



## SECTION 59 INVESTIGATION

### Minutes of the Inquiry

Date	Friday, 18 October 2019
Time	10:00
Location	420 Witch-Hazel, Block A, Eco Glades
Chairman	Adv. T. Ngcukaitobi

Agenda Subject	Discussion
I. Call to order	Chair Adv. Ngcukaitobi called the meeting to order at 10:07 am.
II. Noting of Prof M. Steyn's presence	Chair begun by noting that today was the continuation of the Section 59 Investigation and that two experts would be giving their testimonies of which Prof Melissa Steyn would be the first. He further noted that Prof Steyn would not be taking the oath because they generally do not take an oath from an expert. He then asked Prof Steyn to go on ahead with and address the panel.
III. Background and Prof Steyn's opening remarks	<p>Prof Steyn began her address by thanking the chair for the opportunity she was given to give her expert opinion. She then gave brief information about herself stating that she had been working on matters relating to race since the late 80s and then in the mid-90s she focused on Critical Race particularly Critical Whiteness Studies and then authored her first book on Whiteness Studies in South Africa in 2001. She went on to say that she had expanded her focus and had ventured into Critical Diversity studies which she established at the University of Cape Town in the year 2000 and then in Wits University in 2014, and is the founder and director of the Centre for Diversity Studies there. She added that she was currently the South African National chairperson in Critical Diversity Studies.</p> <p>Adv. Ngcukaitobi then asked Prof Steyn to explain in detail what Critical Race or Critical Diversity Studies was. In response to this, Prof Steyn stated that Critical Diversity Studies is the study of how difference is positioned and constructed in unequal power relations in a way that there are different outcomes for different people. She added that this means that there is systematic unfairness in society. She then pointed out that in these studies they try to bring to light the power dynamics that normative society has invested its interest to hiding.</p>

She then pointed to the fact that the inquiry was making suggestions that there is racial profiling and that she had taken a look at this and it was clear to her that most of the work was done on racial profiling within the context of policing. She stated that policing was relevant because the medical schemes' forensic aspect resembles a department or division within the police. She then stated that what she found useful was that the United Nations issued an application this year that speaks to racial profiling in policing and provides definitions for understanding what it is. She mentioned that the document defines racial profiling to be an instance where race is used as the sole criterion when identifying potential criminals.

Adv. Williams requested Prof Steyn to provide the panel with the title of the document that the UN published which she had been making reference to. In response to this, Prof Steyn said that the document was titled, "Preventing and Encountering Racial Profiling of People of African Descent, Good Practices and Challenges, of which she didn't have a copy of with her at that moment but would gladly make available.

Prof Steyn then went back to her explanation and said that the document also speaks about implicit bias and officers not really being aware. She said that this was now talking about unconsciousness and how a well-meaning person may ignore or not see race but their absent bias may reflect on their policing.

Prof Steyn then mentioned that she had gotten a chance to go through the documents that were sent to her she realized that the medical schemes had done everything to not explicitly discriminate against race or avoid any obvious racial profiling. She added on saying that they anonymizing identity on data bases just to ensure good practice, which are all to their credit. She then stated this was an attempt to being rigorously colour blind.

Prof Steyn stated that the problem was not what has been done or what is there but about what is not because she has not seen anything in place that could help them avoid implicit bias. This means that there was nothing put in place regarding how to identify and eliminate any form of bias that maybe implicit in their systems.

She went on to explain that with Critical Race theory would start with assumption that race is a social fact that informs every aspect of our society, which meant that people had been placed differently in relation to each other. She went on to say that ignoring race in our thinking, planning and implementation would be naïve and indifferent and blind to how people are affected differently by any implementation.

Chair interjected and asked a question making reference to what Prof Steyn had said about the problem being what is not there to address the schemes' implicit bias which would be a consequence of indifference, naivety and blindness.

In response to this, Prof Steyn noted that it was not a consequence but an informed ethos that could lead to unequal outcomes. Then chair asked posed another question saying that if there was a system that doesn't fully thoughtfully engage, identify and address the implicit biases, would one of the consequences be indifference and deliberate blindness?

In response to this, Prof Steyn said that she could say that it was some form of consequence but greatly an informed ethos that brings about the fact that there isn't

	<p>any consideration of other perspectives but a dominant point of view is followed instead. Chair then interjected asking if it meant that that part of the explanation for absence was indifference and deliberate blindness. Prof Steyn said that it was unequivocally so.</p> <p>Prof Steyn then stated that the important question was how policies like these differently land on people who are differently positioned?</p>
<p>IV.</p>	<p><b>Colour Blindness</b></p> <p>Prof Steyn said that she wanted to speak more on colour blindness because these policies assume that if one is colour blind then they are above any capability or implications. She then pointed out that the question about colour blindness was that it evolved around what was being spoken about. She also asserted that in colour blindness, the person who named races was racists.</p> <p><b>Inferential racism</b></p> <p>Prof Steyn made reference to Prof Stuart Hall who talks about inferential racism. By inferential racism he means those apparently naturalized representations of events and situations relating to race, whether “factual” or “fictional”, which have racist premises and propositions inscribed in them as a set of unquestioned assumptions.</p> <p>These enable racist statements to be formulated without ever bringing into awareness the racist predicates on which the statements are grounded.</p> <p>Chair interjected and made reference to Prof Steyn’s postulations so far and stated that the Critical Race Theory seemed inapplicable to the situation at hand. He then made reference to her example of no one being allowed to sleep under the bridge, which brought rise to his own example of those who got 50% passed regardless of whether they were hungry or not when they write the exam.</p> <p>Chair then requested her to clarify what standards would be administrable in order to apply the Critical Race Theory.</p> <p>In response to this, Prof Steyn made reference to chair’s example of the exam the question would be whether or not the position of those who came to write exams hungry and if there are any kind of social plans being made to ensure that nobody writes an exam hungry.</p> <p>She then pointed out that as Critical racial theorists they stand for racial cognizance as opposed to racial blindness and that this would then be incorporated into the formulation of policies. Adv. Hassim asked her if it would not matter what race someone was. In response, Prof, Steyn stated that it would not matter what race a person was but it would also require knowledge and a proper understanding of the South African background or history of how race has been constructed.</p> <p>Adv. Williams then asked why this should be taken seriously? Prof Steyn responded and said that it was because the power relations operate from the position, benefit and comfort of the powerful thus creating their privilege and protecting it from erosion.</p>

<p>V.</p>	<p><b>Recommendations</b></p> <p>Prof Steyn recommended that when policies are formulated, those in power should consider how those policies would land on different people. Furthermore, she stated that race should be kept in everyone’s thinking at all times; ensure cognizance so to avoid unfairness. She also added that avoiding explicit racial profiling by trying to do everything right is not enough but ensuring that there is no implicit bias that could lead to systemic unfairness.</p> <p>She then elaborated on how this could be accomplished and stated that it was through the use or implementation of a system called the racial impact system, which is a tool that has been introduced in public policy and other organizations. Adv. Hassim interjected and asked where this was implemented. She then explained that to her knowledge and the examples that she came across show that t was presumably implemented in the United States and United Kingdom. She added that it was recommended as a form of due diligence. She then stated that it helps to address racial disparities and helps people have alternative policies. She also put emphasis on the point that the onus lied with everyone to ensure that proper research is done when it comes to policy formulation so to ascertain that unfair outcomes are avoided.</p> <p>She also mentioned that those who would be comfortable with skewed outcomes should be questioned and must explain why they’re comfortable. Adv. Ngcukaitobi then posed a question asking if a scheme’s inaction regarding skewed racial outcomes would mean that it is intentional about doing nothing about those outcomes.</p> <p>Prof Steyn responded saying that in such an instance that would be the case, but would describe it as indifference.</p> <p>Adv. Hassim asked that in an instance where the skewed outcomes say that black doctors are the most fraudulent would schemes have to accept that and would it be appropriate to do so?</p> <p>Prof Steyn responded saying that such an acceptance or being comfortable with those outcomes would require some explanation.</p> <p>Prof Steyn was requested to provide the panel with all her sources and references.</p>
<p>Other business</p>	<p><b>None</b></p>

Break at 10:54 to return for the second session at 12:00 p.m.

## SESSION 2

Date	18 October 2019
Time	12:00 pm
Location	420 Witch-Hazel, Block A, Eco Glades
Chairman	Adv. T. Ngcukaitobi

Agenda Subject	Discussion
I. Call to order	Chair Adv. Ngcukaitobi called the meeting to order at 12:03
II. Expects' presentation	Chair called the motion for expects Adv. Cassim and Nabeela. Moolah (Instructing Attorney) to begin with their presentation.
III. Introduction	Adv. Cassim gave an introduction of herself and her ten years' experience in the healthcare sector as a pharmacist and was employed by an administrator as a risk manager who managed a low income plan. She then explained that due to her experience in the healthcare sector, she has had a number of medical professionals approach her seeking her help when they were faced with investigations or had issues with medical schemes or administrators.
IV. Demographics of studied cases on racial profiling	<p>Adv. Cassim explained that her colleague Adv. Moola would assist her with the presentation. She then began by clearly stating that she was not a complainant but had only come to give her expert knowledge based on the experience she has had with schemes.</p> <ol style="list-style-type: none"> <li>1. Gender = almost 50/50.</li> <li>2. Race= 13.3% white, 87% black.</li> <li>3. Discipline: 27% specialists, GPs 22, allied health professionals 67% and pharmacists 67%.</li> </ol> <p>She stated that there was a noticeable pattern of investigations done in a particular discipline. She then made reference to Dr Adri Kok's previous presentation and pointed to how she emphasized that most of the schemes' investigations were Risk Management investigations.</p>
V. Types of investigations by schemes	<p>Adv. Cassim names and gave a distinction between the two investigations: Forensic -and Risk management investigations.</p> <p>She pointed out that Forensic investigations abased on billing codes, tip offs, previous, time based investigations. Furthermore, she explained that Risk management investigations (quality assessment) were almost exclusive, and mostly conducted on the consulting discipline.</p> <p>She then mentioned that there were no risk management interventions. Adv. Williams asked if all the schemes did this type of investigation or only one in particular because it was the first time they heard of this distinction. Adv. Cassim stated that they were a few but the major one that had this function was Discovery.</p> <p>Adv. Williams asked if the risk management investigations resulted in "clawbacks". She stated that it was so but "clawbacks" were always the very last resort, which made this a very important distinction between the types of investigations.</p>

Adv. Williams also asked if a risk management investigation would be aimed at a specific practice. Adv. Cassim said that it was not so but it was only targeted at a specific discipline, for instance all physicians.

Adv. Williams also asked how she had known that Dr Kok was making reference to risk management. In response to this, Adv. Cassim said that it was primarily from the information she had presented to the panel.

Adv. Williams interjected and posed the question of what she meant by information.

Adv. Cassim responded by making reference to the statement Dr Kok had made about the John Hopkins evaluation system, where she put emphasis on how using the John Hopkins evaluation was a way of imposing a system of a totally different country onto another when the circumstances aren't the same at all. She also noted that Discovery is a scheme she's certain that it uses the John Hopkins evaluation.

Chair asked for clarification on how she had drawn these conclusions. Whether she had drawn them herself or from the schemes?

Adv. Cassim responded by saying that she had gotten these from her personal experiences where she had had encounters with schemes and administrators and asked them where these emanated from. She said that she would always ask whether or not any risk management evaluation was done, and the answer would be always "no". The investigation outcomes would be purely on coding and practice type.

Furthermore, she explained that in an instance where risk management analysis had been done, there are interventions that are implemented in order to help a practice to change the way it would be doing things in alignment with what is within the norm. That would be when specialists like Dr Kok would be called in to assist with that. On the other hand, the aim and drive of a forensic investigation would be initially to clawback, which isn't the case with risk management. She stated that what she was aiming at was to bring clarity to how each investigation would be done and all that would be involved in the process.

Chair interjected and raised a point that there would be a possibility that an investigation started out as a forensic investigation but migrated into a risk management investigation because of the fluidity that exists.

Adv. Hassim asked if there was a difference in the way an outlier would be identified in both investigations.

In response to this, Advocate Cassim said that it was possible that one investigation might migrate from the other into another. She then made reference to her experience and said that in a forensic investigation a practice or practitioner would get a letter from the forensic team with very little information but just an invitation to meet. On the other hand, it is different with the risk management investigation, a booklet of more or less 30 pages is sent, and it would be containing information about that practice, which is a far more

	<p>robust analytical process and what would be indicative would be where it emanated from.</p> <p>Adv. Williams interjected by saying that it seemed like the risk management investigation had nothing to do with fraud, waste and abuse. Adv. Cassim said that that exactly was the reason she had raised this point.</p>
VI. Complaints	<p>Adv. Cassim raised the following:</p> <ul style="list-style-type: none"> <li>• Systemic issues which distort investigations: These included co-payments, deductibles, savings accounts, scheme rules (exclusions e.g. outpatient diagnostics), non-payment for tele-medicine and tele-consultations, reports and PMB motivations.</li> </ul>
VII.	<p><b>Procedural Issues with Investigations</b></p> <p>Adv. Cassim pointed out to the following regarding her observations of how the investigations are conducted:</p> <ul style="list-style-type: none"> <li>• A symmetry of power and resources</li> <li>• Conflation of fraud, abuse and waste</li> <li>• Timelines were unreasonable and inconsistent</li> <li>• The manner in which the hearings were conducted was inquisitorial and intimidating.</li> </ul> <p>Furthermore, Adv. Cassim said that the investigations were substantively unfair with vague information given to practitioners. She also mentioned that there were no risk management statements or outcomes calculated in almost all the instances.</p>
VIII.	<p><b>Systemic Issues Underlying Substantive Unfairness</b></p> <p>Adv. Cassim placed emphasis on the following issues:</p> <ul style="list-style-type: none"> <li>• Extrapolation exercise</li> <li>• Coercion in signing Acknowledgement of Debt</li> <li>• Automatic suspension if there was no resolution when the meeting had been concluded.</li> <li>• The make-up of the forensic team consists of people who have subconscious biases.</li> <li>• If experts were said to be consulted, they are really never disclosed.</li> <li>• Issues with coding</li> </ul>
IX. Conclusion and recommendations.	<p>Adv. Cassim notes the following in her recommendations and closing remarks:</p> <ul style="list-style-type: none"> <li>• She stated that fraud (as defined in law) is inexcusable and not tolerated.</li> <li>• She recommended that waste and abuse should be dealt with in a systematic manner.</li> <li>• Investigation and sanctions must be undertaken in accordance with legal prescripts (in substance and procedure)</li> <li>• She added that there would be justice, unbiasedness and independence in adjudication.</li> <li>• Audi alterem partem (representation during hearings) and that there would be proof or fundamentals of evidence invoked.</li> <li>• Proper investigation which would result to factual proof.</li> </ul>

	<ul style="list-style-type: none"> <li>• Conciliation, mediation, and arbitration ought to be independent and objective.</li> </ul> <p>In closing Adv. Cassim asserted that her desire was to see relationships of trust re-kindled between:  Patient-provider  Provider-funder  Regulators-stakeholders.</p> <p>Chair then said that the two advocates did not take the oath because it was known that they were experts who had expert opinions but during their presentation it appeared that it wasn't really so. He then asked both Adv. Cassim and Moola to take the oath of which they did and swore under oath that the evidence they had given was nothing but the truth.</p>
<p>X. Other business</p>	<p><b><u>The next inquiry date</u></b></p> <p>Chair noted that this was meant to be the last day for the complainants/ experts but they had received a request from BHF requesting to give their expert opinion. Chair stated that they were still considering the request. He then stated that the upcoming dates will only be for hearing medical schemes, hopefully from the 11<sup>th</sup> November, but there will be further communication from the Secretariat.</p>

Adjournment: Adjourned at 13:47 p.m. to potentially Monday, 11 November 2019