



Nursing scopes of practice: Legal certainty required despite practising in uncertain times

Justin Malherbe, Senior associate attorney, Webber Wentzel, e-mail: Justin.Malherbe@webberwentzel.com

Nursing, like most fields of healthcare endeavour, is a dynamic profession. Ongoing technological advancements in health, together with a concomitant increase and expansion in scientific knowledge, demand that professionals operating in this sphere adapt to new levels of understanding and ways of doing things. Given the wide-reaching changes in our society in the past few decades, as well as healthcare economics, South Africa has experienced changes to the methods and means of healthcare service delivery and financing. It can thus be reasonably expected of the Law to keep pace with these developments.

That is not always the case. When it comes to healthcare regulation in South Africa, and particularly the regulation of nursing, a deficit often exists between changes in the laws regulating the health professions, and their implementation in practice. This phenomenon is not unique to South Africa. However, in the South African context, where there is a myriad of developmental challenges, this brings into sharp relief, at times, just how important it is to maintain and improve on legal certainty in the professions – especially during periods of accelerated change.

A recent example of this is the publication for comment of new regulations pertaining to the scopes of practice for nurses and midwives. These (proposed) regulations were first introduced in May 2020 (Government Notice 521, published in Government Gazette No. 43305 of 12 May 2020). This was subsequently followed by the publication of a different set of proposed regulations in July 2020 (Government Notice R744, published in Government Gazette No. 43496 of 3 July 2020). An announcement made by the South African Nursing Council (SANC), on 27 May 2020, clarified that an incorrect version of the proposed regulations had been published by the Department of Health in May 2020.

What is of interest in the context of this discussion is the extent to which the two sets of proposed regulations differ in their scope and application. While both sets are directed towards amending (and, in certain respects, possibly overhauling) the current scope of practice regulations which still reside under the now repealed Nursing Act 1978 ('Regulations pertaining to the scope of practice of persons who are registered or enrolled under the Nursing Act, 1978' published in Government Notice R2598, in Government Gazette No. 9513 of 30 November 1984, as amended), it would appear that their individual effects – were they to be implemented in either of their respective formats – would be materially different, depending on which set of proposed regulations is ultimately preferred.

The regulations published in May 2020 sought to amend chapters 1, 2 and 3 of the current scope of practice regulations, whereas the proposed regulations published in July 2020 seek to amend only chapters 3 and 6 of the current regulations. Different terminology is used and new defined terms introduced in each

set of proposed regulations. (See, for example, the distinctions drawn in the May 2020 version with regards to 'basic', 'general' and 'comprehensive' nursing care which do not appear in the July 2020 version, as well as defined terms for 'competence/competencies'). Ultimately, neither deals with all categories of nursing professionals as created in terms of the current Nursing Act, 2005 (Section 31(1) and (2)). The presumption therefore exists that the current regulations will remain in force and effect for those categories of nurses who are not affected by the proposed regulations. For example, enrolled nurses (which designation was confirmed as a category of registration most recently by way of Government Notice 9393, in Government Gazette of 28 June 2019) are not mentioned in either set of proposed regulations, although the May 2020 version does contain revisions to the scope of practice for a staff nurse (as defined in Section 31(1)(c)).

A noteworthy proposal is the introduction of a scope of practice for the registration category to be known as a general nurse. Although this was also recently introduced (in Government Notice 9393, in Government Gazette of 28 June 2019) by the minister of health, it was still necessary to provide content to the role and professional responsibilities of this new category of registered person. That content is as proposed in the July 2020 regulations.

The delineation between the scope of practice of a general nurse and that of an enrolled nurse is not clear. The former is notionally based on the new competency framework aligned to the current Higher Education Qualifications Sub-Framework (HEQSF) governing nursing education, whereas the latter is not (having been based on legacy qualifications that have been phased out). Valid concern arises about the interrelationship between these two categories of registered persons, particularly with regards to their equivalency of scope or otherwise, taking into account the presence of a further category (that of a staff nurse) which also needs to be catered for in providing a scope of practice in terms of the Nursing Act, 2005.

Similar concerns could be expressed regarding the categorisation of midwifery professionals (which encompasses midwives and enrolled midwives per the current regulations), in differentiation from the proposed regulations. In addition, currently under development are the nurse/midwife specialist-qualified practitioners in respect of whom no additional legislative guidance is currently available. Regulations relating to the minimum education requirements for specialisation in certain categories of nursing practice (such as occupational health) were published for comment in 2019 but have yet to be promulgated (published in Government Notice 1322, in Government Gazette 42770 of 16 October 2019).

From a legal risk standpoint, the difficulty recreated by the current proposals (in any of their forms) is one of legislative certainty. The scope of practice of a registered person in terms of

any legislation governing the conduct of a profession is a crucial term of reference insofar as adjudicating professional conduct matters is concerned, as well as civil, criminal, and quasi-judicial inquiries involving members of a profession. For example, one of the standards that South African courts routinely apply to determine whether there is professional negligence on the part of a professional person, is whether their conduct in a given situation falls short of the standard reasonably required of persons belonging to that profession (or branch of the profession) in similar circumstances (*Van Wyk v Lewis* 1924 AD 438 at 444). To determine this, the courts use various sources of information that serve as evidence as to the standard required. Where scopes of practice are available and published in terms of applicable legislation for a profession, this serves as *prima facie* evidence of the level or standard of skill and expertise required. Failure to meet the required standard would demonstrate negligence on the part of the professional concerned (*Goliath v Member of the Executive Council for Health, Eastern Cape* (085/2014) [2014] ZASCA 182 at para 8).

Over many years, our courts have considered aspects relating to wrongfulness and negligence of a professional person's conduct with reference to, *inter alia*, healthcare. In some of the leading cases, the courts have highlighted the fact that the conduct of a practitioner – whether in a civil or criminal context – can be evaluated and determined according to the reasonable standard comprised of a body of professional opinion of members of the same profession (see discussion in *Michael and Another v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at 34 to 40). Accordingly, unequivocal expressions as to the scope of professional practice are necessary and useful, even in a legal context.

On an individual level, the absence of certainty surrounding current and future scopes of practice applicable to various categories of professionals, such as those envisaged by the Nursing Act, 2005, has the potential to create unwanted anxiety – not only for professionals who seek to know and comprehend the regulated boundaries of their professional activities, but also to collective groups of professionals with common interests, goals or skills sets (e.g. professional societies and voluntary associations) that seek to guide, interpret and direct their members towards meeting their legal and ethical obligations towards the profession.

Often, in judicial proceedings involving nurses, the inquiry turns to considering the level of competence, independence and delegation permitted or required of a nurse in a particular registration category. Without a clear statement of what is legislatively permitted or required in distinction from other categories of professional, a court is hampered in its ability to render a fair verdict or outcome. The dearth in interpretation is often made up using expert evidence. This, in itself, can lead to further challenges, especially in dealing with professions (such as nursing) where professional standards and educational outcomes have changed and are yet changing over time. What is certain is that the additional time and expense of leading evidence in substantiation of the 'reasonable person' standard in each legal setting can be minimised (and perhaps avoided) if greater

legislative certainty could be achieved. The introduction of new or revised scopes of practice for nurses is one such opportunity to improve on legal understanding and outcomes.

It must also be mentioned that a lack of appreciation for what constitutes one's scope of practice as a registered person can, of itself, attract sanction. In terms of the professional conduct regulations promulgated under the Nursing Act, 2005 (published under Government Notice R767, in Government Gazette No. 38047 of 1 October 2014), the acts or omissions in respect of which SANC can take disciplinary steps against a practitioner registered in terms of the Act include the performance of professional acts that are beyond the scope of practice for the practitioner concerned (Rule 7). Failing to observe the provisions of any law, rule or regulation that applies to a particular registered practitioner can also be grounds for disciplinary action by SANC (Rule 25). These provide additional reasons why clear, distinct scopes of practice are necessary to ensure a proper understanding and consistent application of professional standards of conduct across the nursing profession.

Thus, while an explanation has been offered by the regulator as to the publication of the different sets of proposed regulations, what is not immediately apparent is whether either of the proposed regulations are capable of delivering the levels of legal certainty that are urgently required in order for nurses of all registration categories (past and present) to fulfil their roles and execute their professional responsibilities as registered persons. The role of nursing is increasingly important given South Africa's slow transition to universal healthcare coverage, the backbone of which is expected to be built from a foundation of a strong nursing profession. As with legislative developments linked to national health insurance (National Health Insurance Bill 11 of 2019 was introduced by the minister of health in 2019 and is currently before parliament), there is a clear need for consultative dialogue surrounding scopes of practice in nursing to achieve consensus prior to transitioning to a new regulatory environment. It is hoped that the processes currently underway to transform and modernise the regulatory regime for nursing will achieve that and more, for the benefit of the profession and the public alike.