

SOUTH AFRICAN MEDICAL MALPRACTICE LAWYERS ASSOCIATION



DR H. EDELING

Per Email: office@emlct.com / edeling@emlct.com

Our Ref: Andre Calitz /bg

Your Ref:

Date: 14 JUNE 2019

Dear Dr Edeling,

RE: ADDRESS TO PRESIDENT RAMAPHOSA

As far back as 1591 the narrative was set when William Shakespeare wrote Henry VI: "First thing we do – let's kill all the lawyers"

Let there be no doubt – the role of the legal profession, particularly medical practice lawyers, is mostly misunderstood and vilified.

Ambulance chasers, parasite lawyers, sallow men with pinched lips that only smile when they hear the word fees.

I am the spokesperson for the SA Medical Malpractice Lawyer's Association, an association with two principle goals:

1. Championing the rights of victims of medical malpractice.
2. Achieving the former through ethical practice by subscribing to a Code of Conduct that forbids touting, dishonesty and for that matter any unethical act.

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POSTAL ADDRESS: P.O. BOX 1967, SAXONWOLD, 2132

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It is always a good start to mention that we probably agree on:

1. We are deeply concerned about the scourge of medical malpractice that pervades our current health care system.
2. We are committed to make every effort to save and improve our healthcare system, whilst also protecting the rights of victims to claim equitable, fair and expeditious compensation.
3. We are deeply concerned by increasing litigation costs, which we after all finance, through Contingency Fee litigation.
4. We would want lessons to be learnt from the events of negligence that have occurred on the one hand, as well as the way in which litigation is conducted.
5. We are vehemently opposed to touting, stealing of records, falsifying of records but are similarly outraged by the lack of record keeping, obstruction in the supplying of medical records to patients and their attorneys.
6. We are opposed to vexatious litigation, but similarly outraged by the callous strategy of obstruction and delay currently employed when defending these matters, ultimately causing the state millions, hundreds of millions of rands, in unnecessary costs, which could be avoided.

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7. We are urging for a balanced multidisciplinary forum, where all interested parties can constructively identify the problems and seek solutions in the spirit of "Thuma Mina" – we have been sent.

In our view, the most pressing issues, aggravating the problems are currently:

1. A collapse in the ability of the office of the State Attorney to competently defend matters of this nature. This is one of the most complex fields of the practice of law, that demands specialist attorneys. These skills, however are sorely lacking in the offices of the State Attorney and are often accompanied by a dilatory approach to preparation, resulting in punitive cost orders against the State, wasting millions of rands.
2. An incoherent approach by the various provincial health department in the manner in which these matters are defended. Peculiar or novel defences are raised, inevitably almost always defeated, but at a huge cost to the fiscus, exacerbated by the lack of skill of the State Attorney.

The only common denominator in the approach of these department are: Obstruct and delay to pay on a later day.

This incoherent approach is further characterised by:

- 2.1 A failure by the executives in the various departments to make decisive decisions in individual matters, instead letting the courts decide, with resultant high legal costs.

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2.2 A lack of respect for the Rule of Law:

2.2.1 Ignoring subpoenas to provide records.

2.2.2 Ignoring Orders of Court to pay compensation, resulting in millions of rands in interest bills – in our practice the Gauteng Health Department incurred interest bills and unnecessary expenditure to the tune of R28 000 000, in just six matters – a desperately alarming statistic.

The response of the National Department has disappointingly been to publish a draft State Liability Amendment Bill seeking to restrict the rights and compensation of the victims of medical malpractice as well as by blaming lawyers for the current crisis without any demonstrable or published actions to address the root causes of the problem.

3. Disparate Practice Manuals in the various Divisions of the High Courts, which on the one hand through application is increasing legal costs and more alarmingly, preventing access to our courts. You heard me correctly: Our biggest difficulty today is to have our day in court.

- Overloaded court rolls
- Massive delays in allocation of trial dates

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The disparate Practice Manuals in the various Divisions of our High Courts, are similarly often at variance with the Uniform Rules of Court, which are no longer fit for purpose, resulting in delays and unnecessary costs, but most importantly: Preventing the most vulnerable of the vulnerable to obtain help expeditiously.

4. There is a huge concern on our part that the lessons are not learned from the negligent conduct as well as the incompetent manner in which these matters are being defended – maybe because no forum for such purpose exists. Long before our President's call for Thuma Mina, did I, outraged by the wastage of money, write to e.g. the MEC for Health Gauteng to try and engage, to offer assistance. I suspect, merely because of who we are, we have never succeeded in securing an audience, which brings me to our core message today.

A great champion for human rights, once wrote:

"Some people see things as they are and say: Why? I dream of things that never were and say: Why not?"

Thus, Why not?

Accept that medical malpractice attorneys are uniquely placed to advise on the roots of negligent conduct, e.g. that we primarily believe skills shortages in the nursing fraternity present the highest risk, prevention thereof, e.g. identifying high risk areas; and the process of obtaining compensation, but that we need a formal forum to do so.

Why not?

Engage with us to assist in:

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1. Training and skills transfers in the office of the State Attorney.
2. Compiling a uniform, fit for purpose, Practice Manual for the various Divisions of our High Courts, together with a revision of the Uniform Rules of Court.
3. Establishment of a special court to hear matters of this complexity to ensure expeditious resolution of disputes and cost savings.
4. To rework the State Liability Act, to place funds awarded for future medical expenses on behalf of children in a ringfenced trust, with the right of reversion to the State of unused funds, whilst also ensuring the funds are used for the purpose it was intended for in the first place rather than limiting the rights and compensation of the victim.

We do not, for one moment, suffer from an illusion that any of this might be easy, or that we'll agree at all times. We realise that much work needs to be done by ourselves to explain what we really do, of why it is important, of how we can prevent touting, collusion between attorneys, doctors, administrative staff, falsification of records, but similarly that society implores us to champion Section 34 of the Constitution to ensure the right of access to our courts, and that **our** regime of compensation, the Contingency Fees Act of 1996, the result of Project 93 of the SA Law Reform Commission, is one of the most concrete examples of giving substance to the realisation of real rights.

I would like to leave you with a final thought:

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Liberty in this context exists in proportion to wholesome restraint both for the doctor and lawyer.

Yours faithfully



ANDRE CALITZ
CHIEF OPERATING OFFICER
SOUTH AFRICAN MEDICAL MALPRACTICE LAWYERS ASSOCIATION

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