



Life Esidimeni deaths: Can the former MEC for health and public health officials escape liability for the deaths of the mental-health patients on the basis of obedience to 'superior orders' or because the officials under them were negligent?

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Arising out of the reported evidence in the Life Esidimeni Arbitration hearings into the deaths of mental-health patients, the question arises as to whether the former member of the executive committee (MEC) for health, the mental health director, the head of the department of health and the project manager can use the defence of 'superior orders' to escape criminal or civil liability. Can the former MEC for health escape liability, by blaming the mental health director, the head of the department of health and the project manager for the deaths, as she did in her evidence? It is suggested that based on the reported evidence, neither the former MEC for health nor the mental health director, the head of the department of health nor the project manager can escape liability for negligently causing the deaths of the patients. They could all be prosecuted for culpable homicide, and in some instances – depending on the results of the arbitration hearings – be held liable to compensate surviving mentally ill patients for physical or psychological harm, and the families of deceased patients for psychological harm.

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During the Arbitration hearings on the Life Esidimeni tragedy, it emerged that the then-member of the executive committee (MEC) for health ordered the removal of 1 700 long-term mental health patients from state-funded care at the private Life Esidimeni facilities to 122 community non-governmental organisations (NGOs), and to some less expensive state hospitals in 2016. During the process, mentally ill patients were transported from private psychiatric facilities 'like cattle on the back of open bakkies, to ill-equipped and unlicensed NGOs, where unqualified staff had no idea how to care for them.'^[1] It was reported that by the end of January 2018, 143 patients had died,^[1] and the number may have increased since then. It was stated that the former MEC for health and other public health officials had ignored 'protests, pleas, warning after warning, and even court action by activists.'^[1] The former MEC, in her evidence, said: 'I cannot carry personal blame because I wasn't working for myself. I was an elected official.'^[1] In this capacity she was 'busy with political work,' and only doing 'MEC work in between' when the news about the deaths became public.^[1] She maintained that it was the fault of the mental health director, the head of department and the project manager – not her. She further claimed, correctly so, that the Public Finance Management Act No. 1 of 1999^[2] and the Public Service Act No. 103 of 1994^[3] precluded MECs from becoming involved in the day-to-day management of the department of health.^[1] However, according to witnesses, she appeared to have done precisely what the Acts prohibited her from doing. For instance, witnesses stated that the former MEC was 'fixated on cancelling the Life Esidimeni contract.'

The mental health director and head of the department both stated that 'she would not take advice from anyone and ... ruled by fear.'^[1] For instance, the head of the department said that 'he was too scared to stand up to her'. The mental health director stated that she was merely following the orders issued by the former MEC and the head of the department.^[1] The former MEC herself had also claimed that she had been forced to end the contract because of pressure by the Auditor General. She said that the contract 'had not been subject to tender and budget constraints'. However, the MEC for finance said during the Arbitration hearings that there was no evidence to support this.^[4]

MECs for health are political appointees who should not interfere with the day-to-day running of provincial departments of health.^[2] Heads of departments of health are the line functionaries responsible for the day-to-day running.^[2] The criminal and civil liability of MECs for health and public health officials for their intentional or negligent wrongful conduct leading to the deaths of patients has been dealt with elsewhere.^[5,6] If they act with 'eventual intention', whereby they subjectively foresaw that their act or omission could kill someone if they did not take corrective action, they may be guilty of murder.^[7] If they negligently fail to take reasonable steps to prevent the deaths, they may be guilty of culpable homicide.^[6] In either instance, apart from any criminal sanctions – depending on the results of the Arbitration hearings – they could all be liable to compensate surviving mentally ill patients for physical and psychological harm, or the families of deceased patients for psychological harm.^[5]

In light of the above, the question arises as to whether, if they were sued civilly or prosecuted criminally, the former MEC for health, the mental health director, the head of the department of health and the project manager could use the defence of 'superior orders' to escape liability, and whether the former MEC for health could escape liability by blaming the mental health director, the head of the department of health and the project manager for the deaths.

When can subordinates escape criminal and civil liability for harming patients by raising the defence of obedience to 'superior orders'?

The law regarding 'superior orders' has only been used in criminal cases, but similar principles will apply to civil actions for delict.^[8] A person may raise the defence of 'superior orders' provided that: (i) the order is given by a person who has lawful authority over the subordinate; (ii) there was a duty on the subordinate to obey the order; and (iii) the subordinate must have done no more harm than was necessary to carry out the order.^[9] Determining whether or not the order was lawful is the most difficult part of the defence, because – even if the other elements are satisfied – subordinates do not have an absolute duty of obedience 'where the order is grossly illegal.'^[10] As a general rule, a person may not raise the defence of 'superior orders' if the person knew that the order was unlawful, or the order was 'manifestly unlawful', in which case the court may infer that the person raising it 'ought to have realised the manifest illegality of the order.'^[7] However, if subordinates can show that the superior had threatened them with harm, 'possibly bodily harm or death', if they did not carry out the orders, the subordinates may raise the defence of 'compulsion' or 'necessity', which would negate their fault.^[7]

Can the former MEC for health, the mental health director, the head of the department of health and the project manager escape liability for the deaths by raising 'superior orders' as a defence?

The former MEC for health claimed that she had been pressurised by the Auditor General to cancel the contract with Life Esidimeni – but there was no evidence to support this. Even if she had been pressurised by the Auditor General, she would have to establish the three criteria listed above to mount an adequate defence of 'superior orders'. She is likely to fail on all three: the Auditor General does not have the lawful authority to tell her to transfer patients to save costs incurred from using private facilities if it would put patients at risk. There was no duty on her to obey such an order if it would lead to patients being transferred to unlicensed facilities with untrained staff that might result in their deaths. Finally, even if she did have a duty to obey, she would be at a loss to show that by transferring patients to such unlicensed facilities with untrained staff she had done no more harm than was necessary to carry out the order. On the contrary, she should have made sure that the patients were transferred to NGOs that were licensed, with qualified staff. In short, she would not be able to show that as a result of having to obey 'superior orders', she was not at fault and had acted lawfully.

The same principles would apply to the mental health director, the head of department and the project manager. Despite the former MEC claiming that legislation prohibited her from dealing with the

day-to-day administration of the Life Esidimeni project, the evidence was that she had interfered and assumed authority over it. She herself admitted in her evidence that in terms of the Public Finance Management Act and Public Service Act, she had no legal authority to do so.^[11] Therefore, the public health officials could not claim that she had lawful authority over them. However, if she did have such authority, for the same reasons as those that apply to the former MEC, they also could not claim that there was a duty on them to obey her 'manifestly unlawful' orders, or that they had not caused more harm than was necessary, by allowing the mentally ill patients to be transferred to unlicensed facilities with untrained staff, which led to their deaths.

Can the former MEC for health escape liability by blaming the mental health director, the head of the department of health and the project manager for the deaths?

It is trite to say that the former MEC, at the time, could have been sued vicariously in her representative capacity for the harmful negligent conduct of public health officials in the department of health. However, when it comes to personal liability, as previously mentioned, the former MEC for health maintained that the Public Finance Management Act and the Public Service Act precluded her, as an MEC, from becoming involved in the day-to-day management of the department of health.^[11] This being so, the interferences by her were illegal, and maybe she could be prosecuted in terms of both Acts. The question remains, however, as to whether under the common law she can escape liability by blaming the mental health director, the head of the department of health and the project manager for the deaths.

As a general rule, under the common law, a person who is in a position to control another person's unlawful conduct, and who ought to have foreseen that a failure to prevent such conduct from occurring will harm another, must take reasonable steps to prevent such harmful occurrence from happening. If he or she fails to take such preventive steps, the person in control may be held personally liable, together with the person engaging in such harmful conduct, for any harm suffered by others.^[8] An example is the case of independent contractors, where the person employing the independent contractor can tell the contractor what to do, but not how to do it. In such circumstances, the employer is not liable for the negligence of the independent contractor (e.g. a surgeon and an anaesthetist in the operating theatre).^[8] unless the employer takes control and orders the contractor to engage in unlawful conduct.^[9]

Where there is a danger to another, the courts will apply the ordinary principles of negligence, and consider whether the harm was reasonably foreseeable and preventable by the employer.^[8] Here, direct liability rather than vicarious liability is imposed on the person in control. It makes no difference whether the person who assumed control was acting legally or illegally. Therefore, in the Esidimeni case, the former MEC cannot escape liability on the basis that the wrongful acts and omissions were the fault of her subordinates – not her – because she was busy campaigning for her political party and was only doing 'MEC work in between.'^[11] Once she directly interfered in the administration of the project, by ordering the transfers of mentally ill patients to unlicensed and unqualified NGOs and some

state hospitals to take place, she should have closely monitored the situation – especially after protests, pleas, warnings and the results of court action were reported to her and the other public health officials by activists.^[1] Her failure to do so because of her duties as a politician was gross negligence on her part.

Furthermore, as indicated above, the subordinates who obeyed the unlawful orders issued by the former MEC to engage in wrongful conduct cannot themselves escape liability on the basis of obedience to ‘superior orders’ – except in very limited circumstances, if they had feared for their lives or were threatened with serious bodily injury.^[7]

Conclusion

There was no evidence to support the claim by the former MEC for health that she had to cut costs in the department of health. Even if there was such evidence, she cannot escape liability for the deaths of the mentally injured patients who were transferred by raising the defence of ‘superior orders’. Such a defence would only apply if she feared death or serious bodily injury had she failed to comply – which is most unlikely. Likewise, the mental health director, the head of the department of health and the project manager cannot escape liability for their negligent conduct in causing the deaths of the patients, unless they too can show that they obeyed the orders of the former MEC because they feared death or serious bodily injury had they failed to comply – also extremely unlikely.

The former MEC also cannot escape liability for the deaths by blaming the mental health director, the head of the department of health and the project manager for the deaths, because once she assumed control by directly ordering the transfers of the patients to take place, she should have closely monitored the situation, and not focused on campaigning for her political party. Such conduct amounts to gross negligence on her part – particularly as warnings and complaints had been communicated to her and the other public health officials.

In the result, the former MEC for health, the mental health director, the head of department and the project manager were all guilty of negligence and could be charged criminally with culpable homicide.^[4] They could also be sued civilly by the surviving mentally ill patients for physical and psychological harm, and by the families of the deceased patients for psychological harm.^[12]

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