

## ***OPINION: The minefield of saving lives***

*Merlita Kennedy & Jared Ishmael: BizCommunity, 5 February 2021*

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THE recent move to charge a medical practitioner with murder rather than culpable homicide for the death of a patient after surgery is alarming, because it could deter innovation and new entrants to the profession. Media reports suggest that South African medical practitioners are increasingly being criminally charged when patients pass away under their care. While this may appease those close to the deceased, what effects will this trend have on South African medical practitioners and medical practice in South Africa? It has been reported by various South African media outlets that the National Prosecuting Authority of South Africa (NPA) has changed the charges against a prominent medical practitioner, aged 73, from culpable homicide to murder following the death of a patient after surgery.

The NPA has not advanced any reasons for amending the charges. Murder is defined as the intentional killing of another human. Culpable homicide is defined as the negligent unlawful killing of another human being. The charges of culpable homicide and murder, while both relate to the killing of a human being, differ in the way that they address fault or culpability. The former centres on negligence while the latter centres on intention in its various forms.

### **The threat of harsh sanctions**

The nature of medical practice is that practitioners often carry out procedures on people whose health is already compromised (which is why they need medical assistance) and this often happens under immensely stressful conditions. That a medical practitioner will produce the desired result cannot be guaranteed, given the number of variables associated with medical practice. Consequently, medical practitioners cannot be compelled to provide the desired result but to diligently apply themselves in a manner similar to that of a reasonable practitioner, regardless of the consequences. The threat of harsh sanction, may, in the eyes of the NPA, deter medical practitioners from deviating from that standard. However, the prospective implications are severe: medical practitioners will be conflicted between performing procedures to assist patients and the threat of criminal sanction if those procedures produce an unintended adverse result. In addition, given the risky nature of medical innovation, practitioners will be reluctant to carry out what may be medically innovative procedures, for fear of criminal sanction.

### **Impact on new entrants**

The criminal sanction of medical practitioners for conduct undertaken in the performance of their duties will have a chilling effect on new entrants to medical practice because the profession itself will carry the risk of criminal sanction for procedures performed on every patient in the normal course of the medical practitioner's career, without time limitations. As a result, colloquially speaking, a medical practitioner could face criminal sanction for "a hard day's work". This must be viewed in the context of South Africa's low doctor-patient ratio of approximately 40.7 doctors per 100 000 people and the poor socio-economic conditions of the majority of South Africans. While the grievances of those who have lost loved ones following medical procedures deserve to be heard and addressed, a balance must be struck between holding medical practitioners accountable and allowing them the freedom to practise and innovate in a profession that is pivotal to human existence and wellbeing.