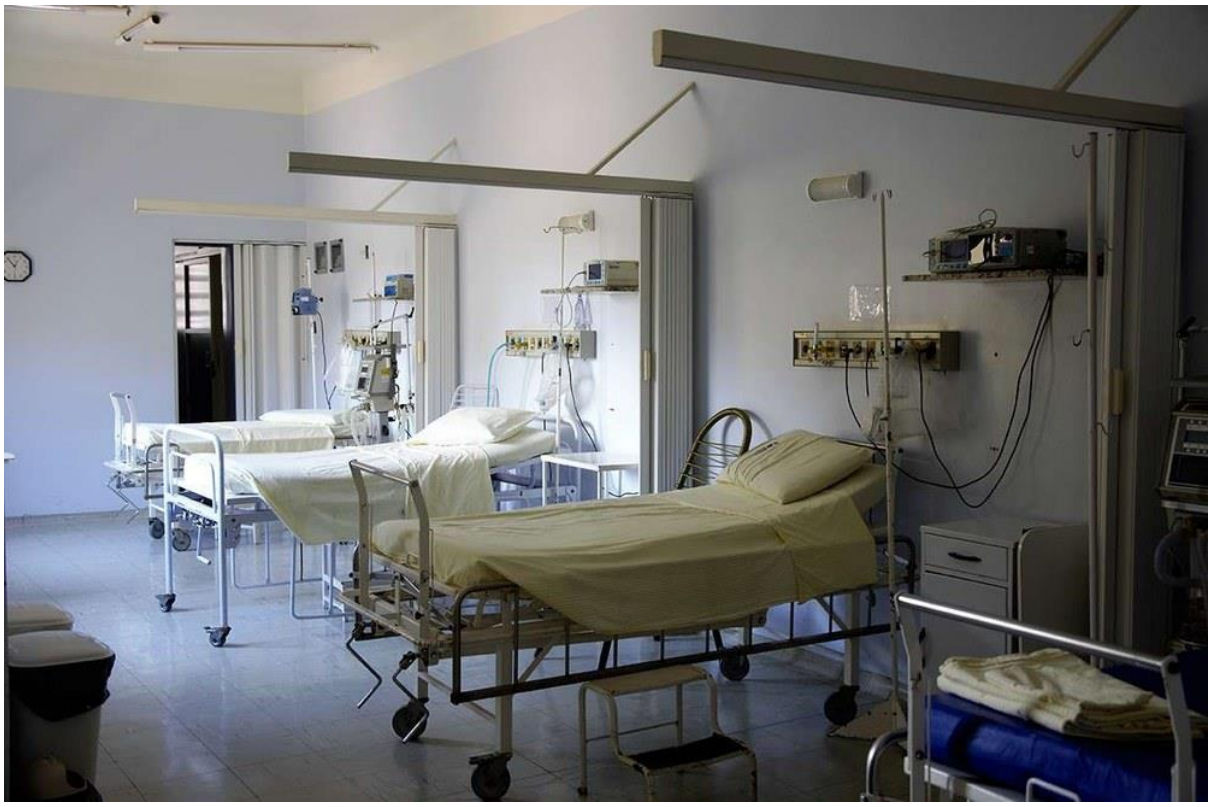

The Life Esidimeni Arbitration: the legal basis for granting the Award

Michelle Toxopeüs | May 08, 2018

This brief discusses the legal basis for granting R1.2 million in damages to each claimant in the Life Esidimeni Arbitration Award.

Introduction

The Life Esidimeni Arbitration Award granted each claimant R1.2 million in damages,[1] including an amount allocated for funeral costs; general damages for shock and psychological trauma; and constitutional damages for violating constitutional rights. While the State conceded liability, the parties disputed whether the claimants were able to claim constitutional damages. This would significantly impact the final amount to be awarded. To address this, the Arbitrator was still tasked with laying a legal foundation for the Award, including the question of constitutional damages.

Background

In October 2015, the Gauteng Health Department made a decision to terminate a long standing contract with Life Esidimeni Health Care Centre (Life Esidimeni) resulting in the mass transfer of over 1 400 mental healthcare patients to various non-governmental organisations. In September 2016, following a question posed to her in the Gauteng Provincial Legislature, Ms Quedani Mahlangu, the MEC for Health in Gauteng at the time, revealed that 36 patients had died as a result of the transfer. The Health Ombudsman (Ombudsman) later found that, at that point, 77 patients had in actual fact died.[2] The public outrage stemming from her answer prompted the Minister of Health, Dr Aaron Motsoaledi, (Minister) to request the Ombudsman to investigate "the circumstances surrounding the deaths of mentally ill patients . . . and advise on the way forward."

The Ombudsman's report was released on 1 February 2017.[3] In it he made 18 recommendations, one of which urged the Minister and the Gauteng Premier to contact all individuals and families affected by the mass transfer to enter into an alternative dispute resolution process. This was recommended based on the "low trust, anger, frustration, loss of confidence in the current leadership of the [Gauteng Health Department] by many stakeholders".[4] Flowing from this recommendation, the parties agreed to refer the dispute to Arbitration before a single Arbitrator, former Deputy Chief Justice Dikgang Moseneke.

Why arbitration?

Arbitration hearings are unlike litigation before a court. They are regulated in terms of agreement between the parties and governed by the Arbitration Act.[5] They are generally less time consuming and more cost-effective but still yield binding results. In addition to this, given the unique nature of the dispute, the Life Esidimeni Arbitration proceedings were also intended to facilitate "closure and redress" for the claimants. This was intended to give the families an opportunity to tell of their experiences and, in the process, grieve and find closure. Similarly, it allowed government officials an opportunity to truthfully account for their actions, take responsibility and demonstrate publicly their remorse.

The claimants in the Arbitration included both the bereaved families of mental healthcare patients who had died as a result of the mass transfer as well as the mental healthcare patients who had been transferred from Life Esidimeni to non-governmental organisations but survived. These families, together with civil society organisations, professional bodies and clinicians worked tirelessly to persuade government to protect the rights of their loved ones.

The decision to terminate the Life Esidimeni contract

Three reasons were given for the termination of the 30-year Life Esidimeni contract. The arbitration award dealt with each reason and found all three reasons wanting.

1. **Deinstitutionalisation:** Government argued that the contract needed to be terminated to conform to National Department policy to deinstitutionalise mental healthcare and develop community-based services located near to loved ones. Deinstitutionalisation is a complex

and costly exercise – it needs to be implemented carefully and correctly. In this case, non-governmental organisations accepted mental healthcare patients without having the necessary resources and infrastructure needed to do so. As a result, these patients ended up in non-governmental organisations far from their family homes and communities – contrary to the principles that deinstitutionalisation envisages.

2. **Contractual concerns:** The Auditor-General allegedly raised concerns about the duration of the contract with Life Esidimeni. But no evidence of these concerns was furnished. To the contrary, the Gauteng Finance MEC testified that she was unable to find any reference to support these alleged concerns in the Auditor-General's management letters to the Gauteng Health Department.

3. **Resource constraints:** Government argued that resource constraints forced a decision to end the contract with Life Esidimeni and find alternative, cost-saving measures to treat mental healthcare patients. However, the Finance MEC again disputed these claims – testifying that the budgetary and financial constraints within the Gauteng Health Department were primarily caused by "mismanagement, incompetence and possible fraud".

The state violated constitutional rights

The reasons for the decision had an important impact on the legality of the decision. This is because all public power must be exercised in a lawful manner, including the decision to terminate the Life Esidimeni contract. The rule of law, a foundational value in the Constitution,[6] dictates that decisions must be rational. In other words, all decisions taken by government must be rationally connected to a legitimate governmental purpose. Government officials testifying at the Arbitration hearings were unable to provide any legitimate purposes for, or the true reasons behind, their decision. The three reasons that *were* given were found to be "fabricated and patently false".[7] The Arbitrator concluded that the decision to terminate the contract, a decision which was found to be irrational and unconstitutional, was the reason for the suffering and death of mental healthcare patients.[8]

The decision and the subsequent treatment of mental healthcare patients also violated several rights in the Bill of Rights. It was found to violate the dignity of those mental healthcare patients that had died, the patients that had survived and the family members "who watched their loved ones waste away and die, powerless to do anything to prevent it."[9] Not only did the treatment of mental healthcare patients during and after the transfer period violated the constitutional right not to be treated in a cruel, inhuman or degrading way, it also implicated the right to life, the right to freedom and security and the right to access adequate healthcare and sufficient food and water. The families of mental healthcare patients entrusted the government to take care of their loved ones but were denied any opportunity to participate in the decisions made concerning them. In this way, the Arbitrator also found that the right to family life was been violated "by the deprivation of the opportunity to take decisions in the best interests of their loved ones' heath."[10]

All this and the State remained unresponsive, acting contrary to the principles and values of public administration entrenched in the Constitution.[11] What is more, the government officials involved[12] refused to take responsibility for the decision to terminate the Life Esidimeni contract.

The role of non-governmental organisations

Once the non-governmental organisations assumed functions of the State in providing what was meant to be adequate mental healthcare to patients, they also obtained constitutional obligations.

Likewise, the non-governmental organisations assumed accountability for the public power they acquired and the public service they rendered.[13] They were obliged to exercise this public power and fulfil this public function lawfully and within the prescripts of the Constitution. They failed to do so.

Still, the delegation of power by the State to non-governmental organisations did not absolve the State of responsibility. As noted in *AAA Investments v Micro Finance Regulatory Council and Another*,[14] "[o]ur Constitution ensures . . . that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity." The State failed in its obligation to ensure that the non-governmental organisations were adequately resourced, duly licensed and qualified to function as caregivers to mental healthcare patients. There was no open procurement process for providing these services on behalf of the State, no assessment reports or procedures of aspirant non-governmental organisations were followed and the licensing process that was followed was "unlawful and knowingly fraudulent".[15]

This laid the foundation for granting general and constitutional damages.

Just and equitable redress: general and constitutional damages

In law, damages can be claimed when an unlawful action or decision intentionally or negligently leads to harm. In this case, the State accepted that the decision to end the Life Esidimeni contract and the subsequent treatment and death of mental healthcare patients was "caused unlawfully and negligently and that liability for the loss of the affected families falls to the Government."[16] Therefore, the claimants did not need to prove the usual legal elements to claim for damages. In terms of the Agreement, the Arbitrator was entitled to consider general and constitutional damages.

General damage is a common law remedy that flows from an unlawful act. In this case, it included a claim for psychological injury and emotional shock arising from the consequences of the decision. Constitutional damages, on the other hand, flow from a vindication of constitutional rights. These included those rights that the Arbitrator found to have been violated, which, in terms of the Constitution, the state and the non-governmental organisations were obliged to respect, promote and protect these rights.[17] In this case, the distinction was important because the State argued that all claims should be brought under the common law remedy of general damages. This argument flowed from an understanding that in many cases, the common law remedy of general damage is often broad enough to provide relief for a breach of constitutional rights.[18] The State therefore argued that all claims in this case should have been brought under the common law remedy of general damages. If the claimants did not or could not bring their claims relating to constitutional violations under general damages, they could not be awarded damages for these violations.

The Arbitration Award rejected the State's arguments on constitutional damages. It stated that claims under the Constitution, as the supreme law, could not be denied "simply because it could not fit into the common law framework."[19] Considering the harrowing violation of rights and disregard for constitutional duties by the state, the arbitration award held that, most importantly, the claims in this Arbitration could not fit under the umbrella of general damages. Therefore, the Arbitrator awarded funeral costs amounting to R20 000 to those claimants whose loved ones had died, general damages for shock and psychological trauma amounting to R180 000 and constitutional damages amounting to R1 million to each claimant.

Conclusion

The Arbitration Agreement allowed the Arbitrator the discretion to determine an appropriate award for damages and further redress. Given the extent of suffering and trauma that mental healthcare patients and their families had to endure, the violation of their rights, the complete disregard of government officials of their constitutional duties both in making the decision to terminate the Life Esidimeni contract and their actions following that decision, he determined that R1.2 million in damages is just and equitable. In doing so, the Arbitrator did not distinguish between classes of claimants as the amount of claimants and the different circumstances of each case would result in unjust outcomes.

The Award, together with the hearings, has brought the claimants a measure of restorative justice and closure. But the effect of the Arbitration has also extended beyond the Award. It has raised important issues of state responsibility and responsiveness to its people, accountability and legality. It has also highlighted important questions of structural problems in mental healthcare governance. It, together with the Ombudsman report, lays an important foundation for future action to hold to account those government officials and non-governmental organisations involved. Already, the National Prosecuting Authority has received 140 dockets from the police to consider criminal liability of individuals implicated in the tragedy. There is also the question of whether certain government officials will be held accountable for misleading the Legislature.[20] While it has set mental healthcare on the discussion agenda, it is yet to be seen whether lessons learnt in Gauteng will translate to better conditions for mental healthcare patients in the public sphere.

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[1] Claimants of mental healthcare patients who survived the trauma and were later transferred back to Life Esidimeni were not granted the R20 000 award for funeral costs. Therefore, their award amounted to R1.18 million.

[2] Page 40 of the Ombudsman's report.

[3] The Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province, (Ombudsman's report), 1 February 2017.

[4] Recommendation 17 of the Ombudsman's report.

[5] 42 of 1995.

[6] Section 1(c) of the Constitution.

[7] Para 179 of the Award.

[8] Para 181 of the Award.

[9] Para 185 of the Award.

[10] Para 196 of the Award.

[11] Section 195(1) of the Constitution.

[12] Ms Mahlangu, Dr Selebano and Dr Manamela.

[13] See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12 at para 59.

[14] [2006] ZACC 9 at paras 40-41.

[15] Para 47 of the Award.

[16] Paragraph 6.7 of the Arbitration Agreement.

[17] In terms of section 7(2) of the Constitution. See para 156 of the Award.

[18] *Fose v Minister of Safety and Security* [1997] ZACC 6 at para 60. See also *Dikoko v Mokhatla* [2006] ZACC 10 at para 91, *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25 at para 74; and *Minister of Police v Mboweni and Another* [2014] ZASCA 107.

[19] Para 216 of the Award.

[20] See paras 82 and 201 of the Award.

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