

Sama: #Life Esidimini is a serious indictment on government

Retired Justice Dikgang Moseneke's opening paragraph in his Life Esidimeni ruling sums up the horror of case. He says, "This is a harrowing account of the death, torture and disappearance of utterly vulnerable mental health users in the care of an admittedly delinquent provincial government . It is the story of the searing and public anguish of the families of the affected mental health users and of the collective shock and pain of many other caring people in our land and elsewhere in the world. These inhuman narratives were rehearsed before me..."



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Moseneke's ruling was handed down this week following public hearings which began in October last year. They came after revelations that 144 mental health patients who were moved from Life Esidimeni to outside facilities died because of improper and negligent care. A further 44 patients are still unaccounted for. The remaining 1,418 patients who were also moved are likely to be indefinitely traumatised.

The arbitration hearings were part of an agreed to alternate dispute resolution process instead of approaches with individual claims or class action lawsuits.

Compensation and culpability

He says, however, the process resulted in two aspects which much be explored.

The first is the issue of 'compensation'. Each family who lost a loved one will be awarded approximately R1.2m.

"The principle of compensation is undisputed as it forms part of a case of (medical) malpractice. In this instance the malpractice was medically, and also socially, abhorrent and the quantum of the award has been determined by Justice Moseneke as being proper," explains Dr Mzukisi Grootboom, chair of the South African Medical Association (Sama).

He says the second aspect that warrants comment is that of "culpability". In effect 144 people, perhaps more, died after being entrusted to the care of a provincial health department. Many, such as the former MEC for Health in the province, Qedani Mahlangu, claimed a lack of foresight of the consequences of their decision. This was wholly rejected by Moseneke and correctly so.

"In our view, culpability in this instance has two components: professional and criminal. Professional culpability warrants the full processes by the relevant statutory bodies of the professionals involved, including the Health Professions Council of South Africa (HPCSA) and the South African Nursing Council (SANC). Why these bodies have been slow to act to date, especially in such a publicised hearing, is inexplicable.

Sama would like to remind doctors that their primary responsibility is the welfare and safety of their patients. This applies whether they are administrators or active clinicians as long as their decisions will impact on the patients.

According to him, criminal culpability has also been alluded to in the judgment and suggests the South African Police Service (Saps) investigate the matter. A full record of the proceedings has been provided to them and they, along with other organs of the justice system, need to do their job and provide a prosecutorial docket to the National Prosecuting Authority for consideration.

"If government can set aside resources for the hearings, resources must be provided for the justice system to conclude its investigation. The intriguing question to consider is whether, given the rejection of the lack of foresight argument by several key players, a charge of murder, *dolus eventualis*, is apt?

"Intent, in the manner of *dolus eventualis* - or legal intention - is considered when the perpetrator objectively can foresee the possibility of their act causing death and they persist regardless of the consequences. This is a question that warrants consideration in court especially in the light of numerous appeals by not only the families of the deceased but also by several professional bodies, mental health experts and civil society organisations to the highest health officials in the province not to implement their deadly plan ."

He adds that if the test of culpability fails, what happened at Life Esidemeni is doomed to be repeated.

"In a sense we have done this before. The death of Steve Bantu Biko was an act where practitioners, and others, failed in their duty. There was no culpability and hence we have done it again. Those entrusted with the care of the vulnerable must understand that there are consequences to actions that cause harm, suffering or death," Grootboom says.

Cost-cutting vs cost-effective

He adds that an important take-away from the hearings is the dispelling of the notion of cost-cutting as being cost effective.

"We were told the reason for moving the patients in the first place was to save costs, or because the Gauteng Department of Health was pressured from the auditor-general. Expedience in healthcare cost lives, and cost-cutting and cost efficiency are two very different notions. One affects quality, the other shouldn't. In our current climate of austerity, let us remind ourselves of the victims of cost-cutting, and practitioners need to remember their only responsibility is to the wellbeing of patients," concludes Grootboom.

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