

**THE ALLIED HEALTH  
PROFESSIONS COUNCIL  
OF SOUTH AFRICA**



**HEALTH CARE JURISPRUDENCE  
AND ETHICS**

# INDEX

## PREAMBLE / INTRODUCTION

## PAGE

- |  |   |
|--|---|
| 1. Purpose of Manual                         | 2 |
| 2. Content of Manual                         | 2 |
| 3. Reference material included in the manual | 2 |
| 4. The Assessment                            | 2 |

## OUTLINE

- |  |    |
|--|----|
| 1. <u>The Law of South Africa</u>  |    |
| 1.1 Sources of Law and Structures of Courts                                      | 3  |
| 1.2 The Constitution of South Africa   | 5  |
| 1.3 Criminal Prosecution   | 6  |
| 1.4 Civil Liability  | 7  |
| 1.5 Statutory Legislation  | 8  |
| 2. <u>Registration and Professional Discipline in South Africa</u>               |    |
| 2.1 The Allied Health Professions Act 63 of 1982                                 | 8  |
| 2.2 Influence of other health care legislation                                   | 11 |
| 2.3 The Allied Health Professions Council and other<br>Statutory Health Councils | 11 |
| 3. <u>Unprofessional Conduct</u>   |    |
| 3.1 Nature of Unprofessional Conduct   | 12 |
| 3.2 Disciplinary Action  | 12 |
| 3.3 Ethics   | 13 |
| References   | 17 |

## **Preamble**

### 1. Purpose of the Manual

The Healthcare Jurisprudence and Ethics Manual provides the core notes and references for purposes of completing the attached assessment to evaluate competency in healthcare jurisprudence and ethics relevant to a practitioner, intern or student registered with the Allied Health Professions Council of South Africa.

### 2. Content of the Manual

The manual contains basic core notes on healthcare jurisprudence and ethics. Where necessary the learners are required to study the required reference material, which is attached to this manual as well as the Allied Health Professions Act, 63 of 1982 (as amended) together with the Regulations. References under "recommended reading" are not required for assessment purposes.

The Allied Health Professions Act *et al* can be down loaded from Council's website, [www.ahpcsqa.co.za](http://www.ahpcsqa.co.za).

### 3. Reference Material Included in the Manual

- The relevant sections of the Bill of Rights as contained in the Constitution of the Republic of South Africa Act 108 of 1996.
- The relevant sections of the National Health Bill.
- The Patients' Rights Charter.

### 4. The Assessment

A Competency Assessment comprising of thirty (30) multiple choice questions is included at the end of the Manual together with an answer sheet. Learners are required to read the instructions at the beginning of the assessment and to complete the answer sheet as provided. Learners are required to complete all the information on the answer sheet. Assessments that are not completed on the answer sheet provided, or incomplete answer sheets, will not be considered for assessment. All answer sheets must be returned to Council as per the instructions provided.

## 1. The Law of South Africa

### 1.1 Sources of Law and Structures of Courts

***"To live as one likes is plebian; the noble man aspires to order and law"* Johann Wolfgang van Goethe (1749 1832).**

1.1.1 The South African legal system comprises of a number of sources of law.

#### The Common Law:

▷ The basis of the Common Law is the Roman-Dutch Law which was introduced into South Africa in the Cape with the arrival of the Dutch in 1652. English Law has also influenced the Common Law, influencing particularly the laws pertaining to commerce.

#### ▷ Customary Law:

The law that existed prior to the arrival of the Dutch, Customary Law is still relevant today provided it is not in conflict with the Constitution or the Bill of Rights. Customary Law is prevalent in rural areas and deals mainly in matters pertaining to the family.

#### ▷ Statutory Law:

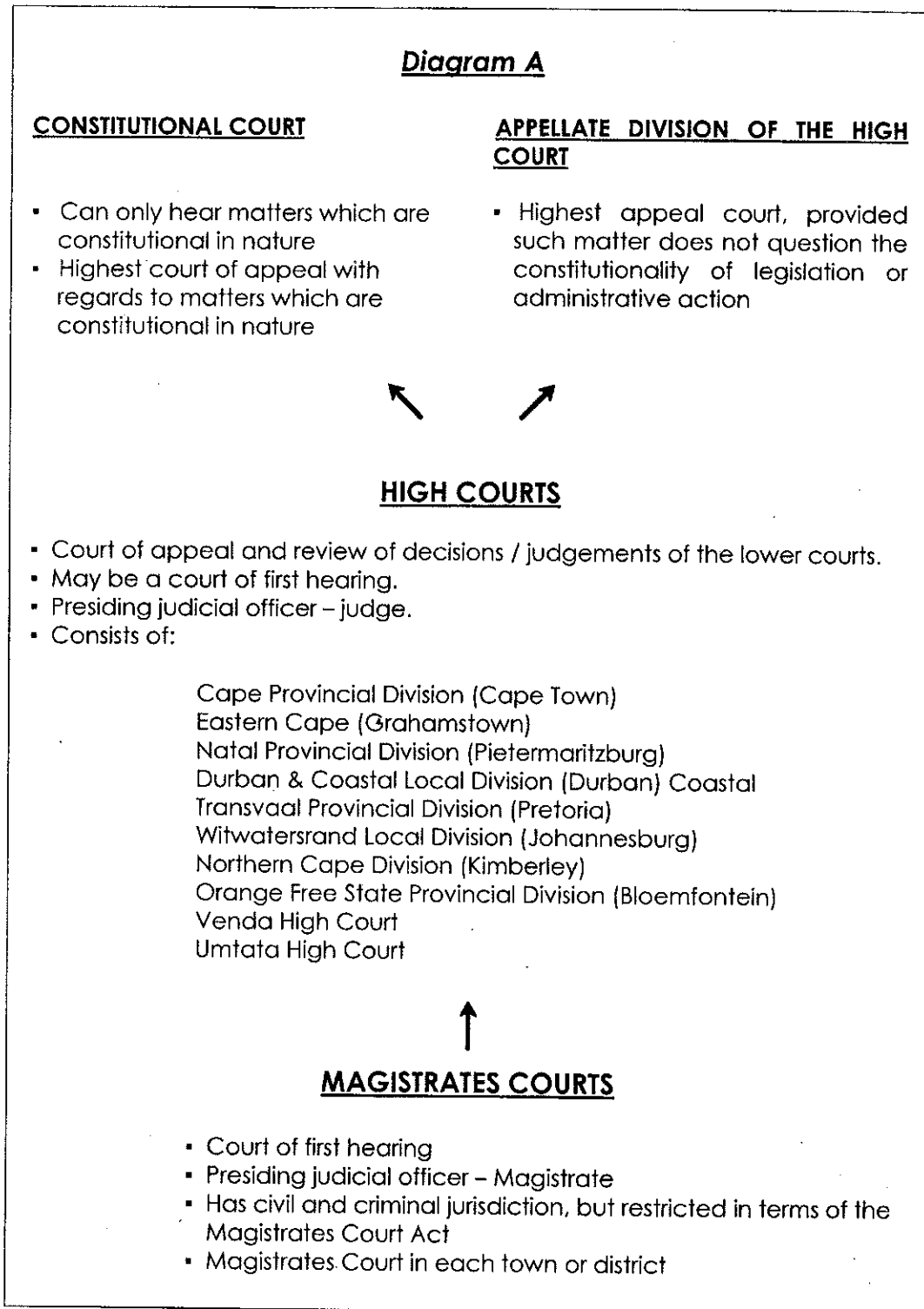
The Laws of Parliament of which the Constitution of South Africa is the supreme legislation.

### 1.1.2 Court Structures

The court structures in South Africa are derived from English law, which was brought into South Africa in the 1800's. The Courts are divided into lower courts, called Magistrates Courts and superior courts called High Courts. For the first time in 1994 the Interim Constitution established the Constitutional Court, which is the highest court of law in respect of constitutional matters.

1 Johann Wolfgang van Goethe - German writer, scientist, master of poetry, drama and novelist  
 2 The Constitution of the Republic of South Africa, Act 108 of 1996  
 3 The Constitution of the Republic of South Africa, Act 200 of 1993

The Court Structure can be represented diagrammatically as provided in diagram A.



## 1.2 The Constitution of South Africa

***“We have the means to change the laws we find unjust or erroneous. We cannot, as citizens, pick and choose the laws we will or will not obey.” Ronald Wilson Reagan, 40<sup>th</sup> US President.***

### Reference Material

- Relevant Sections of the Bill of Rights

On 27 April 1994, the South African legal system underwent a revolution<sup>4</sup>, in respect that the Interim Constitution<sup>5</sup> and then the successive 1996 Constitution brought about 3 fundamental changes:

- ▷ The right to vote and associated political rights were afforded to all citizens without racial qualifications;
- ▷ The introduction of the Bill of Rights and the doctrine of constitutional supremacy; and
- ▷ The replacement of the central government, with a state with federal elements<sup>7</sup>.

### 1.2.1 The Bill of Rights

The following rights shall be studied by the learner:

- ▷ Everyone has the right to life.
- ▷ Everyone has the right to freedom and security of the person.
- ▷ Everyone has inherent dignity and the right to have their dignity respected and protected.
- ▷ Everyone is equal before the law.
- ▷ Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

4 Mohamed DP in AZAPO v President of The Republic of South Africa 1996(4) SA 67 (CC)

5 Constitution of the Republic of South Africa, Act 200 of 1993

6 Constitution of the Republic of South Africa, Act 108 of 1996

7 The Bill of Rights Hand Book, 2nd Edition; De Waal *et al*, 1999 (p2)

- ▷ Every citizen has the right to choose his or her trade, occupation or profession freely. Law may regulate the practice of a trade, occupation or profession.
- ▷ Everyone has the right to an environment that is not harmful to his or her health or well being.
- ▷ Everyone has the right to have access to health care services.
- ▷ Persons belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practice their religion and use their language.

### 1.3 Criminal Prosecution

***"No man is above the law and no man below it."*** Theodore Roosevelt (1858 1919) 26<sup>th</sup> US President.

***"Criminal law is that branch of national law which defines certain forms of human conduct as crimes and provides for the punishment of these persons with criminal capacity who unlawfully and with a guilty mind commit a crime."***<sup>8</sup>

Examples of crimes include murder, theft, rape, culpable homicide, assault and illegal abortion.

#### ▷ Euthanasia<sup>9</sup>

Euthanasia is simply defined as "*mercy killing*" of a terminally ill or injured person in order to prevent further suffering. Euthanasia can be described as "*active euthanasia*" where the practitioner, a patient or family member actively participates in causing the death of a patient.

*Passive Euthanasia* is when a practitioner or a member of the patient's family, or the patient, chooses to withhold treatment when a patient is suffering from a terminal illness or injury. Such action, or the lack of action, is not considered as murder, as nature is permitted to take its course. The cause of death is therefore the underlying illness or injury.

<sup>8</sup> "Principles of Criminal Law", Burchell and Milton, 1991 (p1)

<sup>9</sup> "Introduction to Medico-Legal Practice", Dada and McQuoid-Mason, 2001 (p26-8)

Practitioner assisted suicide is a crime in South Africa provided it involves a positive action by the practitioner.<sup>10</sup>

Other criminal offences:

- ▷ Assault is defined as **"unlawfully and intentionally applying force to the person of another, or inspiring belief in that that force is immediately to be applied to him"**.<sup>11</sup> South African courts have held that medical treatment where there is no patient consent or where such treatment is not justified in law, such action is an assault on the patient and thus attracts criminal liability. Furthermore, any person who assists such practitioner in such illegal treatment shall be held liable as an accomplice, provided such person knew at the time that he/she was participating in an unlawful act.
- ▷ Culpable homicide **"is the unlawful negligent killing of another human being."**<sup>13</sup> Negligence is held to be the failure to act as a reasonable practitioner would have acted in the same circumstances. Therefore, if a patient dies as a result of the practitioner's negligence in treating the patient, such practitioner shall be guilty of culpable homicide.<sup>14</sup>

#### 1.4 Civil Prosecution

A civil wrong, giving rise to civil action, is the infringement of another persons' interests which causes harm, where such infringement is wrongful.<sup>15</sup> As opposed to criminal action, where the wrongdoer is punished for his/her actions, in civil proceedings the wronged party is compensated by the wrongdoer, which compensates the wronged party. In such circumstances the wrongful act is as a result of negligence, a medical malpractice. Negligence may be through a positive act or may be by omission. Such negligence that causes harm, but not death, will often result in a civil action as opposed to a criminal action.

In determining negligence the court applies the test of the reasonable practitioner. The practitioner's actions or omissions are tested against that of his/her peers: *"it is a degree of skill that is*

<sup>10</sup> Ex-parte: Minister van Justisie: in re S v Grotjohn 1970 (2) SA 355 (A) at 365

<sup>11</sup> :Principles of Criminal Law" supra (p423)

<sup>12</sup> Esterhuizen v Adminstrator, Transvaal 1957 (3) 8A 710 (T)

<sup>13</sup> "Principles of Criminal Law" supra (417)

<sup>14</sup> R v Van Schoor 1948 (4) SA 349 (C): S v Mkweishana 1965 (2) SA 493 (N)

<sup>15</sup> "The Law of Delict - The Aquihhan Action", Volume One, P.Q.R. Boberg, 1984 (p)



*reasonable having regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.*<sup>16</sup>

## 1.5 Statutory Legislation

***“With Congress, every time they make a joke it's a law and every time they make a law, it's a joke.”*** William Penn Adair “Will” Rogers (1879–1935), American humorist noted for his commentary on American society and politics.

As discussed under Section 1.1 “The Sources of Law”, laws can be contained within legislation, being Acts of Parliament and the Regulations thereto. Laws that codify the common law and provide laws specific to specific practitioners are found within the statutory legislation which governs such professions. Section 2 deals specifically with the statutory legislation which governs the allied health professions, as well as other legislation that is relevant, or alternatively, influences such professions and such practitioners.

## 2. Registration and Professional Discipline in South Africa

### 2.1 The Allied Health Professions Act 63 OF 1982

***“Registration confers the right upon a practitioner to practice for gain in each profession in respect of which he is registered.”***<sup>17</sup>

#### Reference Material

The Allied Health Professions Act 63 of 1982 and the Regulations thereto.

#### Outline

Learners are required to obtain a copy of the Allied Health Professions Act and the Regulations. Details on how to obtain such legislation can be found in the introduction to this manual. Learners are required to have a comprehensive knowledge of the legislation as only a brief summary is contained herein. Assessment questions will address all aspects of the legislation.

<sup>16</sup> Innes CJ van Wyk v Lewis 1924 AD 438, quoted by Boberg *supra*.

<sup>17</sup> Section 17 of the Allied Health Professions Act, 63 of 1982

### 2.1.1 The History of Act 63 of 1982

Originally known as The Associated Health Services Professions Act, 63 of 1982, the original legislation has undergone many changes or amendments. Legislation however always keeps its original Act number and year of promulgation, if not its original title. For this reason you may find The Associated Health Service Professions Amendment Act<sup>18</sup> and the Chiropractors, Homoeopaths and Allied Health Services Professions Amendments Act.<sup>19</sup>

### 2.1.2 The purpose of Act 63 of 1982

Act 63 of 1982 serves to:

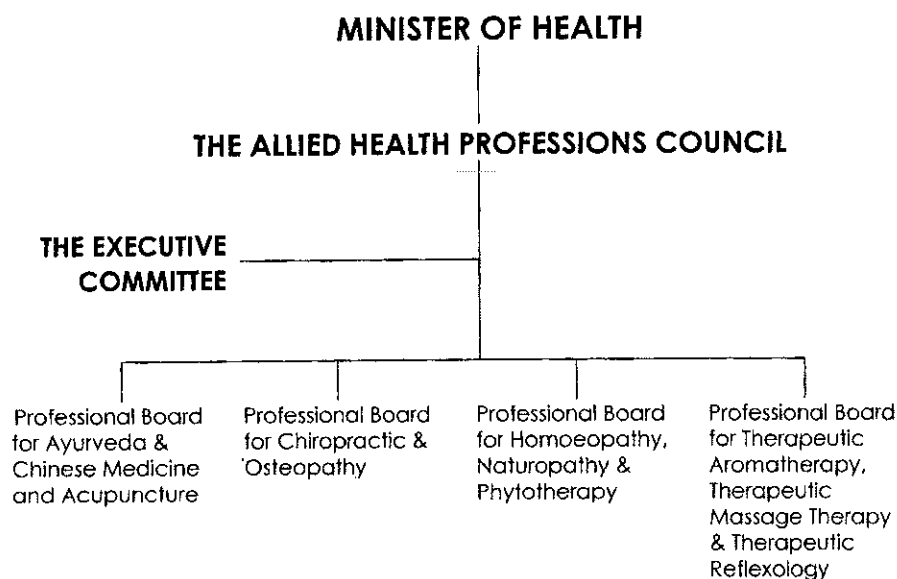
- ▷ establish the Allied Health Professions Council;
- ▷ provide for the functions of the Council;
- ▷ provide for the requirements and procedure for the registration and de-registration of practitioners of allied health professions;
- ▷ provide for the procedure of disciplinary matters; and
- ▷ regulate the conduct of practitioners, interns and students of allied health professions.

### 2.1.3 The Structure of the Allied Health Professions Council (See next page)

<sup>18</sup> Act 108 of 1985 and Act 10 of 1990

<sup>19</sup> Act 40 of 1995, Act 91 of 1997, Act 6 of 2000 and Act 50 of 2000, which was the amendment Act that resulted in the legislation in its current form

## The Structure of the Allied Health Professions Council



### 2.1.4 Functions and Objectives of the Council and the Professional Boards

***"...to provide for the control of the practice of allied health professions ..."***<sup>20</sup>

The functions and objectives of the Council include:

- ▷ the assistance in the promotion and protection of the health of the population;
- ▷ the governing, administration and policy setting relating to the allied health professions;
- ▷ the control of the practice of the professions;
- ▷ the investigation of complaints relating to the conduct of practitioners, interns and students;
- ▷ the control of the registration of persons in respect of the allied health professions;

<sup>20</sup> The preamble to the Allied Health Professions Act

- ▷ setting the standard for education and training for allied health professions; and
- ▷ to advise and make recommendations to the Minister in respect of aspects relating to the allied health professions.

## 2.2 The influence of the Healthcare Legislation

### Recommended Reading

- ▷ The National Health Bill, No 32, available on the website of the Department of Health, [www.doh.gov.za](http://www.doh.gov.za) / legislation / bills, or the Government printers.
- ▷ The Medicines and Related Substances Control Act, 101 of 1965, available on the Medicines Control Council website, [www.mccza.com](http://www.mccza.com).
- ▷ The Health Professions Act 56 of 1974, available on the Health Professions Council website [www.hpcsqa.co.za](http://www.hpcsqa.co.za).
- ▷ The Pharmacy Act 53 of 1974, available from Aquilia Publications.
- ▷ The Nursing Act 50 of 1978, available on the Nursing Council website [www.sanc.co.za](http://www.sanc.co.za) / publications.
- ▷ The Dental Technicians Act 19 of 1979.
- ▷ The Medical Schemes Act 131 of 1998.

Learners will not be assessed on the content of the legislation as listed above. However, learners are encouraged to familiarize themselves with legislation that is relevant to the practitioner or may influence the practitioner.

## 2.3 The Allied Health Professions Council and other Statutory Health Councils

The Allied Health Professions Council is represented on the Forum of Statutory Health Councils of South Africa as well as the

Registrar's Committee. The other councils represented on the Forum and Committee include the Health Professions Council, the Pharmacy Council, the Nursing Council, the Dental Technicians Council and the Social Services Council.

### 3. Unprofessional Conduct

#### Reference Material

- The Allied Health Professions Act 63 of 1982 and the Regulations
- The Patient's Rights Charter
- Section 12 of the Bill of Rights
- Section 6 of the National Bill of Health

#### 3.1 The Nature of Unprofessional Conduct

Section 23(1) of Act 63 provides that:

***"The Council may, in respect of a practitioner registered in any allied health profession in terms of this Act, institute an inquiry into any written complaint, charge or allegation of unprofessional conduct against such practitioner."***

The standard English dictionary defines "unprofessional" as action which is "contrary to the accepted code of a profession, or not belonging to a profession"<sup>21</sup>.

Regulation 12, GN R2610 of 3 December 1982 allows Council to take disciplinary action against a practitioner, intern or student for conduct which is improper or disgraceful. "Improper" is described as conduct which is "indecent, unseemly, irregular or incorrect"<sup>22</sup>. "Disgraceful" is described as conduct which is "shameful or brings about dishonour"<sup>23</sup>.

Unprofessional conduct by a practitioner, intern or student may arise as a result of a criminal offence committed by a practitioner, intern or student, a negligent act which gives rise to a civil action, or conduct which is in violation of the prescribed regulations contained within Council's legislation.

#### 3.2 Disciplinary Action

Chapter 3 of Act 63 read together with the Regulations contained in the Government Notice GN R2610, published on 3 December 1982, provides that Council may take disciplinary

<sup>21</sup> The Collins Paperback English Dictionary, 1990

<sup>22</sup> Collins Dictionary *supra*

<sup>23</sup> Collins Dictionary *supra*

action against a practitioner, intern or student for unprofessional conduct.

Learners are required to study the above-mentioned legislation provisions, which provisions provide the requirements and procedure of an inquiry into misconduct.

Should a practitioner, intern or student be found guilty of unprofessional conduct or conduct which, in consideration of any profession is unprofessional,<sup>24</sup> such person shall be liable for one of the following penalties:

- ▷ A caution or reprimand or both;
- ▷ suspension from practicing any profession for which he is registered, or any act specifically pertaining to such profession, for a specified period of time;
- ▷ removal of his name from the register; or
- ▷ payment of a fine<sup>25</sup>.

### 3.3 Ethics

***"Somewhere between my ambition and my ideals, I lost my Ethical compass".***  
Jeb Stuart Megruber.<sup>26</sup>

The Butterworths Medical Dictionary<sup>27</sup> defines ethics as "the moral rules and principles which govern a member of the medical profession in the exercise of his profession". Ethics, from the Greek word "ethikos" meaning character.

In considering Ethics, we are reminded of the Khosa saying "Ubuntu urgauntu ngabanye abantu" (people are people through other people), which has given rise to the "Ubuntu Principle", which acknowledges the rights and the responsibilities of every citizen in promoting the individual and well-being within society<sup>28</sup>.

<sup>24</sup> Section 24(1) of Act 63 of 1982

<sup>25</sup> Section 24(1) a-d, Act 63 of 1982

<sup>26</sup> Jeb Stuart Megruber was appointed to President Richard Nixon's White House staff in 1969 as Special Assistant to the President. The quote was part of his testimonial at the Watergate trial.

<sup>27</sup> Butterworths Medical Dictionary, 2nd Edition, 1978

<sup>28</sup> White Paper for Social Welfare: Principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa, August 1997

Act 63 of 1982, and in particular the Regulations, do address certain ethical considerations, such as the patient's right to confidentiality. The learner is required to identify the ethical rules codified in the relevant legislation for purposes of assessment. Certain topical ethical considerations are briefly discussed herein.

### 3.3.1 Informed Consent

Section 6 of the National Health Bill requires that a patient shall be informed of:

- ▷ the patient's health status (except where it is not in the best interests of the patient);
- ▷ the range of diagnostic procedures and treatment options generally available to the patient;
- ▷ the benefits, risks, costs and consequences generally associated with each option;
- ▷ the patient's right to refuse health services once the practitioner has explained the implications, risks and obligations of such refusal.

Dr Mahomed A Dada<sup>29</sup> describes informed consent as *"not an isolated event but rather as an ongoing process of information sharing"*.

Dr Dada identifies Informed Consent as having four elements: disclosure, comprehension, competence and voluntary choice.

- a. Disclosure: The patient has the right to know all material risks associated with a particular form of treatment<sup>30</sup>.

<sup>29</sup> Dr Dada: MB ChB (Natal), MMed (for both) (Natal); Diploma in Occupational Medicine (Stell), MMed (Anat Path) (Stell), DABFE, FRIPHH; Forensic and Anatomical Pathologist; Chairman, Pathcare Laboratory Group

<sup>30</sup> *Castell v De Greeff* 1994 (4) SA 408 (c)

- b. Comprehension: The patient has the right to information in a manner in which the patient can understand and appreciate such information.
- c. Competence: The practitioner needs to determine whether a patient has lost his capacity to protect his own interests. A minor over the age of fourteen (14) does not require the assistance of his/her guardian to consent to treatment which is not surgical in nature. A minor over the age of eighteen (18) does not require the assistance of his/her guardian to consent to treatment which is surgical in nature.<sup>31</sup> A female, irrespective of age, does not require her guardian's assistance to consent to an abortion.<sup>32</sup>
- d. Voluntary Choice: The patient shall provide consent free from constraints or coercion, which includes the knowledge of the right to refuse treatment or withdraw from treatment.

### 3.3.2 Confidentiality

The Patients' Rights Charter provides that the patient has the right to confidentiality and privacy. The Hippocratic Oath (5<sup>th</sup> Century BCE), states:

*"All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and never reveal."*

Section 14 of the Constitution<sup>33</sup> provides that "Everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed".

A patient may have access to his/her own records on request. A patient may also allow disclosure of health care records/information, provided the patient has provided the necessary consent.

Should a patient fail to provide consent, alternatively, a practitioner may provide disclosure of information when:

<sup>31</sup> Child Care Act, 74 of 1983, Section 39(4)

<sup>32</sup> Choice of Termination of Pregnancy Act, 92 of 1996

<sup>33</sup> Act 108 of 1996



- ▷ a practitioner is a witness at a trial between the patient and another party, where the patient has instituted legal action; or
- ▷ where the patient has instituted action against the practitioner; or
- ▷ where a statutory council has instituted disciplinary action against the practitioner; or
- ▷ where there is a statutory obligation to disclose certain medical facts <sup>34</sup>; and
- ▷ where it is in the interest of the public at large.

34 a) reporting a notifiable disease or  
b) reporting any case of suspected child abuse in terms of the Child Care Act *supra*

## REFERENCES

### 1. Academic Writings

De Waal J, Currie I, Erasmus G. 1999. Bill of Rights Handbook, The. Juta, Cape Town.

Collins. 1990. Collins Paperback English Dictionary, The. London.

Dada MA, McQuaid-Mason DJ. 2001. Introduction to Medico – Legal Practice. Butterworths, Durban.

Boberg PQR. 1984. Law of Delict, The – Volume One : Aquilian Liability. Juta, Cape Town.

Critchley M. 1978. Medical Dictionary – 2<sup>nd</sup> Edition. Butterworths, USA.

Gordon I, Turner R, Price TW. 1953. Medical Jurisprudence – 3<sup>rd</sup> Edition. Livingstone, London.

Burchell J, Milton J. 1991. Principles of Criminal Law. Juta, Cape Town.

### 2. Legislation

- Allied Health Professions Act, 63 of 1982
- Child Care Act, 74 of 1983
- Choice on Termination of Pregnancy Act, 92 of 1996
- Constitution of the Republic of South Africa Act, 200 of 1993 (Interim Constitution)
- Constitution of the Republic of South Africa Act, 108 of 1996
- Dental Technician's Act 19 of 1979
- Health Professions Act, 56 of 1974
- Medicines and Related Substances Control Act, 101 of 1965
- Nursing Act, 50 of 1978
- Pharmacy Act, 53 of 1974

- Supreme Court Act, 59 of 1959
- The National Health Bill, B32d – 2003
- White Paper for Social Welfare: Principles, guidelines and recommendations, proposed policies and programmes for developmental social welfare in South Africa, August 1997
- The Patients' Rights Charter

### 3. Other

- Workshop presented by Dr Mahomed Dada: An Introduction to Medico-Legal and Ethical Issues: Consent and Confidentiality (May 2004)
- Various quotes obtained from the website [www.quoteworld.org](http://www.quoteworld.org)

### 4. Table of Cases

- AZAPO v President of the Republic of South Africa 1996 (4) SA 671 (CC)
- *Ex-Part é*: Minister van Justisie: in re sugrotjohn 1970 (2) SA 355 (A) at 365
- Esterhuizen v Administrator, Transvaal 1957 (3) 8A 710 (T)
- R v van Schoor 1948 (4) SA 349 (C)
- S v Mkwetshana 1965 (2) SA 493 (N)
- Van Wyk v Lewis 1924 AD 438
- Castell v De Greef 1994 (4) SA 408 (C)