



# The Life Esidimeni tragedy Arbitration award: A step in the direction of justice

Past issues of *the South African Journal of Bioethics and Law* have discussed the ethical violations and human rights abuses that were committed during the Life Esidimeni tragedy. This editorial describes some aspects of the subsequent Arbitration award.

A total of 144 mental healthcare patients died after their moves from the Life Esidimeni facilities, which began in October 2015. An additional 1 418 were exposed to trauma and morbidity, but fortunately survived. Of these, the whereabouts of 44 patients remain unknown. The arbitration proceedings started on 9 October 2017, and lasted 4 months. The sittings were over 45 days, and 60 witnesses, of whom 12 were senior state officials, took the stand and gave evidence under oath. The Arbitration was established as a result of a recommendation by the health ombud, in his report that investigated the circumstances leading to the death of these patients. The core dispute to be resolved by the Arbitrator, Justice Dikgang Moseneke, was the nature and extent of equitable redress due to patients and their families. The arbitration process was also intended to achieve closure for the families.

Justice Moseneke aptly summarises the situation in the introduction to his report,<sup>[1]</sup> in which he states:

'This is a harrowing account of the death, torture and disappearance of utterly vulnerable mental healthcare users in the care of an admittedly delinquent provincial government. It is also a story of the searing and public anguish of the families of the affected mental healthcare users, and of the collective shock and pain of the many other caring people in our land and elsewhere in the world.'

The Arbitration found that there was an arrogant and forceful disregard for the regulatory regime that was set up in 1994 by the state for the care of mental healthcare patients, and that is aligned with international human rights and mental healthcare norms and standards. Accordingly, there were severe breaches of Constitutional obligations, resulting in justifiable Constitutional damages claims. Both the former member of the executive council (MEC) of the Gauteng Department of Health and its head of department failed to explain the true reason why the contract with Life Esidimeni had been terminated, and diverted responsibility and accountability to a 'decision of the collective'. Justice Moseneke places the reason for the death and torture that ensued as their irrational and unconstitutional decision to terminate the contract, but highlights the fact that the actual reason for this act of commission is still unknown, and hence true closure is still denied to families and the country.

The state argued that an amount of ZAR200 000 would be adequate recompense for the families of the deceased and for patients who had survived the tragedy. This would cover funeral expenses

and common-law general damages arising from pain, suffering and emotional shock. It resisted compensation for Constitutional damages. The Arbitrator found that this would not be equitable redress, and made a binding award, with costs, of ZAR1 200 000 for most of the claimants. This was to be paid by the government in a lump sum by not later than 19 June 2018. Also awarded were the services of qualified mental healthcare practitioners to assess the counselling and support needs of the families and surviving patients, to be provided within a month of the date of publication of the award (19 March 2018). The required counselling and support services were to be provided immediately or within 30 days of the assessment.

The government was also directed to construct, at its exclusive expense and within a year of the publication of the award, a monument at an appropriate and prominent location to commemorate the suffering and loss caused by the tragedy, and also to serve as a reminder of the human dignity and vulnerability of mental healthcare patients. The health ombud and claimants were to be provided with the recovery plan for systemic change and improvement in the provision and delivery of mental healthcare by the Gauteng Department of Health. The government was to report to the health ombud and to the claimants within 6 months, and thereafter on a 6-monthly basis until the conclusion of the recovery plan. The government was also directed to promptly report or cause to be reported the conduct of the relevant healthcare practitioners to the Health Professions Council of South Africa and the South African Nursing Council, as appropriate. The government was to give notice to the health ombud and the claimants or their representatives of the steps it had taken, within 30 days of initiating these steps.

When drawing up the award, the Arbitrator was quite scathing about the conduct of senior officials in the Gauteng Department of Health. Their shameless abuse of the human rights of mental healthcare patients is unconscionable. The award is a step in the direction of justice for the victims of the tragedy and their families. However, it remains to be seen how far the government will go with regard to delivery of the award.

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1. Moseneke J. The Life Esidimeni Arbitration Report. <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf> (accessed 11 June 2018).