

LIFE ESIDIMENI

1 March 2018



UNIVERSITY OF THE
WITWATERSRAND,
JOHANNESBURG



LIFE ESIDIMENI TIMELINE (JUNE 2015 – MARCH 2016)

- June 2015 – SA Society of Psychiatrists (SASOP) sent letter to MEC and team warning about the likely consequences of terminating the contract with Life Esidimeni.
- October 2015 – MEC announced termination of contract with Life Esidimeni.
- November 2015 – SA Depression and Anxiety Group (SADAG), SASOP, SA Federation for Mental Health (SAFed) and families engaged with Department about concerns.
- December 2015 – concerns not adequately responded to, litigation launched; Settlement Agreement reached with the Department – Department undertook not to move anyone until agreement on process and facilities.
- December 2015 to March 2016 – parties engaged but the Department provided insufficient information to allow for consultation.
- 18 February 2016 – Department press statement announces extension of contract – all mental healthcare users would be out of Life Esidimeni facilities by end June 2016.
- March 2016 – it emerged that the Department planned to move 54 people, with various diagnoses including “severe intellectual disability” to Takalani Home. SADAG, SASOP, SAFed and families litigated against the Department to prevent the move but failed.

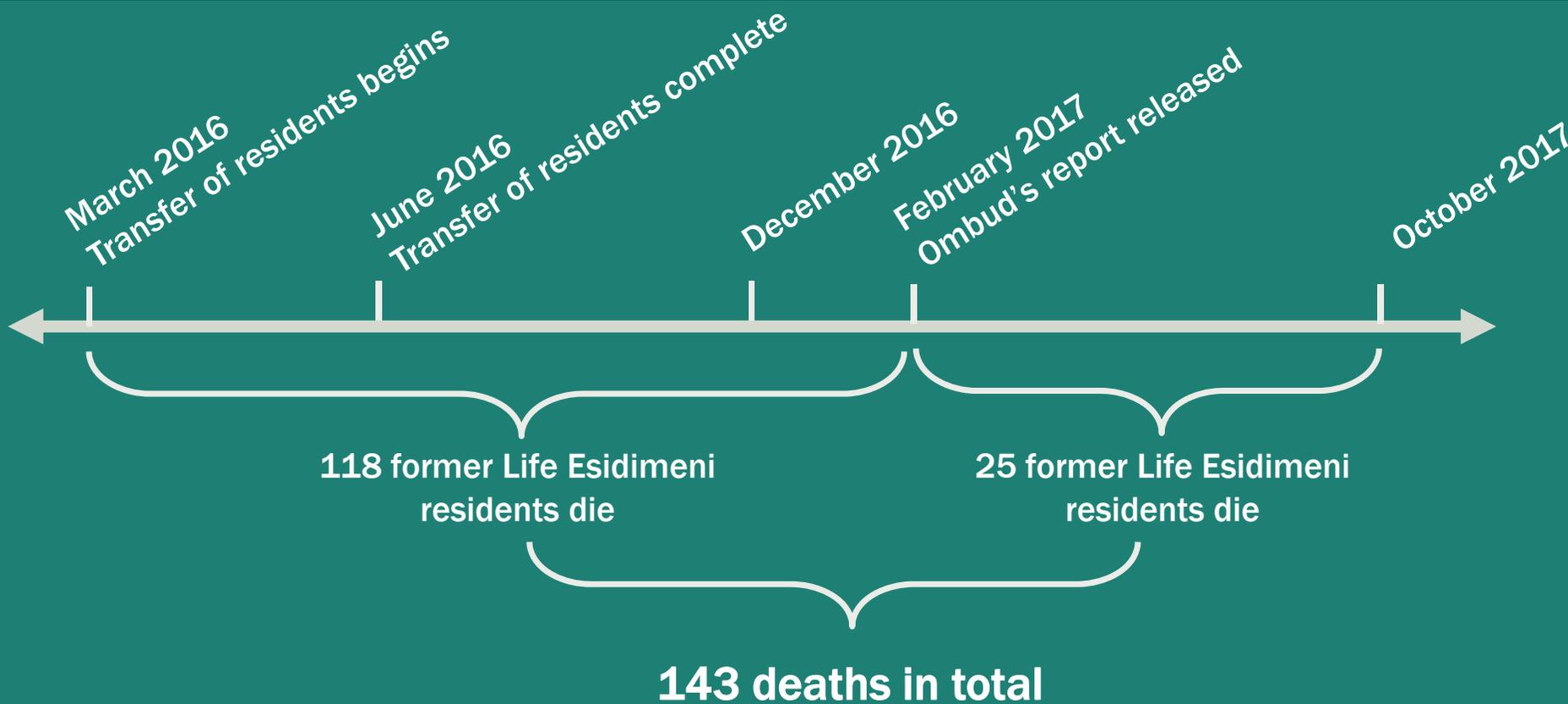
LIFE ESIDIMENI TIMELINE (JUNE 2016 TO NOVEMBER 2016)

- June 2016 – all mental healthcare users moved out of Life Esidimeni.
- 13 September 2016 – MEC announced, in response to a question in Parliament, that 36 former residents of Life Esidimeni had died since their move.
- 15 September 2016 – Minister of Health requested, after a meeting with the MEC, the Health Ombudsman to investigate the deaths.
- 16 September 2016 – request made to the SAPS to conduct inquests into all deaths of former residents of Life Esidimeni.
- November 2016 - High Court in Port Elizabeth stops similar closure of frail care centres in the Eastern Cape and appoints a curator to look after the interests of all residents at the facilities.

LIFE ESIDIMENI TIMELINE (JANUARY 2017 TO FEBRUARY 2017)

- 6 January 2017 – Health Ombudsman sends report to MEC for Health.
- 12 January 2017 – Health Ombudsman invites media and interested parties to press conference on 18 January 2017 to release report.
- 13 January 2017 – MEC for Health asks for extension to 24 January 2017 to make submissions.
- 24 January 2017 – MEC for Health makes submissions on report.
- 1 February 2017 – Health Ombudsman releases report.
- 1 February 2017 – Gauteng MEC for Health Qedani Mahlangu resigns.

LIFE ESIDIMENI OVERVIEW OF PATIENT DEATHS



MAJOR FINDINGS OF HEALTH OMBUDSMAN REPORT

- From 1st April to 30th June 2016, an estimated 1,371 chronic mentally ill patients were rapidly transferred to hospitals and NGOs in Gauteng.
- A total of ninety-four (94+) and not thirty-six (36) mentally ill patients (as initially and commonly reported publicly in the media) died between the 23rd March 2016 and 19th December 2016 in the Gauteng Province.
- All the 27 NGOs to which patients were transferred operated under invalid licenses.
- All patients who died in these NGOs died under unlawful circumstances.
- The decision was unwise and flawed, with inadequate planning and a 'chaotic' and 'rushed or hurried' implementation process.
- Evidence identified three key players in the project: MEC Qedani Mahlangu, Head of Department (HoD) Dr Barney Selebano and Director Dr Makgabo Manamela. Their fingerprints are 'peppered' throughout the project.

GROSS HUMAN RIGHTS VIOLATIONS AND VIOLATIONS OF THE CONSTITUTION

- Some patients tied down to the back of bakkies and transported to NGOs.
- Some patients transferred without identification or medical records.
- Insufficient or rotten food at NGOs, some deaths due to starvation, autopsy of one patient revealed brown paper and plastic in stomach contents.
- Insufficient bedding and blankets, exposure to cold.
- At one NGO patients wearing plastic bags instead of diapers.
- Lack of medication and care givers.
- Overcrowding.
- Abuse and rape.
- Late notifications of death.
- Denial of dignity in death – one body so badly decomposed no fingerprints could be taken for death certificate, old butchery converted into mortuary and bodies piled up.
- Contravention of South African law by some medical officers certifying deaths as natural.

RECOMMENDATIONS OF THE HEALTH OMBUDSMAN LEADING TO ARBITRATION

- The National Minister of Health must lead and facilitate a process jointly with the Premier of the Province to contact all affected individuals and families and enter into an Alternative Dispute Resolution [ADR] process.
- The outcome of such process should determine the way forward such as mechanisms of redress and compensation.
- It is announced that former Deputy Chief Justice Dikgang Moseneke will act as Arbitrator to the proceedings.
- Three issues that were unresolved prior to and throughout the hearings are the precise number of deaths, the indisputable identity of all patients who died and contacting all family members to join the ADR proceedings.

TERMS OF THE ARBITRATION

- The State concedes that the conduct of its functionaries and employees unlawfully and negligently caused the death of the deceased or other emotional or psychological harm to the survivors of the tragedy and that the State is liable to afford all of them equitable redress including compensation.
- The primary role of the Arbitrator will be to lead the process; to give a proper hearing to the State and the claimant families; to receive or cause to be tendered evidence, including expert evidence on any relevant matter; and to make a binding award of compensation that in all circumstances would be just and equitable.

ROLE PLAYERS

- Justice Dikgang Moseneke – Arbitrator (former Deputy Chief Justice of South Africa).
- Evidence leaders – Advocate Nontlantla Yina and Advocate Patrick Ngutshane.
- Legal Aid Board (representing survivors) – Advocate Lilla Crouse.
- Section 27 (representing over 60 families of deceased victims) – Advocate Adila Hassim.
- Hurter Spies Attorneys (representing 4 families) – Advocate Dirk Groenewald of the trade union Solidarity.
- Gauteng Department of Health (represented by Werksmans Attorneys) – Advocate Tebogo Hutamo.

SECTION 27

- Public interest law centre.
- Named after Section 27 of the Constitution:

Health care, food, water and social security

27. (1) Everyone has the right to have access to—
- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

KEY WITNESSES

- Professor Malegapura Makgoba – Health Ombudsman.
- Dr Makgoba Manamela – Gauteng Department of Health Director of Mental Health Services.
- Dr Barney Selebano – Gauteng Department of Health Head of Department.
- Qedani Mahlangu – Gauteng MEC for Health and Social Development.
- Dr Gwen Ramokgoba – Deputy Minister of Health of South Africa.
- Dr Aaron Motsoaledi – Minister of Health of South Africa.
- David Makhura – Premier of the Gauteng Province.
- Barbara Creecy – Gauteng MEC for Finance.
- Family members (lay witnesses).
- Expert witnesses (such as psychologist, psychiatrist, actuary).

TYPES OF DAMAGES ON UNLAWFUL DEATH

- Funeral expenses.
- Loss of financial support.
- A general damages claim for emotional shock.
- Funeral expenses, loss of financial support and emotional shock referred to as “common-law” damages.
- Common law is body of law derived from judicial decisions.
- Loss of financial support requires a breadwinner – not the case here.
- Loss of financial support principle is to place dependants in same position as they would have been but for the unlawful death.
- Constitutional damages (South Africa does not have punitive damages).

FLAWS OF OUR COMMON LAW

- As mentioned by Justice Moseneke in closing argument, if an actuary and a gardener die in the same unlawful circumstances, the actuary's dependants would get 1000 times the gardener's dependants – but this relates to common law loss of support claims.
- Loss of financial support is class based – each life is not treated equally.
- Can contrast this to Sharia Law, for example in the United Arab Emirates so-called *diya* or blood money of up to AED 200,000 is payable in the event of an unlawful death. No distinction based on occupation or earnings of deceased.
- How do we balance class based systems of compensation with the fact that every life is a universe of its own and is priceless?

CONSTITUTIONAL DAMAGES

- Constitutional damages can be awarded as appropriate relief in compensation for loss suffered as a consequence of unlawful infringement of a constitutional right. In this regard, a court may fashion a new remedy and make an award in the form of constitutional damages as appropriate relief to compensate for an infringement of a constitutional right.
- Does not always sound in money – for example *Fose v Minister of Safety and Security* – money not deemed to be “appropriate relief”.
- In a country where there are great demands on the public purse and the machinery of government as a result of constitutionally prescribed commitments with substantial economic implications and the urgent need for economic and social reform, it was inappropriate to use scarce resources to pay punitive constitutional damages to plaintiffs who were already fully compensated for the injuries done to them.
- State argued constitutional damages not payable to families in respect of deceased.

ACTUARIAL CALCULATIONS

- Our law provides no “calculation rules” regarding Constitutional Damages, especially in a case of gross human rights violations leading to so many deaths.
- I placed a value on the responsibility of the State to maintain each life. Paying out the unlawful saving to the dependants puts the perpetrator of the unlawful deaths in the same position had the deaths not occurred.
- The reason why I believe you need to look at the calculation from the position of the negligent party is because our law does not create a vehicle to compensate a victim in this situation (because there is no loss of support claim). The fact that there is no loss of support claim is in itself perhaps discrimination against the disabled.
- In a common law claim you look at the pre- and post- incident scenario of the victim. Here I simply propose doing the same but from the point of view of the perpetrator. It is really then a matter of creating a space through the Bill of Rights to link the extent of the gross human rights violations to what each family should receive.
- Useful parameter and only measure of the “value of a life”.

MORTALITY OF PSYCHIATRIC PATIENTS

- Local studies – only the Weskoppies study that revealed lower mortality rates than those found in other studies from developed countries. This discrepancy is most likely as a result of the excess mortality in the general population in South Africa.
- International studies – progressive decline in excess mortality associated with psychiatric illness internationally, since the introduction of effective psychotropic drugs. Nevertheless, all psychiatric disorders have an increased risk of premature death. It must be noted that a general problem with mortality studies in psychiatry is that in the vast majority of studies the number of patients is too small and the follow-up period too short to yield a precise estimate of mortality ratios.
- Life Esidimeni aggregate experience used over 4 years (constructed from financial statements and press releases). Gave a range of results using an extra mortality loading of +120% and +220%.
- Aggregate experience appropriate as looking for a level amount of compensation per victim.

NET DISCOUNT RATE

- Assumption setting process can look at South African case law, rates used by practitioners in South Africa, other practice areas subject to a legislated net discount rate, current market rates and international experience.
- SA case law – ranges from -0.3% to 3.0%.
- SA practitioners – range from 1.0% to 2.5% for future medical costs (average 1.75%).
- Pension Funds Act – legislated net discount rate around 1.9% in March 2016.
- Inflation linked bonds – 2.0% in March 2016.
- UK damages – 2.5% before 2017, now -0.5%.
- US damages – depends on State, evidence from forensic economists (average 1.4%).
- Canada damages – depends on Province, ranges from 0% to 3%.
- Australia damages – artificially high, ranges from 5% to 8%.
- Hong Kong damages – 2.5% for periods greater than 10 years.
- Bermuda damages – -0.25% for price inflation.

LIFE ESIDIMENI IN CLOSING

- After 43 days of evidence and 2 days of legal argument, still no reason given as to why there was such a rush to move patients.
- Manamela, Selebano and Mahlangu all testified that it was to save costs. However Creecy contradicted that evidence.
- Final decision on compensation for constitutional damages due by 9 March 2018.
- Criminal prosecutions may still follow for those found liable by relevant authorities – SAPS investigations not finalized.
- Common law claim (funeral costs and general damages) settled at R 200,000.
- It is hoped that actuarial calculations will be used to set a parameter from which compensation for constitutional damages can be derived – was the only attempt to determine “punitive constitutional damages”.

IMPORTANCE OF PRO BONO WORK

- Pro Bono means without charge.
- Some notable cases:
 - SASSA and Minister of Social Development v Lion of Africa Life Assurance Company Limited – Black Sash joined as Amicus Curiae – Roseanne prepared expert report which assisted in the Constitutional Court putting an end to direct deductions from Child Support Grants for funeral insurance.
 - Michael Komape pit toilet drowning in Limpopo.
 - Norovirus outbreak at Charlotte Maxeke Hospital where 6 babies died.
 - National Blood Transfusion Service HTLV-1 (human T-cell leukaemia) – not routinely tested for – argument that NBTS should expand the list of infectious agents for which mandatory testing is required.

TIPS WHEN PERFORMING PRO BONO WORK

- Obtain clear brief and state assignment clearly.
- Importance of peer review.
- Speak to other disciplines and seek assistance.
- Contact authors of academic papers if necessary.
- Still need to maintain independence just like any other expert witness work – your duty is always to assist the court or arbitration.
- Never assume the role of the advocate.
- Because it is for free does not mean you will not end up testifying.

QUESTIONS?

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