SELECT ESSAYS ON GOVERNANCE AND ACCOUNTABILITY ISSUES IN PUBLIC LAW

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THE LIFE ESIDIMENI TRAGEDY

A Terrible Tale of Death, Torture and Disappearance
of Utterly Vulnerable Mental Health Care Users

*Deon Erasmus**

6.1 INTRODUCTION

On 29 September 2015, the Gauteng Department of Health (“the Department”) terminated a contract with Life Esidimeni, which had been in operation for over 30 years. In terms of the contract, Life Esidimeni supplied caring facilities to mental health care users in several psychiatric homes it operated.¹ As the contract was terminated on a six-month notice period, all mental health care users had to be moved out of the Life Esidimeni facilities by 31 March 2016. This led to random mass discharges of patients. The closure date of the facilities was later extended to 30 June 2016. The decision to terminate the contract necessitated the moving of 1,711 patients between October 2015 and the end of June 2016. These mental health care users were moved to hospitals and non-governmental organisations selected by the Department and some were returned to their family homes.²

The three reasons for the termination of the contract advanced by the Department were a policy requirement to deinstitutionalise mental health care users, concerns raised by the Auditor-General regarding the duration of the contract and budgetary constraints.³

1 *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project (Claimants) and National Minister of Health of the Republic of South Africa and Others (Respondents)* par 23 <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf> (2018-11-15). Hereinafter “Award”.

2 Award par 24.

3 Award par 27.

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The Department did not heed concerns raised and warnings expressed by families of the mental health care users, civil society, professional bodies and clinical personnel within the Department, before and after the termination of the contract, as to the protection of the rights and meeting of the needs of the removed mental health care users. The then member of the Executive Council, Ms Mahlangu, the Head of Department, Dr Slebano and Head of the Mental Health Directorate, Dr Manamela, proceeded with the mass removals of patients, without any involvement and consultation with the families concerned or concerned health professionals. These irrational decisions resulted in the death of at least 144 patients, excluding the 44 patients still missing. About 1,400 patients survived the gruelling conditions they had to endure after their forced removal from Life Esidimedi facilities.⁴

In this chapter, the “harrowing account of the death, torture and disappearance of utterly vulnerable mental health care users in the care of an admittedly delinquent provincial government” will be discussed with reference to Fineman’s vulnerability theory and the need for a responsive state.⁵ Issues concerning constitutional damages and the reaction to the arbitration award will in addition be discussed.

6.2 THE ARBITRATION HEARING

The Life Esidimedi Arbitration was established pursuant to a recommendation of the Health Ombud’s report into the matter.⁶ The dispute was referred to a single arbitrator, retired Deputy Chief Justice Dikgang Moseneke (“the arbitrator”) subject to a written arbitration agreement signed on 8 September 2017 in terms of the provisions of the Arbitration Act 42 of 1965. The arbitration proceedings started on 9 October 2017 and ended on 9 February 2018. The hearings, at which 60 witnesses testified, ran for 45 days, including two days of legal arguments.⁷

The core dispute that had to be determined was the nature and extent of equitable redress, including compensation due to mental health care users and their families who were negatively affected by the closure of the Life Esidimedi mental health care facilities.⁸ The State admitted unqualifiedly that it was liable to compensate the affected mental health care users and their families individually or as a group.⁹

The State contended that it was liable to compensate the families of the deceased and the surviving mental health care users or their families for their estimated

4 Award par 25.

5 See par below.

6 “Report into the circumstances surrounding the deaths of mentally ill patients: Gauteng Province” recommendation 17 <https://www.sahrc.org.za/home/21/files/Esidimedi%20full%20report.pdf> (2018-11-15).

7 Award par 4.

8 Award par 5.

9 Award par 6.

funeral expenses and common law general damages as a result of pain, suffering and emotional shock. An all-inclusive amount of R200 000 was tendered for that purpose.¹⁰

The claimants in general advanced that, apart from the general damages for which the State is obviously liable, it should also be liable for constitutional damages, as a result of the “pervasive, egregious, uncaring and wanton violations” of the constitutional rights of the mental health care users and their families.¹¹

The arbitrator found that the patients died under unlawful circumstances, as they were placed at non-governmental organisations at the instance, request and authority of the State. The NGOs willingly became agents for the State and had to care for the patients against payment of subsidies and remuneration. Both the State and its agents acted recklessly, uncaringly and contrary to the legislative framework protecting mental health care users. The State was the primary bearer of the duty of care and other constitutional duties applicable to the patients and their families. The outsourcing of these duties to ill-equipped and ill-prepared NGOs amounted to a blatant, unlawful and life-threatening disregard of the State’s constitutional and statutory duties which was the cause of multiple deaths and torture.¹²

The three State officials mentioned above testified at the arbitration hearing that they had no reason to believe that the displaced mental health care users would die or suffer severe ill treatment and torture. The arbitrator held that this response was so improbable that it had to be false.¹³ The reasons for the termination of the contract were rejected by the arbitrator and described as “neither cogent nor rational”.¹⁴ Evidence was led at the hearing that de-institutionalisation was expensive and ordinarily not a cost-saving measure.¹⁵ The mental health care users as well as the NGOs to which they were transferred were not adequately prepared for the move.¹⁶

In the following section, the details of the award issued by the arbitrator will be set out.

6.3 THE ARBITRATION AWARD

On 19 March 2018, the arbitrator made the following monetary award:¹⁷

1. The Government (as represented by the National Minister of Health, the Premier of Gauteng and MEC of Health: Gauteng Province) was ordered to

10 Award par 10. Some claimants accepted this offer.

11 Award par 10.

12 Award par 79.

13 Award par 26.

14 Award par 28.

15 Award par 29.

16 Award par 31.

17 Award par 226.

pay an agreed amount of R20 000 to each of the claimants listed in respect of funeral expenses.¹⁸

2. The Government was ordered to pay R180 000 to each of the claimants in respect of general damages for shock and psychological trauma.
3. The Government was ordered to pay R1 000 000 to each of the claimants as appropriate relief and compensation for its “unjustifiable and reckless breaches of section 1(a), (c) and (d), section 7, section 10, section 12(1)(d) and (c), section 27(1)(a) and (b) and section 195(1)(a), (b), (d), (e), (f) and (g) and multiple contraventions of the National Health Act 61 of 2003 and the Mental Health Care Act 17 of 2002 that caused the death of 144 mental health care users and the pain, suffering and torture of 1 418 mental health care users who survived and their families”.
4. The parties also agreed to have a place of remembrance or monument erected for the victims of the Gauteng Mental Health Marathon Project and counselling for the bereaved family members. The purpose of this monument must serve as a reminder to future generations of the human dignity and vulnerability of mental health care users.
5. Government was further ordered to provide the Health Ombud and the claimants or their legal representatives with a recovery plan with the purpose to achieve a systemic change in the provision and delivery of mental health care in Gauteng. This recovery plan had to be delivered within 6 months of the publication of the award and thereafter every 6 months until the conclusion of the recovery plan.
6. The arbitrator in addition ordered that the conduct of certain of the professional health officers should be reported to their respective professional bodies.
7. The Government was lastly ordered to pay the party and party legal costs of all the claimants.

In the following section, the legislative framework within which the duties and responsibilities of the Government relating to the care of mental health care users will be set out and discussed.

6.4 THE LEGISLATIVE FRAMEWORK

The National Health Act 61 of 2003 and the Mental Health Care Act 17 of 2002 are the primary legislative instruments applicable to mental health care users. These acts aim to give effect to the progressive realisation of the constitutional right of access to health care services. Section 27 of the Constitution provides that every person has the right to have access to health care services, including reproductive health care, and also states that no person may be refused emergency treatment. According to

18 Those who accepted the offer of the Government of R200 000 previously were excluded from this award.

section 7(2) of the Constitution, the government must respect, protect, promote and fulfil the rights set out in the Bill of Rights.

In relation to health care services, this means that government must *respect* the right of access to health care services by not unfairly or unreasonably obstructing access to existing health care services, whether in the public or private sector; *protect* the right by developing and implementing a comprehensive legal framework to ensure access to health care services and *promote* the right by creating a legal framework ensuring that individuals realise these rights themselves.¹⁹

In terms of the National Mental Health Policy Framework and Strategic Plan,²⁰ an important objective of the policy is the promotion and protection of the human rights of people living with mental illness.²¹

The government also has international law obligations regarding the rights of mental health users. The Universal Declaration of Human Rights,²² for instance, declares that no one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment²³ and guarantees the right to security in the event of sickness or disability.²⁴

The African Charter on Human and People's Rights²⁵ provides in article 16 that every individual shall have the right to enjoy the best attainable state of physical and mental health and states that parties are under an obligation to take the necessary measures to protect the health of their people.

In terms of the preamble to the Convention on the Rights of Persons with Disabilities,²⁶ parties must promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and promote respect for their inherent dignity.

The United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care²⁷ sets the standard of the best available mental health care within the health and social care system, which includes the right

19 "The Constitution and public health policy" 33 <https://section27.org.za/wp-content/uploads/2010/04/Chapter2.pdf> (2018-11-20).

20 2013-2020. The framework had become national policy after extensive consultation and the adoption of the Ekurhuleni Declaration on Mental Health in April 2012.

21 Framework par 5 <https://www.health-e.org.za/wp-content/uploads/2014/10/National-Mental-Health-Policy-Framework-and-Strategic-Plan-2013-2020.pdf> (2018-11-20).

22 Adopted by the UN General Assembly resolution 217A(III) on 10 December 1948.

23 Art 5.

24 Art 25(1).

25 Adopted by the General Assembly of the OAU on 27 June 1981 and entered into force on 21 October 1986, ratified by South Africa on 10 October 1997.

26 Adopted at the UN Headquarters on 13 December 2006 Preamble.

27 Adopted by the UN GA on 17 December 1991 as Resolution 46/19.

to be treated with humanity and respect for the inherent right to human dignity and protection from physical or other abuse and degrading treatment.

From the aforementioned legal framework, it is clear that the State has the duty to care for and protect the rights of mental health care users. In the next section, the position of mental health care users will be discussed within the framework of Fineman's vulnerability theory.

6.5 FINEMAN'S VULNERABILITY THEORY

In current human rights rhetoric, "vulnerability" is normally referred to in collective terms. Vulnerable groups should be afforded special protection, it is argued, because their rights are perceived to be particularly at risk of being violated. The rights of these vulnerable groups are consolidated in group-differentiated categories of rights, due to specific character traits or specific experiences the group members share.²⁸

Some groups, such as children, due to their relative immaturity and developing character, are viewed by default as requiring special protection.²⁹ Vulnerability is mostly associated with concepts such as victimhood, deprivation, dependence or pathology. So, for example, in health discourse persons infected with HIV-AIDS are classified as a "vulnerable population". Other examples include those living in poverty or confined to state institutions, such as prisons and mental health care facilities. Fineman³⁰ correctly submits that children and the elderly are "prototypical examples" of sympathetic vulnerable groups.

Fineman³¹ defines the human condition as one of universal and continuous vulnerability. She describes vulnerability as a condition which arises from our human embodiment, which is exposed to an omni-present possibility of being exposed to harm, injury and misfortune. The influence of these factors may vary in intensity and may occur accidentally or intentionally. Individuals may attempt to lessen the occurrence of these risks or mitigate the impact thereof, but the possibility of them occurring cannot be eliminated and therefore they are beyond human control.³²

This has the result that there is an ever-present possibility that humans may become dependent on others as a result of biologically-based catastrophes such as diseases or epidemics. Humans are in addition vulnerable to physical forces occurring in the environment they live in, such as fire, floods, drought and famine.³³

28 "The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration" <http://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-11.3.pdf> (2018-11-25).

29 Above.

30 Fineman "The vulnerable subject: anchoring equality in the human condition" 2008 *Yale Journal of Law and Feminism* 18.

31 Fineman "Vulnerability and inevitable inequality" *Oslo Law Review* 133.

32 Fineman (n 30) 9.

33 Above.

Human vulnerability is experienced by each individual in a unique manner as each individual is positioned in a different way “within a web of economic and institutional relationships”.³⁴ Due to the fact that individuals cannot avoid the state of vulnerability, humans turn to societal institutions to assist and protect them against their inherent vulnerability. She argues that society cannot eliminate human vulnerability but can and does address human vulnerability by introducing programmes, institutions and structures for that purpose. Any vulnerability analysis will thus include individual and institutional components.³⁵

She develops the theory further by stating that human vulnerability and the need for connection and the care generated in the process motivates humans to reach out and form a society. This brings “individuals into families, families into communities and communities into societies, nation states, and international organizations”.³⁶

The state legitimised and empowered social institutions. These institutions can assist some to recover quickly from their difficulties while other institutions impact negatively on the recovery process. The state accordingly must accept responsibility for the conduct of these institutions.³⁷

Fineman³⁸ argues that the actions of state-empowered institutions should be scrutinised as to their role in providing assets in ways that may, even though not intentionally, unfairly privilege certain persons or groups. Just as is the case with individuals, institutions are also vulnerable both to internal and external forces. Empowered institutions are capable of being captured or corrupted. They can be harmed or grow too big and become ineffective. These institutions nevertheless have a pivotal role to play in addressing the vulnerability of individuals. It is thus imperative that they exercise their powers in a non-discriminatory manner so as neither to favour nor disadvantage individuals or groups. What is important is that the institutions should be structured in such a way that they can respond fairly to the shared human vulnerability. If they fail in exercising this duty fairly, the state would have to rectify the position by either justifying the unequal treatment or acting positively to adjust the institutional arrangements.³⁹ Lessig is of the view that institutional corruption occurs when an ostensibly legal or current ethical strategy of an institution has the effect that it undermines the effectiveness of the institution by weakening its ability to achieve its purpose. This may lead to the weakening of the institution’s purpose or the public’s trust in the institution.⁴⁰

34 Fineman (n 30) 10.

35 Above.

36 Fineman “Equality, autonomy, and the vulnerable subject in law and politics” in Fineman and Gear (eds) *Vulnerability: Reflections on a new ethical foundation for law and politics* 13-22.

37 Kohn “Vulnerability theory and the role of government” 2014 *Yale Journal of Law & Feminism* 1 6.

38 Fineman (n 30) 18.

39 Fineman (n 30) 19.

40 Lessig “Institutional corruption defined” 2013 *Journal of Law, Medicine and Ethics* 3 2.

The vulnerability theory accordingly argues for the development of a more responsive state. The state is constituted for the common benefit of all and not for a select few. The state thus has the obligation to ensure that its empowered institutions do not unduly privilege any group over another.⁴¹

The vulnerability theory of Fineman provides a useful theoretical framework to explain the role of the state in the protection of the rights of vulnerable groups, such as mental health care users. It is submitted that mental health care users who are cared for in state-empowered institutions or NGOs who are appointed by the state to care for mental health care users are a vulnerable population. Due to their vulnerability, the state should be responsive to their needs. It is clear that the decisions taken by the state officials during and after the move of the mental health care users and their reaction to the catastrophic consequences is indicative of institutional corruption within these state-empowered institutions.⁴² This calls for a scrutiny of the structure and actions of these institutions in order that they may be more responsive to the needs of mental health care users. This will necessitate serious adjustments of the institutional arrangements and leadership structures thereof.

These adjustments of institutional arrangements can only be achieved through political and administrative accountability. Public office bearers and government officials should act in the best interests of society.⁴³

In the following section, the nature and application of constitutional damages as a measure of redress for the violation of constitutional rights will be set out, with reference to the arbitration award.

6.6 CONSTITUTIONAL DAMAGES AS A MEASURE OF REDRESS

The Government resisted the claims for constitutional damages on two grounds. It firstly argued that once a claimant has been compensated under common law, she or he may not rely on the Constitution to seek redress.⁴⁴

In terms of section 38 of the Constitution, anyone listed in the section, who alleges that a right in the Bill of Rights has been infringed upon or threatened, has the right to approach a competent court, which court may grant appropriate relief, including a declaration of rights. In the case of *Fose v Minister of Safety and Security*,⁴⁵ the Constitutional Court entertained a claim for exemplary damages against the Minister of Police as a result of alleged torture committed by members of the police service.

41 Fineman "The vulnerable subject and the responsive state" 2011 *Emory Law Journal* 251 273-4.

42 Lessig (n 37) 3.

43 <https://www.news24.com/MyNews24/political-accountability-denied-20170317> (2020-03-11). The aspect of responsiveness and accountability is further discussed in par 7 below.

44 Award par 212.

45 1997 3 SA 786 (CC).

Before evidence was led, the case served before the Constitutional Court for it to determine whether a claim for punitive damages was a competent claim in terms of the Constitution. The plaintiff instituted a delictual claim for damages. The court had to decide whether the plaintiff was entitled to constitutional damages, inclusive of punitive damages, in addition to ordinary delictual damages.⁴⁶

The court held that “appropriate relief” would include a claim for damages, but that it was not appropriate in this case to award punitive damages. The court was of the view that in many cases the common law will be broad enough to provide all the relief that would be appropriate for the particular breach of constitutional rights. Each case would depend on its own facts.⁴⁷ The court, however, indicated that the courts have a responsibility and should “force new tools” and shape innovative remedies to achieve proper enforcement of constitutional rights via the courts.⁴⁸ It is submitted that the approach of the court to award constitutional damages was conservative and that the court viewed the common law remedies as the starting point when considering damages for the infringement of constitutional rights.

In *MEC Department of Welfare, Eastern Cape v Kate*,⁴⁹ constitutional damages were awarded to the plaintiff as a result of the systemic failure by the Eastern Cape Provincial Government to honour its constitutional obligation to pay social grants to those who qualify for it. Mrs Kate applied for a disability grant in April 1996, but was only informed in August 1996 that her grant was approved. She claimed the amount that had accrued to her since the approval of her application, plus interest. The High Court awarded interest, including interest from the date that her application was made. The plaintiff was not entitled to interest for this period, as the debt did not accrue to her upon making application for the grant. The Supreme Court of Appeal awarded constitutional damages based on the fact of the systemic and continued failure of the provincial government to deliver social grants.⁵⁰

The court was mindful of the fact that Mrs Kate suffered direct financial loss as the grant was destined to be consumed and not invested but the loss for her was “just as real”.⁵¹ The court commented that to be held in poverty is a cursed condition and that apart from the physical discomfort of her deprivation her human dignity was reduced. Being unlawfully deprived of a grant that is required for her daily survival amounts to an unnecessary extended endurance of her condition as long as the unlawful deprivation continues. The court indicated that there is no empirical

46 Compare Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2015) 4-5 267-278. See also O'Regan “Fashioning constitutional remedies in South Africa: some reflections” 2011 *Advocate* 41-43.

47 Fose par 60.

48 Above par 69.

49 2006 4 SA 478 (SCA).

50 Above par 33.

51 Above.

monetary yardstick against which to measure a loss of this kind.⁵² In this case, the approach of the court was conservative in the sense that the court was mindful to award damages actually suffered and not as a punishment to the state.

In the matter of *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,⁵³ the Supreme Court of Appeal had to entertain the issue of how to protect the property rights of a private land owner whose land had been unlawfully occupied by approximately 40,000 homeless people after they were evicted by the state. The court also had to balance this issue with its duty to protect the housing rights of the unlawful occupiers. A side issue which arose was whether the court may order an organ of state to expropriate property. The Supreme Court of Appeal and subsequently the Constitutional Court left this issue undecided and applied the novel remedy of constitutional damages.⁵⁴

Regarding constitutional damages, the court highlighted the advantages of this remedy as it compensates the property owner for the unlawful occupation of its property in violation of its rights on the one hand. On the other hand, it ensures that the unlawful occupiers will continue to have accommodation until suitable alternatives are found. In addition, it relieves the state of its urgent duty to find such alternatives. The court in addition held that the difficulty in quantifying the compensation may be met by employing the provisions of section 12 of the Expropriation Act 63 of 1975.⁵⁵ The court in this matter as well did not award punitive damages to the property owner but compensated the owner in terms of existing legislation relating to expropriation.

In the *Life Esidimeni* matter, the arbitrator held that the actions of the state and its officials violated the constitutional rights of the mental health care users who had died, the patients who survived and the family members of these patients, who were powerless to prevent it.⁵⁶ Not only did the treatment of the mental health care users during the transfer and thereafter violate their constitutional right not to be treated in a cruel, inhuman or degrading way, it also impacted on the right to life, freedom and security and the rights to access to adequate health care and sufficient food and water. As for the families of the mental health care patients, the arbitrator held that they entrusted the government to take care of their loved ones but were denied the opportunity to participate or to be informed of decisions made in respect of them. This violated the right to family life as it deprived the family of an opportunity to take decisions in the best interests of the health of their loved ones.⁵⁷

⁵² Above.

⁵³ 2004 3 All SA 169 (SCA).

⁵⁴ Above par 59. See also Dugard "Modderklip revisited: can courts compel the state to expropriate property where the Eviction of Unlawful Occupiers is not Just and Equitable? 2018 21 *PER/PELJ* 1.

⁵⁵ This section determines how the amount of compensation for expropriation of land should be calculated.

⁵⁶ Award par 185.

⁵⁷ Award par 196.

In *Komape v Minister of Basic Education*,⁵⁸ a five-year-old boy, Michael Komape, was attending his third day of primary school, when he fell into a dilapidated pit toilet at school and died as a result of suffocation.⁵⁹ This matter was decided after the delivery of the *Life Esidimedi* award. The plaintiffs instituted a delictual claim for emotional shock and trauma experienced by the family as a result of Michael's gruesome death.⁶⁰ In the alternative, they claimed punitive damages as a penalty and deterrence for the wrongful conduct that caused the death of Michael.⁶¹ The plaintiffs contended that the court should develop the common law as they do not have an effective remedy for compensation and that compensatory damages in view of the facts of the matter are integral to vindicate them for the breach of their constitutional rights and duties.⁶²

The court referred to the case of *Jones v Krok*⁶³ where an award for punitive or exemplary damages was described as "contrary to public policy". The court pointed out that the rationale of a claim for delictual damages is not to enrich a claimant, but to serve as compensation for the loss suffered. In the court's view, the constitutional damages claimed by the plaintiffs amounted to nothing short of a claim for punitive damages.⁶⁴ The court was of the opinion that a successful claim for punitive damages would over-compensate the Komape family, which would not be in the interests of society.⁶⁵ In the court's opinion, a structural interdict would be a just and equitable remedy which would effectively vindicate the Constitution. The best interests of all learners at school where pit toilets are still in use will have to take preference. Such an interdict will compel the state to comply with its obligations in terms of the Constitution.⁶⁶

The matter was taken on appeal to the Supreme Court of Appeal⁶⁷ where the court again addressed the issue of constitutional damages and held that this type of damages is awarded in respect of financial loss which would otherwise not have been catered for at common law.⁶⁸ The court further indicated that there is no reported decision in South Africa where constitutional damages were awarded as compensation for a breach of a right not resulting in direct or indirect financial loss, or where compensation of this kind was awarded for a physical or psychiatric

58 [2018] ZALMPPHC 18 (23 April 2018).

59 *Komape* par 17–19.

60 Above par 10.

61 Above par 7.

62 Above par 9.

63 1995 1 SA 677 (SCA) 696 C-H.

64 *Komape* above par 67.

65 Above par 68.

66 Above par 70.

67 *RK v Minister of Basic Education* [2019] ZASCA 192 (18 December 2019). The appellants appealed as the court *a quo* also dismissed their claim for damages for emotional trauma and shock. This aspect is not discussed as only the issue of constitutional damages is relevant to this contribution.

68 *RK* par 58.

injury.⁶⁹ Such further damages would amount to a punishment for the breach of a right in addition to the compensation already granted for damages suffered as a result of a physical or psychiatric injury.⁷⁰

The breach of rights involved a failure to provide proper sanitation facilities at a large number of schools which affected the rights of a large number of scholars across the Limpopo province. The public purse should be utilised for the benefit of all the scholars rather than paying the appellants a large additional award in constitutional damages in order to vindicate the rights of all scholars to proper sanitation facilities. The court accordingly held that there was no room for an award of constitutional damages.⁷¹

The court referred to the award in *Life Esidimedi* and commented that the award recognised the rights of the families of health care users who died and awarded compensation as constitutional damages. In view of the fact that the award was not binding and the facts differed substantially from the facts *in casu*, the award was not relevant authority.⁷² Mukheibir and Mitchell⁷³ correctly suggest that the purpose of the *Life Esidimedi* award is in the nature of an award for aggravated or even punitive damages, although these terms were not used in the award.

Some reservations were, however, levelled against the high amount of the monetary compensation awarded as constitutional damages. Mackie⁷⁴ correctly states that no one who is familiar with these tragic and cruel events would begrudge the survivors or their families their award. He however cautions that if one looks beyond the circumstances of this tragedy, the details of the award could be a cause for concern. He submits that the large monetary amount and symbolism of the award is problematic for the reasons listed below.

Almost any shocking or outstanding delict committed by the state or its officials may be moulded as a violation of constitutional rights. Remoulding a delict in this way should not be a reason why the existing common law remedies should not be used to vindicate the rights of the claimant. The argument that shocking, appalling or very complicated delicts cannot be properly vindicated within the common law remedies is in his opinion not convincing. The claims are delicts and compensation should be calculated within the rubric of the common law.⁷⁵

69 Above.

70 Above par 59.

71 Above par 63.

72 Above par 62.

73 Mukheibir and Mitchell "The price of sadness: comparison between the Netherlands and South Africa" 2019 22 *PER/PELJ* 18.

74 Mackie "The problem with the Esidimedi arbitration award" <http://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-11.3.pdf> (2019-02-04).

75 Above.

He views the arbitrator's disregard for the going rate for general damages by the courts as "damaging" and argues that no amount of money can ever compensate a claimant for the grief and trauma associated with losing a loved one. Courts are bound by judicial precedent and accordingly do apply a going rate based on established quantification principles in order to promote consistency and fairness, leading to a fair result. The magnitude of the award places it far above the amount that a claimant could reasonably expect to be awarded in a court of law. This factor risks distorting the perception of the public of what constitutes fair compensation for delicts. Although the award, as an arbitration award, is not binding or precedent setting, it will in his opinion have an inflationary effect on similar claims which the state can hardly afford.⁷⁶

He views it as troubling when high-profiled victims of high-profile wrongdoings are disproportionately compensated as a symbol of collective disgust at a particular incident. This has the result that other victims of similarly serious wrongdoings are largely ignored by the public eye and receive considerably less compensation for similar wrongs, even if they do get the opportunity to vindicate their rights.⁷⁷

Constitutional damages were *inter alia* awarded by the arbitrator to promote the values of the Constitution and to punish the state in an effort to prevent or deter future infringements. The actual effect of the award, in his opinion, was that a very sizeable amount of money, to the tune of R135 million, in constitutional damages was taken from an already financially strained health budget and paid over to relatively few individuals.⁷⁸

The arbitrator held that the claimants' claim for compensation arising from the "invasive and pervasive" violation of constitutional rights by the state cannot readily be couched in common law terms. He came to the conclusion that there is no equivalent common law claim based on the state's breach of the right to access to health care, the right to food and water, freedom from torture and protection from cruel and degrading and inhumane treatment. There is also no common equivalent for a claim breaching the rule of law or its obligations in respect of mental health users in terms of international law or domestic legislation. All these breaches let to "agonising devastation" for the families of the deceased, surviving mental health care users and their families.⁷⁹

The arbitrator decided that the going rate for compensation for psychological injury and shock, which might be R180 000, is insufficient viewed in light of the massive proportions of this case.⁸⁰ The "narrow and dated structures" of the common

76 Above.

77 Above.

78 Above.

79 Award par 217.

80 Award par 219.

law only, was, in his opinion, not sufficient to address the uniqueness and full complexity of the case at hand.⁸¹ He also decided not to differentiate between classes of claimants as such a differentiation would lead to an uneven and unjust outcome and accordingly decided on a uniform award.⁸²

The common law relief available to the families of the mental health care users was very limited as their claim did not include a claim for loss of support which, in most cases, forms the largest part of a dependent's action.⁸³

Whittaker⁸⁴ notes that there is no actuarial formula prescribed by actuarial practice notes or established South African case law for the calculation of constitutional damages. Section 27, the NGO assisting some of the claimants, prepared an actuarial report which was presented at the arbitration proceedings as expert evidence. He comments that the claim of the families of the deceased was not a straightforward loss of earnings claim and it was therefore not necessary to use an actuarial calculation to formulate the value of the claim. He points out that there is "no manual for calculating the monetary value of life; nor of the price-tag of the grief and trauma that the families have endured".⁸⁵

He correctly argues that it was critical that whatever method was going to be employed to quantify this loss had to be deeply rooted in the constitutional values of equity and fairness. The only monetary measure that was available to apply to the health care users was the costs of their maintenance in the Life Esidimeni facilities or alternative facilities for the remainder of their lives. At the time of the transfer of the mental health care users, the state was paying subsidies to Life Esidimeni, which would have been paid as long as the users lived. The calculation of the amount that would have been spent on the deceased as dependants of the state, had the transfer not occurred and the deceased survived, can be viewed as an unlawful saving to the state.⁸⁶

He suggests that the following guidelines should be applied when a stand-alone claim for constitutional damages is considered judicially. In certain cases, the common law remedies may not provide an adequate remedy for the breach of constitutional rights. The granting of constitutional damages should not be awarded to avenge the death of a person but to affirm rights. The claimants should display a persistency in their efforts to end the unlawful infringement of a constitutional right. It is not necessary that the loss should be a direct financial loss. Other forms of loss, such as the reduction of a person's human dignity, are also an empirical monetary standard

81 Above.

82 Award par 220.

83 Whittaker "The Life Esidimeni arbitration and the actuarial quantification of constitutional damages" 3 <https://www.actuarialsociety.org.za/wp-content/uploads/2018/10/2018-Whittaker-FIN.pdf> (2019-02-05).

84 Above 3.

85 Above 13.

86 Above 3-4.

against which a claim may be assessed. Factors that will play a role in this assessment include the multitude and seriousness of the constitutional breaches and the presence of arbitrary state power. Punitive damages do not form part of South African law but the role of the vindication of the right and the deterrence of future violations of the right in question can serve as justification to award compensation. In conclusion, he argues that the actuarial calculation of constitutional damages should be structured so as to be fair to the claimants and the state; be limited to an amount not more than what the state would have expended had the violation not occurred and have the result that a uniform award across various categories of claimants be awarded so as to treat each affected life the same.⁸⁷

Other facets of the award, such as those relating to responsiveness and accountability of the state and its officials, will be addressed in the next section.

6.7 RESPONSIVENESS AND ACCOUNTABILITY

Responsiveness can be defined as the degree to which governments are attentive to what people want and their willingness to act on it. It also reflects on those public policies and institutions which respond to the needs of citizens and uphold their rights.⁸⁸ Accountability refers to the ability of citizens, civil society and the private sector to scrutinise the policies and actions of government and its institutions and to hold them accountable thereto.⁸⁹

The arbitrator accurately alluded to the fact that the Constitution holds public officials to be responsive to the plight and reasonable requests and demands of citizens. The officials responsible for the closure of the Life Esidimeni facilities insinuated in their evidence that they were entitled to “empty” the facility as the families had abandoned the mental health care users. Because of this abandonment, they did not have to give anyone notice of the closure of the facility. He accepted that there may have been family members who had not visited their loved ones at the facility over an extended period. However, he rejected these claims as without merit as the claimants in the arbitration relate to a fraction of the total number of mental health care users with who died or survived the ordeal.⁹⁰

The commitment of the claimants is evident from their persistent steps to commence the arbitration proceedings, their protests over the planned transfers, their negotiations and pleas not to move their loved ones, their engagement with public interest litigators of section 27, their involvement in organised public protest marches at which they tendered memoranda to public officials and alerted the print

87 Above 27.

88 Van Donk and Williams “In search of responsible and responsive local governance” 11 https://www.ggln.org.za/images/soig_reports/SoLG_2015.pdf (2019-02-12).

89 “The contribution of government communication capacity to achieving good governance outcomes” 2 <http://siteresources.worldbank.org/EXTGOVACC/Resources/BriefGovCommCapacity.pdf> (2019-02-12).

90 Award par 197.

and electronic media to make their plight public. After the blind transfer of their loved ones, the families searched for them. Some families whose loved ones died went and retrieved their bodies and buried them at their own cost.⁹¹

The arbitrator also correctly indicated that the inquiry is not about what the families of the users did, but rather about what the officials refused or neglected to do, namely to stop the mass transfer of users to NGOs not fit for the purpose. After knowing all the facts and risks, they elected not be responsive to the reasonable and lawful requests and demands of the claimants.⁹²

The Constitution proscribes a public service motto of *Batho Pele* which requires public servants who are responsive to the reasonable grievances of citizens and others within our borders. This includes the readiness to respond and alleviate these concerns, as well as the protection and promotion of the rights afforded to them. This did not happen in the present case.⁹³

As to the accountability of the officials in question, the arbitrator indicated that the answers of Ms Mahlangu to questions put to her in the provincial legislature were “objectively inaccurate and misleading”.⁹⁴

The arbitrator referred to the “larger question of accountability for the entire Marathon Project and its toxic aftermath”. He indicated how the officials acknowledged the pain caused to the families and the torture endured by the survivors. They apologised in a tearful or near-tearful way but, despite their position of power and authority, they refused to take full responsibility for the administrative and political decision which led to this tragedy.⁹⁵

The arbitrator commented that Ms Mahlangu had resigned from her position as a member of the Executive Council after the publication of the findings of the Ombud. By doing so, she had at least taken political responsibility for the woeful failing of the Department she headed.⁹⁶

From this section, it is clear that the arbitrator evaluated the actions of the various officials against the requirements of responsiveness and accountability. It is submitted that he correctly held that the officials failed both requirements as stipulated in sections 1 and 195 of the Constitution miserably.

It is clear that from the outset that the arbitrator viewed the mental health care users as “utterly vulnerable”.⁹⁷ As indicated above, Fineman argues that factors such as

91 Award par 198.

92 Award par 199.

93 Award par 200.

94 Award par 201.

95 Award par 202.

96 Award par 206.

97 Award par 1.

dependence or pathology, as well as persons confined to state institutions, like the health care users in this case, qualify them to be classified as a vulnerable population.⁹⁸

The Department of Health and its officials are empowered by the state to provide care to the health care users as a result of their vulnerability. The families of the health care users entrust their loved ones into the care of the state and its officials. These officials have a pivotal role to play in addressing the vulnerability of the health care users. As pointed out above, Fineman correctly argues that state-empowered institutions are capable of being captured or becoming corrupt and in the process they can become ineffective.⁹⁹ These institutions can also fail in their caring mission as a result of bad or incorrect decisions by its leadership. The decay and ineffectiveness of these institutions which may harm the rights of vulnerable groups may take place unintentionally, but it is submitted that the arbitrator correctly held that the actions of the officials involved and the state acted in a reckless and uncaring manner and contrary to the statutory provisions aimed at protecting mental health care users. Despite the fact that the state attempted in a “blatantly unlawful and life-threatening way” to outsource these duties to ill-equipped and under-prepared NGOs, the state still owed a continued duty of care and other constitutional duties to the health care users and their families.¹⁰⁰ Under such circumstances, Fineman argues that the state would have to rectify the position by acting positively by adjusting the institutional arrangements.¹⁰¹

One way of adjusting institutional arrangements is for a court to issue a structural interdict to effectively vindicate the constitutional rights of vulnerable groups.¹⁰² Government and its officials attached to government institutions can in this manner be held accountable for institutional corruption. Another method to ensure that government institutions fulfil their constitutional mandate is for a court to appoint a special master or curator to oversee court-supervised institutional transformation.¹⁰³

6.8 CONCLUDING REMARKS

Section 27 noted that the arbitration process was set up in order to provide information as well as to provide redress and closure to the mental health care users and their families. The award handed down by the arbitrator has generally been welcomed and was hailed as a major step towards a new culture of accountability in the civil service. Section 27 applauded the fact that MEC Mahlangu had resigned and that Dr Selebano and Dr Manamela followed suit by resigning as well.¹⁰⁴

98 Fineman (n 30) 8.

99 Fineman (n 30) 10.

100 Award par 79.

101 Fineman (n 30) 8.

102 *Komape* par 70.

103 See in this regard Erasmus and Hornnigold “Court supervised institutional transformation in South Africa” 2015 18 7 *PER/PELJ* discussion of this aspect falls outside the scope of this contribution.

104 <http://section27.org.za/2018/03/section27-welcomes-life-esidimeni-arbitration-award/> (2019-02-03).

The award and the actual hearings may be viewed as a restorative justice process for the claimants and starting point of obtaining closure. The effect of the arbitration process had extended effects apart from the award itself. It touched on issues such as the responsibility and responsiveness of the state towards the people of this country. It highlighted the constitutional values and duties of legality and accountability. It clearly put the spotlight on structural problems and bad decision-making within the South African mental health care governance. In conjunction with the Ombud's report, it lays the foundation for future action to hold government officials and NGOs who act on behalf of the government accountable.¹⁰⁵

The award is seen as a major step towards a new culture of state accountability.¹⁰⁶ The process, in addition, emphasises the pivotal role NGOs such as section 27, the South African Depression and Anxiety Group, the South African Federation for Mental Health and the Society of Psychiatrists play in advancing and protecting the rights of vulnerable groups.

The role of Legal Aid South Africa should also be commended as this organisation funded the representation of the claimants. In this regard, the Chief Legal Executive, Patrick Hundermark, remarked that "funding precedent-setting matters that promote the rights of communities is a key part of the delivery of Legal Aid South Africa's mandate to ensure access to justice for all. Such impact litigation matters affect many people; in this instance, a large number of vulnerable mental health care users who desperately needed justice to be upheld".¹⁰⁷

The criticism levelled against the high amount of monetary compensation awarded as constitutional damages is not without merit. The total sum paid to all 134 claimants amounted to R159.46 million. Such an amount could have contributed considerably towards the improvement of mental health care in South Africa.¹⁰⁸ The Democratic Alliance reported that it obtained information that the Gauteng Department of Health has received an additional 200 new claims for financial compensation from families of health care users who survived the Marathon Project move. If successful, the payments that will be made to these claimants would amount to almost R236 million.¹⁰⁹

105 Toxopeüs "Life Esidimeni arbitration: The legal basis for granting the award" <https://hsf.org.za/publications/hsf-briefs/the-life-esidimeni-arbitration-the-legal-basis-for-granting-the-award> (2019-02-03).

106 <http://section27.org.za/2018/03/section27-welcomes-life-esidimeni-arbitration-award/> (2019-02-10).

107 Above.

108 The basis for the granting of constitutional damages and the amount involved is also not in line with the principles laid down by the courts as set out in par 6 above.

109 "DA says 200 new Life Esidimeni compensation claims received" <https://www.iol.co.za/news/south-africa/gauteng/da-says-200-new-life-esidimeni-compensation-claims-received-16852842> (2019-02-20).

One can only trust that Government and its officials will indeed adopt a culture of responsiveness and accountability. Although health minister Aaron Motsoaledi apologised for the ordeal, he did not accept political responsibility by tendering his resignation.¹¹⁰

In September 2018, the Eastern Cape Department of Health published a R120-million tender to outsource chronic mental health care in the province. Seven hundred adult and 180 paediatric mental health care users are being cared for in Life Esidimeni facilities in Kirkwood and Bethelsdorp. In the tender, emphasis was placed on the reintegration of mental health patients back into their communities. In addition to chronic care, prospective service providers were required to tender for community-based initiatives to achieve the proposed integration.¹¹¹ This proposed action has distinct undertones of the Marathon Project of the Gauteng Department of Health.

When cross-examined by the legal counsel for Legal Aid during the arbitration process, former MEC for Health, MS Qedani Mahlangu, was asked whether human rights considerations were taken into account during the implementation of the Marathon Project. She responded as follows: "I am not a prophet. Now I know that the human rights of patients were violated, but it was not intentional and that's important. If I were a prophet, maybe I would have seen and had the foresight, but I am not a prophet."¹¹²

The former MEC did not need prophetic foresight. It would have sufficed for her and her department to be responsive and accountable towards the human rights of utterly vulnerable mental health care users.

110 "The R159-million Life Esidimeni bill has been paid" <https://www.timeslive.co.za/news/south-africa/2018-06-13-the-r159-million-life-esidimeni-bill-has-been-paid/> (2019-02-15).

111 "Mental health to be 'outsourced' in Eastern Cape" <https://www.timeslive.co.za/news/south-africa/2018-09-24-mental-health-to-be-outsourced-in-eastern-cape/> (2019-02-20).

112 "#LifeEsidimeni: I am not a prophet, says former MEC" <https://www.iol.co.za/news/south-africa/gauteng/lifeesidimeni-i-am-not-a-prophet-says-former-mec-12929128> (2019-02-20).