

# A PRESS BRIEFING ON THE LIFE ESIDIMENI ALTERNATIVE DISPUTE RESOLUTION PROCESS

EMOYENI CONFERENCE CENTRE

15 JUBILEE ROAD, PARKTOWN, JOHANNESBURG

1. On 1 February 2017, Professor Malegapuru W Makgoba, acting as a lawfully appointed Ombud of Health (in terms of section 81(1) of the National Health Act) made public his findings that: “A total of ninety-one (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 Gauteng Province”; that “[a]t the time of writing the Report, 94 patients had died in 16 out of 27 Non-Governmental Organisations (NGOs) and 3 hospitals”; that “[a]ll the 27 NGOs to which patients were transferred operated under invalid licenses”; that “[a]ll patients who died in these NGOs died under unlawful circumstances”; and that the Gauteng Mental Health Marathon Project (GMMP), under which mental health care users (MHCU) were transferred from Life Esidimeni Healthcare to NGOs, resulted in patterns of death of mentally ill patients and “these conducts were most negligent and reckless and showed a total

lack of respect for human dignity, care and human life” and thus violated the Constitution and other applicable legislation.

2. The Ombud went on to recommend that: “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. A credible prominent South African with an established track record should lead such a process.”
  
3. During July 2017, a public announcement was made that Justice Dikgang Moseneke, the retired Deputy Chief Justice of South Africa, will lead an ADR process in which the State will be represented by the National Minister of Health and the Premier of the Gauteng Province and that the former residents of Life Esidimeni, who died or survived the tragedy, will be represented by their families.

4. Shortly after his appointment, Justice Dikgang Moseneke convened a series of consultative meetings with the National Minister of Health, the Premier, the Family Committee representing specified mental health care users who had lost their lives or who had survived and their legal representatives – *SECTION27*. With time, the preparatory process was joined by an additional set of legal representatives – *Hurter Spies Attorneys*. The primary purpose of the joint meetings was openly to assist the parties to identify the ADR process most suited to what the parties consider just and equitable and to decide, by agreement, on the modalities of the ADR process.

5. The parties have chosen arbitration as the principal form of resolving their dispute and arriving at equitable redress that must include compensation that is just and equitable to all concerned. The starting point of the arbitration agreement is that the National Minister of Health and the Premier of Gauteng, acting on behalf of the State, have conceded unconditionally the legal merits of the claims by each of the claimants which are more fully described in the arbitration agreement, also referred to as the Terms of Reference. Put clearer, the State concedes that the

conduct of its functionaries and employees unlawfully and negligently caused the death of the deceased or other bodily or 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.

6. 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. Given the unusual and peculiar nature of the dispute, the Arbitrator must also facilitate and allow space for the families and other affected people to testify about their deep loss and to grieve in the trust of finding closure. The State also must find room to demonstrate its public contrition and remorse and to re-commit to honour its obligations towards mental health care users under its care.

7. During the preparatory stage three matters remained unresolved. The **first** was the exact number of patients who died, additional to

the 94 patients identified in the Ombud's Report. The State suggested tentatively that the total number might be in excess of a 100. The **second** was the indisputable identity of all the patients who died or were affected as a result of their removal from Life Esidimeni Healthcare. The **third** problematic issue was that not all families of patients who died or survived the tragedy have joined or responded to invitations to join or be part of the present ADR process. The State, at the request of the parties, has widely advertised the ADR process in the public media and invited families of the deceased or affected patients to come forth and join the process. The advertising campaign yielded a limited success only. It is hoped that even after the ADR process has started more concerned families will seek to join or benefit from the outcome of the arbitral process. They are invited and urged to make contact with the office of the Arbitrator even at this late stage.

8. The Arbitrator and parties to the Life Esidimeni ADR Process and their legal representatives have agreed to hold public hearings, save when some compelling consideration requires otherwise, at Emoyeni Conference Centre, 15 Jubilee Road, Parktown,

Johannesburg, for three weeks starting from Monday, 9 October 2017 to 30 October 2017. If it is necessary, further public hearings will be held. At the end of process the Arbitrator is required to issue a binding award that represents equitable redress.

9. In order to ensure an efficient and orderly process, the Arbitrator has appointed counsel to lead evidence in consultation with counsel for all the parties concerned. All parties will also be entitled to lead oral or documentary evidence and make submissions as they may elect. The ADR process will also have appropriate administrative support established by the Arbitrator and funded by the State.

Issued by the Arbitrator

**Justice Dikgang Moseneke**

**Retired Deputy Chief Justice of South Africa**

**12 September 2017**