

CONSTITUTIONAL DAMAGES AND THE LIFE ESIDEMENI DECISION

The Life Esidimeni saga has finally drawn to a close; at least as far as the arbitration process is concerned, with retired deputy chief justice Dikgang Moseneke announcing compensation to be paid to each of the claimants. The arbitration hearing itself has been hailed by Section 27 as a “major step towards a new culture of accountability in the civil service as highlighted by the rigorous cross examination of 12 senior civil servants”. Moseneke sifted through a plethora of evidence consisting of amongst others, testimony by 22 family members of deceased victims as well as 9 surviving victim’s families, 59 affidavits submitted by Section 27, 42 affidavits presented by Legal Aide and 173 exhibits. The hearing record itself consists of 3000 pages. The order by Moseneke brought closure to the legal process, with him confirming the agreement between all the parties of R 200 000.00 common law damages (R 20 000.00 for funeral expenses and R 180 000.00 for pain and suffering) and a further R 1 million granted in constitutional damages.

A claim for constitutional damages exists when a government official violates constitutional rights. This includes the right to equality, health or life etc. The awarding of constitutional damages seldom occurs in the South African legal landscape, despite our advanced constitution. Courts are inclined to rather exhaust all other forms of compensation in remedying constitutionally infringed rights. Deciding on a remedy when a constitutional right has been infringed upon requires a far more pragmatic approach than is normally the case. A court of law will first look at any additional remedy available in legislation, then turn to existing common law and finally it is obliged to develop a remedy which gives effect to the Bill of Rights.

Section 38 of the constitution governs the constitutional remedies that are available, by providing that appropriate relief may be granted for the violation or threat to fundamental rights this appropriate relief is a very general term. It is important to note that as far as possible indirect application of the bill of rights must be considered before direct application. The constitution itself limits the subject matter and the remedial competence

of courts. There are three types of constitutional damages. Firstly, declarations of invalidity, secondly prohibitory and mandatory interdicts and thirdly awards of constitutional damages. It is apparent that in the Life Esidimeni arbitration that declarations and interdicts will not be appropriate remedies in the circumstances.

The nature of constitutional remedies is to a greater extent that they should be forward looking, community orientated and structural. The awarding of damages on the hand rather requires a looking back into the past to compensate the victim and this is perhaps why there has not been much jurisprudence dealing with this subject. In determining the value of constitutional damages Moseneke would have considered a number of factors. It is evident that the violation of fundamental rights not only harms the individual, but it also harms society as a whole and consequently impedes the creation of a just and democratic society. The purpose of the available remedies is also to prevent the further infringement of rights and to defend and promote the constitution. Moseneke would have considered that vindication of the constitution is imperative as failure to do so, especially when the perpetrator is the state, will result in a society losing faith in our constitutional democracy and government. It is important that the South African society and government be consistent with the application and enforcement of the bill of rights and be held accountable where it falters in this duty.

Interestingly the effectiveness of the chosen remedy is perhaps the greatest indictment against the health department. It is evident that the decision to grant such a large sum for constitutional damages was to serve as an effective way of correcting a wrong propagating by the very organs which have been established to protect the victims. The nature of the violation and the impact of it on the victims would also have been considered. It goes without saying that the conduct of the health department does not engender faith in the government as a whole. The awarding of damages in some way serves to re-assure society that their rights are protected and that there is some recompense for the violation of these absolute rights.

The recommendation to grant constitutional damages was made by the advocate representing the victims and their families. It was not supported by the State Advocate, who cynically argued that constitutional damages could only be awarded to the victims and not their families, and that as the victims were deceased no such damages could be awarded. The State seemed to completely disregard the purpose of constitutional damages and displayed a shocking lack of insight into the extent of its culpability. Perhaps the worst indictment then on the Health Department is not only the decision by Moseneke to award constitutional damages, but rather the remarks he made stating that the “terrible tale of death and torture” constituted a very serious breach of the Constitution and occurred as a result of an abuse of power by servants of the State. Moseneke came to the final decision that the founding values of the Constitution and the principles governing public administration, the right to health, the right to family life, the right to dignity and the right to access to quality health care services were grossly violated. He also believes that there was “irregular expenditure, mismanagement, incompetence and possible fraud in the Gauteng Department of Health.”

Although awards of damages can assist in tempering the financial damage caused through loss or suffering it will of course never negate the damage caused by the death and the suffering of the victims in the Life Esidimeni disaster. Retired Deputy Chief Justice Moseneke did however achieve some form of redress for those wronged and held government accountable in a fair, reasonable and humane manner. He also succeeded in developing this very important aspect of constitutional jurisprudence. Perhaps most importantly he managed to re-affirm confidence in our judiciary and the sanctity of our Constitution

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