish between the various categories of healers.<sup>65</sup>

The THP Act distinguishes between the following varying persons who engage in *traditional health practice*,<sup>66</sup> provided they are *registered*<sup>67</sup> as such under the Act:

- (a) traditional health practitioner;<sup>68</sup>
- (b) diviner;<sup>69</sup>
- (c) herbalist;<sup>70</sup>
- (d) student;<sup>71</sup>
- (e) traditional birth attendant;<sup>72</sup>

<sup>57</sup> Xaba <http://www.ces.fe.uc.pt/emancipa/research/en/ft/triunfo.html> (accessed 2005-08-30) 4. See also Kohnert “Witchcraft and Trans-national Social Spaces: Witchcraft Violence, Reconciliation and Development in South Africa’s Transition Process” 2003(2) *The Journal of Modern African Studies* 8; and Kriel “Witches, Healers, and Helminths: Sotho Beliefs regarding the Utilisation of the Latent Power of Phenomena” 2003(3-4) *Anthropology Southern Africa* 168.

<sup>58</sup> Those who provide a diagnosis usually through spiritual means. See Richter 8.

<sup>59</sup> The herbalist chooses and applies relevant remedies. See Richter 8.

<sup>60</sup> Holland 3.

<sup>61</sup> Xaba <http://www.ces.fe.uc.pt/emancipa/research/en/ft/triunfo.html> (accessed 2005-08-30) 5.

<sup>62</sup> Richter 8.

<sup>63</sup> 3 of 1957.

<sup>64</sup> Muller and Steyn 1999(2) *Society in Transition* 149.

<sup>65</sup> Pienaar, De Beer and Vorster “Die Sosio-ekonomiese Posisie van Vroulike Kragdokters by die Nkuna van Ritavi” 2000(4) *South African Journal of Ethnology* 165.

<sup>66</sup> Own emphasis.

<sup>67</sup> Registration is a requirement – see par 3 3 below.

<sup>68</sup> This is an umbrella term for the various categories of traditional healers – s 1.

<sup>69</sup> A *sangoma*.

<sup>70</sup> An *inyanga*.

<sup>71</sup> A person training to be a traditional health practitioner – s 1.

<sup>72</sup> A midwife.

- (f) traditional tutor;<sup>73</sup> and  
 (g) traditional surgeon.<sup>74</sup>

Since only a traditional healer engaged in traditional health practices may be registered as one under any of the relevant categories, the term “traditional health practice” warrants further explanation. In terms of the Act it is:<sup>75</sup>

“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,<sup>76</sup> pregnancy, childbirth and death, but **excludes** the professional activities of a person practising any of the professions contemplated in the Pharmacy Act,<sup>77</sup> ... the Health Professions Act,<sup>78</sup> ... the Nursing Act,<sup>79</sup> ... the Allied Health Professions Act,<sup>80</sup> ... or the Dental Technicians Act,<sup>81</sup> ... and any other activity not based on **traditional philosophy**.”<sup>82</sup>

It is clear from the wording of the Act that “traditional health practice” means any activity based on traditional philosophy. The Act affords quite a wide meaning to the concept of traditional philosophy. It includes:

“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”.<sup>83</sup>

The broad meaning afforded to the traditional philosophy concept might create difficulties when it needs to be proven, especially where the concepts

<sup>73</sup> Someone who trains a traditional healer.

<sup>74</sup> Traditional healer who performs certain operations, such as circumcision. A number of acts deals with circumcision, for example: (a) Limpopo Circumcision Schools Act 6 of 1996 that regulates circumcision in the schools of the Limpopo province; (b) National Health Act 61 of 2003 that empowers the Minister of Health to stipulate conditions under which traditional circumcision may be carried out (see s 43); (c) Children's Act 38 of 2005 that prescribes the conditions for male and female circumcision (see s 12).

<sup>75</sup> S 1.

<sup>76</sup> Puberty and adulthood would include the so-called initiation schools that are regularly in the news for the circumcisions which are done on young boys.

<sup>77</sup> 53 of 1974.

<sup>78</sup> 56 of 1974.

<sup>79</sup> 50 of 1974.

<sup>80</sup> 63 of 1982.

<sup>81</sup> 19 of 1979.

<sup>82</sup> Own emphasis.

<sup>83</sup> S 1.

are based on unwritten and unscientific customs and usages. It would also be difficult to exclude other healing methods based on spiritual elements.<sup>84</sup>

### 3.3 Licence to heal

One of the first aims of the THP Act is to establish an interim Traditional Health Practitioners Council of South Africa.<sup>85</sup> On 21 December 2005, the Minister of Health published two notices pertaining to the appointment of Council members. The first notice invited interested persons to submit comments or representations to the regulations setting out the process of appointment of Council members within three months.<sup>86</sup> The second notice invited nominations of candidates for appointment to the Council within thirty days.<sup>87</sup> The latter notice seems to be premature, because the relevant provisions pertaining to the appointment of Council members only came into operation on 13 January 2006 and the date for commentary to the proposed regulations pertaining to the procedure of appointment only lapses in March 2006.

A second aim of the Act is to provide for the registration, training and practices of traditional healers. Currently the many traditional healer organisations in operation in South Africa fulfil this function. It is, however, extremely difficult to determine or monitor the quality of their training. Doctors for Life<sup>88</sup> is concerned that the quality of healthcare in South Africa may deteriorate if traditional healers are allowed to use medicines that are prescribed by the "spirits" as it often happens within the traditional healthcare system.<sup>89</sup>

The third object of the Act is to serve and protect the interest of members of the public who consult traditional healers.<sup>90</sup> The Act will create a framework for co-operation between mainstream health practice and traditional healing, which could, it is hoped, lead to integration and co-

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<sup>84</sup> *Eg*, the Natural Healers Association's mission statement reads as follows: "To widen the window of opportunity to influence the development of health legislation in South Africa to recognize the spiritual elements of International/African Traditional, Indigenous, Spiritual, Energy and Natural Healing Methods. To monitor and keep members informed of latest developments regarding Traditional, Indigenous, Spiritual, Energy and Natural Healing Methods. By seeking Government Recognition, to ultimately assist our members to provide a more cost-effective and efficient healthcare service for all South Africans." <http://www.holistichealers.co.za/index.htm> (accessed 2006-02-02).

<sup>85</sup> Hereafter "the Council". See Chapter 2 of the Act. Ss 7, 10, 11(3), 12-15, 47 48 and 50 came into operation on 13 January 2006. The date of commencement of the other provisions of the Act has yet to be published.

<sup>86</sup> See GN R1247 in GG 28349 of 2005-12-21.

<sup>87</sup> See GN R1229 in GG 28348 of 2005-12-21.

<sup>88</sup> Doctors for Life (South Africa) is a member of Doctors for Life International, which is a non-governmental and registered Non-Profit making Organisation (NPO) established in 1991 <http://www.doctorsforlifeinternational.com/>.

<sup>89</sup> *Oral submissions to the parliamentary committee on Traditional Healers and the Health Care System in SA (18/02/1998)* [http://www.doctorsforlifeinternational.com/issues/traditional\\_heal.cfm](http://www.doctorsforlifeinternational.com/issues/traditional_heal.cfm).

<sup>90</sup> S 2.

operation between traditional and western healing.<sup>91</sup> Once again, Doctors for Life indicated that they doubt whether the public would be protected if healers were allowed to use medicine that has not been validated scientifically.<sup>92</sup>

To qualify as a traditional healer, one is required to register.<sup>93</sup> It may be a daunting task to effect the registration of practising traditional healers. Research in the Tzaneen area<sup>94</sup> has shown that it is difficult, if not impossible, to determine the exact number of traditional healers in one area. This is the result of outdated name lists and the fact that there is currently no imperative on a traditional healer to register anywhere. A potential source of reference would be the traditional healers themselves, because they usually know one another. This would entail empirical research, which could prove to be quite costly.<sup>95</sup>

The Registrar of the Council may only register a person as a healer upon satisfaction that the applicant is suitably qualified to be a traditional healer.<sup>96</sup> The Minister of Education is responsible for determining the suitable qualifications for registration.<sup>97</sup> This is a potential area of conflict. To date, the education and training has been done by the various organisations. One can only hope that only suitably skilled healers will eventually be registered. Doctors for Life have voiced their concern with the proposed legislation. They are of opinion that it is a mechanism which cannot regulate the spirit world; neither can it control communication between "ancestral spirits" and the healer. According to them it is difficult to see how a piece of legislation can regulate the "spiritual" or the "calling" which is normally associated with traditional healing.<sup>98</sup>

The Act provides that any person who is dissatisfied with the treatment of a registered traditional healer or a student may lay a complaint with the Council.<sup>99</sup> The Council has comprehensive competencies to investigate

<sup>91</sup> Hopa, Simbayi and Du Toit 1998(1) *South African Journal of Psychology* 8 express their hope that there would soon be an integration of the two approaches. See also Jones "Traditional Healers here to stay; Yes to Traditional Healers: Izindaba" 1998(9) *South African Medical Journal* 1057. However, Maseko of the Traditional Healers Organisation does not believe in the integration of the western and traditional health systems. He is of opinion that they should exist as parallel systems. See Hess 1998(37) *HST Update* 6.

<sup>92</sup> [http://www.doctorsforlifeinternational.com/issues/traditional\\_heal.cfm](http://www.doctorsforlifeinternational.com/issues/traditional_heal.cfm).

<sup>93</sup> In terms of s 1, a traditional health practitioner is someone who is registered in terms of the Act as a traditional health practitioner and in terms of s 21(1) nobody may practise as a traditional health practitioner without being registered. S 44, furthermore, reiterates that an unregistered practitioner is not entitled to remuneration for any services he or she has rendered, neither is he or she entitled to practise as a traditional health practitioner. There is no consensus between traditional healers regarding the necessity of registration – see Muller and Steyn 1999(2) *Society in Transition* 152.

<sup>94</sup> In the Northern Province.

<sup>95</sup> Pienaar, De Beer and Vorster 2000(4) *South African Journal of Ethnology* 165.

<sup>96</sup> S 21(5).

<sup>97</sup> S 22. See also s 47 that entitles the Minister to issue regulations in this regard.

<sup>98</sup> Doctors for Life [http://www.doctorsforlifeinternational.com/issues/traditional\\_heal.cfm](http://www.doctorsforlifeinternational.com/issues/traditional_heal.cfm).

<sup>99</sup> See s 29. The disciplinary inquiries and investigations are regulated in Chapter 4 (ss 29-41) of the Act. It seems from the wording of the Act, that a person cannot use this route if the

complaints against registered traditional practitioners<sup>100</sup> and may appoint an investigating officer to conduct the investigations.<sup>101</sup> Should a traditional healer be found guilty of improper or disgraceful conduct, he or she is liable to incur a wide range of penalties, including a caution or reprimand; suspension for a specific period; removal of his or her name from the register; a fine; compulsory community service; and payment of costs or restitution to the complainant.<sup>102</sup> It is important that the communities be informed of their rights to complain about any improper or disgraceful conduct of a traditional healer, otherwise it would be futile if the necessary structures to lodge a complaint were in place, but nobody knew the incidental civil procedure. In addition, a complainant has to be sufficiently protected from the vengeance of the healer he or she reported. Despite the definition of unprofessional conduct, Doctors for Life are of opinion that it is difficult, if not impossible, to determine the unprofessional conduct of a traditional healer, because the suitability of some medicines and uses have not yet been determined.<sup>103</sup>

The disciplinary procedure described in the previous paragraphs can only be instituted against a registered practitioner. An unregistered practitioner or student is criminally liable either in terms of the offences under the Act<sup>104</sup> or in terms of a common law offence.<sup>105</sup> It is envisaged that it would take a considerable amount of time in order to determine whether or not a traditional healer is qualified enough to be registered, and the question arises as to whether practising healers would be prosecuted whilst they are in the process of applying for registration. What will happen if a practising healer does not qualify for registration or if a healer practices without any knowledge of the existing legislation?<sup>106</sup>

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traditional health practitioner or student is not registered in terms of the Act. There should be mechanisms in place in order for members of the public, especially complainants, to determine whether or not the practitioner is registered.

<sup>100</sup> The Council may postpone the inquiry if the complaint is likely to form the subject of a criminal case in a court of law, but nothing prohibits the Council to hold an inquiry even if the person is criminally liable – see s 30.

<sup>101</sup> The investigating officer does not have to be a member of Council – see s 31. The powers of the investigating officer pertaining to the entering and search of premises and the seizure of goods as described in s 32 have the potential to infringe significantly on the rights of persons and should be exercised with caution. The confidentiality and privacy of patients may only be violated in terms of a court order or with the consent of the presiding officer at the inquiry – see s 31(6). In terms of s 33(5), statements of witnesses which comply with s 213 of the Criminal Procedure Act 51 of 1977 will be admissible as evidence.

<sup>102</sup> S 34(1). In terms of s 35 the Council may conditionally suspend or postpone a sentence for a certain period.

<sup>103</sup> As examples, they refer to the use of scrapings from armpits or vaginal secretions that are used in some instances. See [http://www.doctorsforlifeinternational.com/issues/traditional\\_heal.cfm](http://www.doctorsforlifeinternational.com/issues/traditional_heal.cfm). See also par 5 below.

<sup>104</sup> See ss 43 and 49. Examples include when a person practices as a traditional health practitioner for gain (s 49(1)(a)) or when a person renders services normally associated with traditional or any other kind of healing (s 49(1)(b)-(g)).

<sup>105</sup> Examples will include assault when the patient is injured during treatment, or murder if a patient dies whilst being treated (depending on the form of intent of the traditional healer).

<sup>106</sup> Interview with May Mongdi Seithati on 15 September 2005. He has been a traditional healer for the past eighteen years and practises in the small town of Rammolutsi at Viljoenskroon.

The inclusion or integration of traditional healing with the official health sector of South Africa is seen as a relatively inexpensive method of expanding health services.<sup>107</sup> The provisions of the Act should ensure that registered traditional healers do not charge exorbitant fees for their services.<sup>108</sup> A registered practitioner must inform the recipient of the intended service or consultation fee before he or she renders any traditional health service.<sup>109</sup> The Act prescribes that a practitioner must supply his patient with a detailed account within a reasonable period of time,<sup>110</sup> which should comply with the provisions of the Medical Schemes Act.<sup>111</sup> The Council may also determine and publish fees from time to time<sup>112</sup> and the patient may approach the Council for advice regarding the fees charged.<sup>113</sup> In terms of the new legislation, a practitioner's account may be charged against one's medical aid. It is, however, uncertain at this stage whether existing medical aids will be able to cope with these new demands. It could lead to a significant rise in membership fees.

According to the memorandum on the objects of this Act which accompanied the THP Bill that preceded the Act, the Act not only aims to recognise the medical schemes of traditional health practitioners, but also the medical certificates they issue. As earlier indicated,<sup>114</sup> the envisaged registration of traditional healers should alleviate the problems employees currently experience when their employers fail to acknowledge medical certificates issued by traditional healers. Some employers and Doctors for

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He claims to be both herbalist and diviner. On average, he sees six patients a day. He received his calling to become a traditional healer from his ancestral spirits. He received his training in Lesotho where he lived before becoming a South African citizen. He makes traditional medicine from the environment and is a member of the African Herbal Doctor Association. When the Traditional Health Practitioners Act was mentioned, he said that he had never heard of it. Nevertheless, he would register as a traditional healer in terms of the Act if it is explained to him and if it does not prohibit him from practising as a traditional healer. He was, nonetheless, adamant that he would continue his traditional healing practice even if the Act would not allow him to do so. Although it could not be said that the views of one traditional healer reflect the views of the majority, this single interview clearly demonstrates the need to educate traditional healers with regard to the requirements and consequences of the Act. Ignoring the issues would not make them go away. It is important that the government should interact with everyone concerned with traditional healing and the modern health sector to ensure mutual understanding and co-operation.

<sup>107</sup> Muller and Steyn 1999(2) *Society in Transition* 145.

<sup>108</sup> It is unlikely that traditional healers would charge an exorbitant fee for services rendered. The opposite seems to be true. Research has shown that their fees are extremely low and that they seldom act against default payers. See Pienaar, De Beer and Vorster 2000(4) *South African Journal of Ethnology* 166-170.

<sup>109</sup> S 42(1).

<sup>110</sup> The Act does not prescribe what period of time amounts to a reasonable period of time.

<sup>111</sup> 131 of 1998. The purpose of this Act is to "consolidate the laws relating to registered medical schemes; to provide for the establishment of the Council for Medical Schemes as a juristic person; to provide for the appointment of the Registrar of Medical Schemes; to make provision for the registration and control of certain activities of medical schemes; to protect the interests of members of medical schemes; and to provide for measures for the co-ordination of medical schemes ..."

<sup>112</sup> S 42(5).

<sup>113</sup> S 42(3).

<sup>114</sup> See par 3.3.

Life are concerned about the difficulties one may encounter in monitoring sick notes and the possibility of increased cost to companies.<sup>115</sup> It is also important to take the scholarly education of some traditional healers into consideration. Some of them may be illiterate and unable to issue complicated accounts and medical certificates.

Another probable drawback, in the face of an already tight health budget, could be the potentially expensive and time-consuming implementation and monitoring of licences and the testing and certifying of traditional remedies.<sup>116</sup>

Although the Act has been subject to criticism,<sup>117</sup> the general feeling is that it would ensure some standards of safety and certainty, which would benefit the medical profession in general and the patients of traditional healers in particular.<sup>118</sup> Doctors for Life challenged the constitutionality of the Act in the Constitutional Court and, contrary to what one would think, the challenge succeeded on grounds pertaining to the legislative processes.

#### 4 JUDICIAL INTERVENTION: PUBLIC INVOLVEMENT IN LAW-MAKING PROCESSES

From the outset, Doctors for Life<sup>119</sup> opposed the THP Bill, because they are of opinion that any form of practice of medicine not based on empiric truth is potentially harmful to the community and bad for the economy.<sup>120</sup> In a direct application to the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly*<sup>121</sup> they challenged the constitutional validity of certain Health Bills, among them the THP Bill.<sup>122</sup> At the time of launching their application, they were unaware that the THP Bill had in fact already become an act. The application was initially brought against the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (NCOP), but the Minister of Health and the Speakers of

<sup>115</sup> Strydom "Would you Willingly Accept a Sick Note from a Sangoma?" 2006-01-12 *Business Owner* <http://www.businessowner.co.za/Article.aspx?Page=23&type=22&Item=2965> (accessed 2006-02-01). Doctors for Life are of opinion that traditional healers have a tendency to give people off for longer periods if required by the "ancestral spirits". See [http://www.doctorsforlifeinternational.com/issues/traditonal\\_heal.cfm](http://www.doctorsforlifeinternational.com/issues/traditonal_heal.cfm).

<sup>116</sup> Howse "Health & Finance" 2000(4) *South African Medical Journal* 341.

<sup>117</sup> See [http://www.doctorsforlifeinternational.com/issues/traditonal\\_heal.cfm](http://www.doctorsforlifeinternational.com/issues/traditonal_heal.cfm).

<sup>118</sup> This seems to be the viewpoint of the South African Medical Association as reported in the media – see Cartillier 2004-09-08 *Agence France-Presse* <http://www.aegis.com/news/afp/2004/AF040920.html> (accessed 2005-08-29).

<sup>119</sup> Their viewpoint on traditional healing [http://www.doctorsforlifeinternational.com/issues/traditonal\\_heal.cfm](http://www.doctorsforlifeinternational.com/issues/traditonal_heal.cfm).

<sup>120</sup> See also "This week in Parliament" 2004-08-13 <http://www.polity.org.za/components/print.asp?id=55372> (accessed 2007-01-19).

<sup>121</sup> [2006] JOL 18085 (CC); 2006 6 SA 416 (CC). Hereinafter "the *Doctors for Life* case".

<sup>122</sup> They also challenged the constitutional validity of the Sterilisation Amendment Bill B12-2004, the Choice on Termination of Pregnancy Amendment Bill B72-2003 and the Dental Technicians Amendment Bill B63-2003. This article only deals with the THP Bill.

the nine provincial legislatures were later joined as respondents in the matter.<sup>123</sup>

The Constitutional Court dealt with extremely important issues<sup>124</sup> such as the role of the public in the law-making process,<sup>125</sup> separation of powers<sup>126</sup> and the jurisdiction of the Constitutional Court in matters where Parliament failed to fulfil a constitutional obligation.<sup>127</sup>

Among others, Doctors for Life argued that the NCOP and provincial legislatures failed to fulfil their constitutional obligation to facilitate public involvement when it passed the THP Bill, whilst the respondents contended that they did comply with their respective duties to facilitate public involvement in the passing of the THP Bill.<sup>128</sup> It was thus important for the Constitutional Court to reflect on the nature and scope of this duty.<sup>129</sup> After

<sup>123</sup> See *Doctors for Life* case *supra* par [6].

<sup>124</sup> A detailed discussion of these issues falls beyond the scope of this article and it will not be dealt with, except where it becomes relevant for this article.

<sup>125</sup> The Court identified three stages in the law-making process, namely: deliberation stage, when Parliament is still deliberating on a bill; presidential stage, when the bill has been passed by parliament, but still under consideration by the president; and signed stage, when the president has signed the bill into law, but before it comes into force *supra* par [40].

<sup>126</sup> Currently, the issue of separation of powers between the various branches of government is a thorny issue. The strict separation between the executive, legislative and judicial branches of government has been blurred by constitutional provisions empowering the Constitutional Court with comprehensive review powers in certain matters that normally resort under the jurisdiction of other branches of government. In this case, the question was whether parliament fulfilled its obligation under s 72(1)(a) of the Constitution. In terms of s 167(1)(e) of the Constitution the Constitutional Court has exclusive jurisdiction to investigate whether parliament or the president fulfilled a constitutional obligation. By operating within the parameters of s 167(1)(e), the Constitutional Court “intrudes” in the domain of other branches of government and this fact creates some tension between the various branches of government. However, considering that the Constitution is supreme law and the Constitutional Court is the highest court in all constitutional matters, it is imperative that the Constitutional Court serves as final watchdog over the doings of all branches of government, especially if their doings have constitutional implications. The Court also explained that they should have exclusive jurisdiction in disputes that involve important questions that relate to the “sensitive areas of separation of powers”. See par [13-31] of the *Doctors for Life* case for a discussion of these issues.

<sup>127</sup> This issue dealt with the question as to whether the Constitutional Court is competent to grant declaratory relief in respect of proceedings of parliament. The Court concluded that it had no competency to grant any relief in relation to the presidential stage, except in the circumstances dealt with in s 79 of the Constitution (*supra* par [56]). With regard to the signed stage, the Court held that it is competent to grant relief even if an act has not yet been brought into force (*supra* par [65]). As regards the competency of the Constitutional Court during the deliberation stage, the Court acknowledged that it posed difficult and important issues, because it concerns a review of the internal proceedings of parliament by the Constitutional Court. However, the Court did not find it necessary to answer this question, because the THP Act and the other Health Acts were not at the deliberate stage when the litigation commenced (see par 67-71).

<sup>128</sup> Moreover, the respondents attacked the constitutionality of the other bills that are not dealt with here *supra* par [4]. The obligation to involve the public is found in s 72(1)(a) of the Constitution pertaining to the NCOP and s 118(1)(a) of the Constitution pertaining to the provincial legislatures.

<sup>129</sup> In terms of ss 72(1)(a) and 118(1)(a). The Court followed a contextual approach in order to determine the scope and nature of the duty to facilitate public involvement. In doing so, it considered, firstly, the constitutional role of the NCOP in the national legislative process and



thorough observations concerning the right to political participation under international and foreign law,<sup>130</sup> and the nature of constitutional democracy in South Africa,<sup>131</sup> the Court held that there are two aspects of the duty to facilitate public involvement.<sup>132</sup> Firstly, it is the duty to provide meaningful opportunities for public involvement in the law-making process and secondly, it is the duty to take measures to ensure that people have the ability to use the opportunities provided. The Court applied a criterion of reasonableness to review the conduct of parliament and held that there are three factors relevant in determining whether or not the conduct of parliament was reasonable, namely the rules adopted by parliament to facilitate public involvement, the nature of the legislation under consideration and the urgency of the legislation.<sup>133</sup>

In order to determine whether the NCOP and the nine provincial legislatures complied with their constitutional obligation to facilitate public involvement, the Constitutional Court evaluated the evidence before it<sup>134</sup> and concluded that, under the circumstances, the appropriate method of facilitating public involvement would be to hold public hearings.<sup>135</sup> However, six of the nine provinces and the NCOP did not hold public hearings on the THP Bill nor did they invite written representations on it. In these circumstances, the failure of the NCOP was unreasonable and, as a result, they did not comply with their constitutional duty to facilitate public involvement.<sup>136</sup> In the event, the court declared the THP Act invalid,<sup>137</sup> but suspended its order of invalidity for a period of 18 months to enable parliament to enact it afresh in accordance with the provisions of the Constitution.<sup>138</sup>

## 5 THE WAY FORWARD

The implication of this order handed down in the *Doctors for Life* case is fascinating; the operational provisions of THP Act will remain in operation for a period of 18 months commencing on 17 August 2006 after which it will cease to exist. The phrase “enact it afresh” in all probability means that the current Act will not be able to survive in its current form and it will have to be

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its relationship to the provincial legislature and, secondly, the right to political participation under international and foreign law. The court's arguments in this regard provide excellent reading material for international and foreign-law lawyers and it is noteworthy to see how the Court continues with its trend to utilise international and foreign precedent. See par [90-109]. See also Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 159-161 for a discussion of some of these decisions.

<sup>130</sup> See par [90-109].

<sup>131</sup> See par [61-117].

<sup>132</sup> *Supra* par [129].

<sup>133</sup> *Supra* par [146].

<sup>134</sup> Par [148-166] in general and par [167-181] with specific reference to the THP Act. A summary of the findings of the provincial hearings [http://www.healthlink.org.za/pphc/Phila/summary/vol3\\_no23.html](http://www.healthlink.org.za/pphc/Phila/summary/vol3_no23.html).

<sup>135</sup> *Supra* par [180].

<sup>136</sup> *Supra* par [181].

<sup>137</sup> *Supra* par [212].

<sup>138</sup> *Supra* par [214].

enacted anew. A year and a half is not an extremely long time to get one's house in order, and parliament will have to spark in order to ensure that they comply in time with the criteria the Constitutional Court set down for public involvement. It is however, not the content of the Act which was declared unconstitutional, but the processes followed to enact it, and it is doubtful whether parliament would use the opportunity to change its contents considerably.

On 11 October 2006, the Minister of Health published a notice to announce the establishment of a presidential task team to investigate policies and practices pertaining to traditional medicine.<sup>139</sup> They have a mandate to advise the minister on issues pertaining to traditional healing. Since one of the main concerns of Doctors for Life deals with the fact that traditional healers usually use medicine which has not been scientifically tested, it might be worth the while to deal with the regulation of traditional medicine in conjunction with the THP Act.

On 27 February 2007, the Minister of Health published regulations that have an indirect bearing on traditional healing.<sup>140</sup> Regulation 5(1)<sup>141</sup> protects participants involved in indigenous medical systems research; they must be subject to the same degree of respect and protection from harm as participants in scientific medical research.

Currently the Department of Health is in the process of drafting a policy document pertaining to traditional healers and their use of traditional medicine. The Department of Health will facilitate public participation at district level and it is envisaged that these processes will take up most of the year.<sup>142</sup>

During June 2007 the government published the Traditional Health Practitioners Bill,<sup>143</sup> and since its contents is exactly the same as that of the Act, it is doubtful whether any major changes are envisaged. According to the memorandum on the objects of the Bill, the Bill must be dealt with in accordance with the procedure prescribed by section 76 of the Constitution<sup>144</sup> and section 18(1)(a) of the Traditional Leadership and Governance Framework Act.<sup>145</sup>

## 6 CONCLUSION

Doctors for Life publicly voiced their concern regarding the THP Act and judicially succeeded in slowing down the law-making process. However, the

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<sup>139</sup> GN R103 GG 29288 of 2006-10-11.

<sup>140</sup> In terms of the National Health Act 61 of 2003.

<sup>141</sup> R135 in GG 29637 of 2007-02-23.

<sup>142</sup> Information obtained from the deputy-director S Ngcobo on 15 March 2007.

<sup>143</sup> B20/2007.

<sup>144</sup> The Bill falls in the purview of schedule 4 since it deals with the functional area of a province and, therefore, s 76 of the Constitution is applicable.

<sup>145</sup> 41 of 2003. This means that the Bill has to be referred to the House of Traditional Leaders for their input.

potential benefits of including, rather than excluding, traditional healers, outweigh the disadvantages. It might reduce the possibility of malpractices and maltreatment of patients. Besides, even in the formal health sector, there are incidents of malpractices. The Act should, in future, address these issues and ensure a rise in the general standard of traditional healers and the protection of patients who seek their help. This might be a naïve viewpoint. Some traditional healers may feed on the superstitious beliefs of their patients who may be too scared to report maltreatment to the Council. However, having half an egg instead of an empty shell may be a step in the right direction to eradicate incompetent traditional healers in South Africa.

The inclusion or integration of traditional healing with the official health sector of South Africa is seen as a relatively inexpensive method of expanding health services.<sup>146</sup> The provisions of the Act should ensure that registered traditional healers do not charge exorbitantly high consultation fees, and it would give traditional healers the necessary power to demand payment for their services.

Facilitating public participation in the law-making processes may be the least of parliament's problems; the Act may have an opposite effect than envisaged. According to Xaba,<sup>147</sup> the socio-economic conditions of African people and the lack of support from the official health sector were some of the reasons why traditional healing flourished. The regulating of traditional healers by government could hamper the access of traditional communities to traditional healers and the Act might become mere paper law.<sup>148</sup>

Although this article deals with the legal position on traditional healers in general, it must be emphasised that there is no distinction between the legal position of male and female traditional healers; the THP Act and its regulations will equally apply to both sexes. However, although the legal position of female traditional healers may be equal to that of males, there are indications that their social and economic position may be different.<sup>149</sup>

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<sup>146</sup> Muller and Steyn 1999(2) *Society in Transition* 145.

<sup>147</sup> Xaba <http://www.ces.fe.uc.pt/emancipa/research/en/ft/triunfo.html> (accessed 2005-08-30) 21.

<sup>148</sup> See par 5.

<sup>149</sup> Pienaar, De Beer and Vorster 2000(4) *South African Journal of Ethnology* 164-170 indicates that the economic position of the female traditional healers in the area they researched, were mostly insufficient and some of them had to rely on old-age pension, if they indeed received any. They did not compare the economic position of the females with that of the males and it would be difficult to comment on the economic position of the male traditional healers.