Life Esidimeni: Human Rights Lens

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Brief Background on Life Esidimeni

In October 2015, the MEC for Health in Gauteng, Qedani Mahlangu, announced the termination of the contract between the Department of Health and Life Esidimeni. Around 2000 people, who were receiving highly-specialised chronic psychiatric care, were to be moved out of Life Esidimeni to families, NGOs and psychiatric hospitals providing acute care in the Gauteng Health Marathon Project.

Why close? The MEC claimed: a) To save money b) To deinstitutionalize (the policy says to do so slowly, over several years, after developing and capacitating community care)
Brief Background

From **March to June 2016**, mental health care users were discharged from Life Esidimeni in large numbers, with the last discharges happening in June.

As a result of the move, 144 mental health care users died, 1418 were exposed to trauma and morbidity and the whereabouts of 44 mental health care users remain unknown.

Between Oct-Dec 2016, the Health Ombud was requested by the Nat. MoH to investigate the ‘circumstances surrounding the deaths of mentally ill patients in the Gauteng Province’.
Brief Background

The Health Ombud wrote a detailed report and in recommendation 17 set out that there should be ‘an alternative dispute resolution process’ aimed at determining redress mechanisms and compensation.

That the process should be led by a credible prominent South African with an established track record.

The parties referred their issues to a single arbitrator (Justice Moseneke) subject to a written arbitration agreement and inline with the provisions of the arbitration act.
Brief Background

The arbitration proceedings started on 9 October 2017 and ended on 8 February 2018. They were open to the affected families, the public and all the media.

On 19th March 2018, the arbitration award was read out by Justice Dikgang Moseneke.

In total the Government was ordered to pay 1.2 million rand to the claimants including funeral expenses, shock and psychological torture and constitutional damages not later than 3 months from the publication of the award.
Applying a Human Rights Lens

Taking a human rights lens requires investigating and challenging deeply held assumptions about why certain people end up suffering from certain afflictions beyond the presenting issues.

Requires understanding the role that poverty, gender, in-equality, social and systemic exclusion as well as political failure play in perpetuating human rights violations.

The Life Esidimeni scenario presents a series of human rights violations embedded in the programmatic steps that were taken throughout the process. The mental health care users were vulnerable and poorly resourced.
The corpus of Human Rights is binding international texts which SA have assented to. It also includes non-binding but persuasive interpretive documents including general comments, technical guidance, treaty body recommendations such as the 1991 United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.

In order to domesticate international law, national legislation such as the Constitution have been adopted with similar provisions as those in int. documents.
Human Rights Lens

A series of human rights were violated in the process. The Rights that were violated include; right to life, right to the highest attainable standard of mental and physical health as well as its underlying determinants such as right to food, water, right to dignity/freedom from torture, cruel inhuman and degrading treatment.

All the main texts specifically the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, The International Covenant on People with Disabilities. The African Charter on Human and Peoples’ Rights as well as the Maputo Protocol mention at least one of these rights.
Apart from assenting to all the international human rights treaties mentioned above, SA enacted a very elaborate Constitution with an extensive bill of rights as well as extensive Case law.

The advancement of human rights and freedoms is one of the key tenets of the SA Constitution

SA has also enacted a series of laws and policies which include: National Health Act, Mental Health Care Act, National Mental Health Policy Framework and Strategic Plan.
The Constitution

The Constitution is the supreme law and any law or conduct that is inconsistent with it is invalid.

Binds all state organs and every official entrusted with Public Power.

All public officials/state organs who made decisions on the Marathon Project were bound to observe the constitution.

By delegating power to NGOs they acted as State organs and thus were also bound to exercise their mandate lawfully and in a reasonable manner.
State Obligations and Accountability

Obligation of the state to respect, protect and fulfill human rights (Gen Comment 14 on Health, section 7(2) SA Constitution)

Obligation to respect: refraining from denying or limiting access to health care as reflected in the Marathon Project.

Obligation to protect: states to adopt legislation/take other measures to ensuring equal access to health care services by third parties. Also ensure that third parties do not infringe on peoples’ rights to health and health care.
Accountability

Key underlying human rights principle

Duty bearers should be answerable to citizens by ensuring timely, accessible and accurate information and encouraging participation in policy decisions.

Maintain a high standard of professional ethics. Using public resources in an efficient, economic and effective manner. Providing services equitably, impartially and without bias.

The lack of accountability, transparency was a key factor in the Life Esidimeni case.
The decision to terminate the Life Esidimeni contract was irrational use of public power and in blatant breach of the law and constitution.

MHC Users, their families, CSOs, prof orgs tried to persuade Govt to devise a plan to protect their rights/needs prior to being moved out of life Esidimeni. The Govt ignored them. The justification given for the move out of Life Esidimeni was also found to be untrue, irrational and unlawful.

Internal Review Mechanisms: Mental Health Review Board (MHRB). Power to consider appeals against decisions of the health establishment.
Accountability

- The decision by a Health Establishment to transfer a patient should be reviewed and if found unreasonable maybe reversed by the MHRB.

- The MHRB knew about the massive discharge of mental health users and did nothing.

- In the hearings the chairperson claimed that she thought that the board had no power to reverse/oppose the decision to move users.

- The arbitrator deduced that the MHRB chose to ignore the actions in order to protect their positions and handsome remunerations.
Rights that were Violated: Right to Life

The right to life is at the basis of all human rights.

Article 6 of the ICCPR ‘Every human being has the inherent right to life. This right shall be protected by the law. No one shall be arbitrary deprived of his/her life.

Article 11 of the SA Const emphasizes everyone’s right to life.
Right to Life

- It’s already been pointed out 144 mental health care users died in a series of undignified ways.
- The Ombud Report as well as the arbitration hearings revealed that the deaths were not natural but caused unlawfully and negligently.
- The Govt defense that they could not have foreseen that the move would lead to death and suffering of others was refuted based on the irrationality of the reasons behind the move.
Right to Life

- All 27 orgs to which MHC users were moved operated with invalid licenses. These were ‘mysteriously selected’ (Health Ombud Report).

- More than 95% of the deaths occurred at the NGOs. Transferred in departmental vehicles or vehicles owned by NGOs without a written plan for transportation. In one case the NGO came with a bakkie. Some had their hands or feet or both tied

- Some suffered the trauma or being moved from one place to another forcing families to look for them for long periods of time.

- Often were moved without clinical records and their belongings
Several challenges in accessing medication once they had been moved. Lack of appropriate care givers to identify or provide appropriate medicines to the patients.

The mass displacement of MHC users occurred without the consent and prior notice of their families. While families were aware of the intended closure, they were not informed of where they would be moved and thus some spent months looking for their loved ones.

The conditions at non-government organizations were so bad that they were referred to as ‘death traps’.
Right to Life

- Bad quality or insufficient food, difficulty in accessing medication, under staffing or inappropriate staffing, insufficient security,
- Some were very overcrowded with low levels of hygiene, dirty facilities, unmaintained facilities (one facility had a leaking roof and a door that was about to come off its hinges). MHC users had insufficient blankets and clothes for the cold period, some were abused and mistreated.
- Late payments to the NGOs
Right to Life

As a result of ill-equipped and ill prepared non-governmental organizations multiple deaths ensued.
Right to Human Dignity

- The preamble of the UDHR sets out ‘recognition of the inherent dignity and of the equal and inalienable rights of all the members of the human family and that ‘disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind’.

- The SA Constitution sets out that human dignity and the achievement of equality is one of the fundamental values of the Constitution. Article 10 highlights that everyone has inherent dignity and the right to have their dignity respected and protected.
Right to Human Dignity

- Critical for a meaningful departure from the oppression of colonialism and apartheid.

- Recognition of each individual’s self worth, regardless of their circumstances is vital for the achievement of constitutional values.

- The Marathon Project trampled on mental health care users dignity by failing to include them and their families in decisions pertaining to the move, transporting them in inhuman conditions, subjecting them to under facilitated places where they were moved, leading to the undignified death of some and untold suffering of those who survived.
Right to Dignity

- The evidence showed those who tried to look for their loved ones were confronted with emaciated, dehydrated and unwell mental health care users in dingy and unkempt non-governmental organizations a clear demonstration of indignity towards the mental health care users.

- Others conducted long searches only to find that their loved ones had died. One claimants stated that they found the body of their loved one decomposed in a hospital mortuary.
Freedom from cruel, inhuman and degrading treatment

Set out in Section 12(1)(e) of the constitution. Related to the right to dignity.

Proactive and systematic acts that are not only unkind but hateful and directed at bodily and psychological hurt and harassment.

The evidence by various expert witnesses demonstrated that the treatment of the MH care users amounted to torture.

One expert highlighted
Freedom from cruel, inhuman and degrading treatment

“If you take a group who didn’t know the move was coming, weren't prepared for it and are moved on the backs of trucks, tied with sheets without identity documents, without wheel chairs, that amounts to torture. And then they are moved into filthy dangerous environments as if they are not human and you deny them basic needs such as food and water, you overcrowd them…. All those are features of actively torturing people in these institutions”
One expert report noted that the way the users were treated brought back memories of the way people were treated during the apartheid regime.

“The entire project is a sad reminder of Steve Biko …. who died in detention. On the night before he died he was placed on cell mats on the floor of the land rover, semi-comatose, naked and handcuffed and driven to Pretoria Central Prison. No medical records were sent with him. Neither was he accompanied by any medical personnel during the medical journey.”
Right to Health

Article 12 of the ICESCR recognizes the right of everyone to the highest attainable standard of physical and mental health. Article 16 of the African Charter has the same provision and further emphasizes that State Parties shall take the necessary measures to protect the health of their people and ensure that they receive medical attention when sick.

The right to health is closely related to the realization of other human rights …right to food, water, right to life, non-discrimination, right to human dignity (Gen Comment 14 on health Para.3)
Right to Health

- Section 27 of the SA Constitution recognizes everyone’s right to health care services, sufficient food and water. The state must take reasonable legislative and other measures, within its available resources to progressively realize this right.

- By failing to take rational and reasonable steps to protect the right to health and health care of the MHA the state violated the right. Furthermore, by transferring them to NGOs that were not in position to ensure adequate food and water, their right to health was violated.
Conclusion

As a result of these rights violations the arbitrator maintained that the claimants had to be compensated for constitutional damages.