

## **Constitutional Dispensation for Health and Healthcare: Is it working?**

We have just witnessed a tragic drama unfolding right before our eyes in the Gauteng Province, in which more than 100 psychiatric patients (and counting) died needlessly due to neglect and lack of appropriate health care, this as a result of administrative incompetence and political arrogance within the provincial government.

When it became public knowledge that an unusual pattern of deaths was occurring among psychiatric patients in the Gauteng Province, Minister of Health Aaron Motsoaledi requested the Ombud for Health to investigate. The Ombud's Report was released recently.

Towards the end of 2015, the provincial minister of health (or MEC) for the Gauteng Province, Qedani Mahlangu, announced that she was terminating the contract with the long-time private provider, Life Esidimeni (Place of Dignity).

The reason given for relocating these patients from a facility that had offered quality in-patient care, including treatment and rehabilitation, for publicly funded patients with chronic psychiatric disorders and severe intellectual disability for some years, was that the cost had become too high.

It is clear that the decision was taken without consulting the national Department of Health, and was implemented in direct defiance of directives from the national Department.

It is also clear that the decision was taken without consultation with the families of the affected patients, who were deeply anxious about the move but were utterly powerless to exert influence on their government. One desperate family member was quoted as saying: "We cried to government, we pleaded with them not to close because they told us that they are closing in March."

The decision was also opposed by some officials within the provincial administration as well as by external professionals and other stakeholders.

With the deadline of 31 March 2016 fast approaching, the province implemented what it called the Gauteng Mental Health Marathon Project whereby the patients were hastily and clumsily transferred from the Life Esidimeni hospital facility to 27 newly contracted NGO facilities scattered in various, sometimes remote locations.

The transfer was rushed and chaotic. To quote from the Ombud's Report: 'Some patients were transferred directly from sick bays, others with co-morbid medical conditions that required highly specialised care, into NGOs where such care was not available. [Moreover] frail, disabled and incapacitated patients were transported in inappropriate and inhumane modes of transport,

some without wheelchairs, [bound and carried] with bedsheets, and some were transported in open bakkies' et cetera

What is crystal clear is that at the time the decision was made to withdraw the patients from this well-established facility, no suitable alternative arrangements were in place for their continued care.

It turns out that none of these NGO facilities was licensed, and most of them were hopelessly ill-prepared to receive and provide appropriate care to the incoming patients, many of whom were severely disabled. The NGOs were not fit for purpose. The accommodation was often cramped. There were no medications, no qualified staff, and not enough food. In short, there was utter chaos, and people died.

In a sense, the callousness, the condescension and the cruelty with which these patients were treated by the Gauteng provincial government represented the zenith of human rights abuse in the health sector. It resembled a throwback to the horrors of the apartheid era so vividly described in the late 1990s ground-breaking book 'The Ambulance of the wrong colour' by Laurel Baldwin-Ragaven et al.

This event raises a whole gamut of questions and issues around the adequacy and effectiveness of constitutional protection, and whether our health system is appropriately structured to ensure efficiency and competence in the provision of health care.

## **Human rights abuses**

Mental health care users are among the most vulnerable, invisible and forgotten groups of people in our society.

However, there is no lack of constitutional provision, legislative framework or policy directives in our country aimed at protecting the human rights of the mental health care user. The problem lies in the all too common culture of indifference and, one might add, blatant disdain for people who are both sick and poor by privileged people in positions of power in our public health system.

South Africa is a signatory to numerous international human rights conventions including the Mental Health Declaration of Human Rights which asserts that mental health care users have

- The right to fully equipped medical facilities and appropriately trained medical staff in hospitals, so that competent physical, clinical examinations can be performed, and
- The right to hygienic conditions and non-overcrowded facilities, and to sufficient, undisturbed leisure and rest.

The Mental Health Act (Act 17 of 2002) specifically seeks to protect the well-being of the mental health patient. Section 11 directs that every person or health establishment providing care, treatment and rehabilitation services to a mental health care user must take steps

to ensure that users are protected from exploitation, abuse and any degrading treatment.

Our Constitution contains a Bill of Rights which protects every South African, including mental health sufferers. In this regard, it is apropos to once again quote from the Ombud's Report, which states:

‘The execution and implementation of the project showed a total disregard for the rights of the patients and their families, including but not limited to:

- The right to human dignity
- The right to life;
- The right to freedom and security of person;
- The right to privacy,
- The right to protection from an environment that is harmful to their health or well-being,
- The right of access to quality health care services, sufficient food and water and
- The right to an administrative action that is lawful, reasonable and procedurally fair.

The Life Esidimeni fiasco demonstrates once again that that laws and policies cannot, in and of themselves, protect the lives and dignity of persons with disabilities. The people and the system providing the care must themselves be fully transformed and free of prejudice.

## **The Gauteng Saga a symptom of a bigger problem**

It is important to recognise that the Gauteng crisis is not an isolated incident. It is symptomatic of a corrupt and crumbling public health system nationwide. The tale of mismanagement and human rights abuses of patients who are both sick and poor echoes across the country as provincial health departments seem to be mired in corruption and incompetence.

Writing in the Daily Maverick of 24 January 2017, Greg Nicolson warns that (quote) 'The Eastern Cape's health system has collapsed. It is riddled with corruption. There is no electricity or water, no drugs, too few doctors and nurses, no chance of an ambulance arriving, no dignity and no care'.

Some of you will be familiar with the recent report by the civil society organisation 'Section 27' entitled *Death and Dying in the Eastern Cape*, which makes for horrifying reading. It contains the personal, first-hand accounts of patients with blood-curdling in-hospital experiences.

One young woman was admitted to a level III hospital for intrauterine death at seven months. She was made to share a bed with another woman in normal labour. There was no electricity and (she says) '[w]hen it became dark, the nurses attended to the women and delivered the babies by the light of their cell phones.' Her labour was induced, and when the contractions became intense

at night, she says 'I stood up and searched in the darkness for a nurse. The nurses ordered me to walk around. I tried to tell them that something was coming out of me. They told me to walk around more. I kept telling them about the pain. By then my dead child had come out feet first, and the head was stuck inside me. The baby hung from me as I walked around the ward and tried to plead with the nurses, to beg them for relief from the pain. I was still walking around when I collapsed from the pain.'

Stories of this kind are not limited to the Eastern Cape. The systemic collapse is occurring in Limpopo, Mpumalanga and elsewhere in other provinces. One investigator who has looked at these problems across the country observes: 'The underlying problem is that there is no accountability. No one is being held properly accountable for any poor service delivery or failed outcomes. People continue to do things as they please. People know that they can get away with murder and nothing will happen to them.'

Section 27 has quite rightly summed up the situation, namely, that we are no longer dealing with the legacy of apartheid. We are dealing with the failures of democracy.

This brings us to the nub of the problem: Who is accountable?

Addressing health inequities: Whose responsibility?

In terms of the Constitution, health is a dual responsibility (or is a concurrent competence) of both the national and provincial governments. The national government is responsible for overall national policy and funding, but the provinces are responsible for managing the provincial health system autonomously.

When problems and challenges arise, we all look to Minister Aaron Motsoaledi to sort them out, but he has little constitutional authority to meddle in the day-to-day running of a provincial health department, and his advice is often ignored.

Yet he nevertheless bears responsibility as the highest figure on the totem pole.

To date, many provincial administrations are wallowing in a highly toxic mix of corruption and incompetence.

The question therefore arises: who is ultimately accountable? Where does the buck stop? Who is to blame?

Is the existing constitutional arrangement working, and is it even a structural issue?

We know money is not the problem. There is never enough money for anything, but we are spending as much if not more money on health than comparable nations. There is sufficient funding to make the system work. Compassion and respect do not cost any money.

Or, were we so brutalised by apartheid that we have become a callous, uncaring, selfish and greedy society?

These are some of the questions we need to confront.