



Date:	30 July 2020
To:	Alinah Khompeli Human Rights Commission Free State Province
From:	Hon Mariette Pittaway MPL Whip of the Official Opposition Free State Provincial Legislature
Subject:	Kosmos Care and Rehabilitation Centre at the Free State Psychiatric Complex

Dear Ms Khompeli,

The above mentioned matter bears reference.

1. BACKGROUND

- 1.1. I hereby wish to submit this complaint to the Human Rights Commission in my capacity as the Democratic Alliance's (DA) spokesperson in the Free State Legislature on the portfolio of health.
- 1.2. The DA has received numerous complaints regarding the poor state of healthcare¹ at the Kosmos Care and Rehabilitation Centre at the Free State Psychiatric Complex in Bloemfontein (hereinafter referred to as the "**Centre**").
- 1.3. To this effect, the DA drafted a letter on the 27 July 2020, directed to the Free State Member of the Executive Council (MEC) for Health, Montseng Tsiu, as well as to the Free State Head of Department (HOD) of Health, Dr David Motau, detailing the aforesaid complaints. Despite, the urgent nature of our complaint, we have not received any feedback nor an acknowledgement of receipt from either the Department of Health in the Free State (hereinafter referred to as the "**Department**"), the MEC nor HOD. Copies of this correspondence has also been annexed hereto for your ease of reference.
- 1.4. With the advent of the Constitution of the Republic of South Africa, organs of state and provincial local government departments, have been mandated to ensure the progressive realisation of the rights of all South African citizens.

¹ The National Health Act No 61 of 2003 defines "health services" as follows:

"health services" means- (a) health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution; (b) basic nutrition and basic health care services contemplated in section 28(1)(c) 25 of the Constitution; (c) medical treatment contemplated in section 35(2)(e) of the Constitution; and (d) municipal health services"



- 1.5. A deprivation of these rights afforded to the citizens of the Republic of South Africa due to a failure by the responsible organ of state, would constitute an infringement on their basic human rights. Alternatively, a lack of doing everything within its powers to circumvent further decay of state resources, would make the state responsible for an infringement.
- 1.6. According to the Limburg Principles, progressive realisation does not imply that the state can defer indefinitely, efforts for the full realisation of the right. On the contrary, state parties are to "*move as expeditiously as possible towards the full realisation of the right*" and are required to take immediate steps to provide minimum core entitlements.²
- 1.7. This is further emphasised in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the "*enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity*".³
- 1.8. This means that health care facilities, goods and services have to be available in sufficient quantity; must be physically and economically accessible to everyone, must be ethically and culturally acceptable, and must be of a medically appropriate quality.⁴
- 1.9. The DA are desirous to demonstrate, by means of utilising legislative authority, the shortcomings of the Department, the MEC and the HOD, in an attempt to stimulate effective healthcare delivery.

2. FACTS

The failure by the Department to assist the Centre in delivering basic healthcare to its patients originated from the fact that:

2.1. 20 July 2020:

- 2.1.1. From around 08h00 the nursing personnel at the Centre were participating in a strike, due to *inter alia* shortages of personal protective equipment (PEE), the lack of sanitary measures and the lack decontamination of wards.

² Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights Para 21 pp 63-78 in Economic, Social and Cultural Rights: A Compilation of Essential Documents International Commission of Jurists, 1977.

³ The steps to be taken by State Parties to the ICESCR to achieve the full realization of the right to health include those necessary for the provision of the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial health; the prevention, treatment and control of epidemics: endemic, occupational and other diseases; and the creation of conditions which would assure to all, medical services and medical attention in the event of sickness.

⁴ General Comment No. 14 of Committee of ESCR, 2000, para 12.



- 2.1.2. The wards at the Centre that were affected were 2D, 3B, 4D, 5B, 6A. In wards 2D and 6A the patients need to be fed as they are physically disabled.
- 2.1.3. By around 10h00 Ward 3B, a mobile male ward, was completely locked due to the patients in the ward being under quarantine. The patients reported that they had not yet eaten, but that the food service staff would provide them with food from the outside door.
- 2.1.4. In ward 5B, the ward for elderly male patients, some of the patients were naked, as there was no laundry service that morning. The sister in charge had locked the medicine store as well as the cutlery store and left the ward with the keys.
- 2.1.5. Just before 16h00, it was reported that patients in ward 3B, had been locked in the ward all day without any supervision and without food. Two volunteers took the onus upon themselves to feed the patients. All the food for the day, breakfast, lunch and dinner was dished up and given to the patients who had not eaten all day.
- 2.2. **23 July 2020:**
- 2.2.1. From around 12h00 the call for help went out again as ward 4D did not receive food. All nursing personnel were awaiting Covid-19 test results. The situation in the ward was devastating as all the patients had not received the care from nursing personnel and they are all on diapers. The nursing personnel reported that they were unable to help as ward 3E had a diarrhoea outbreak. Furthermore, the male personnel were not willing to change female patients. It was reported to the area manager who was informed that the nursing personnel are refusing to work in the ward until it has been decontaminated.
- 2.2.2. The storerooms with the diapers were locked. Technical services had to be called to cut the locks. The food services personnel assisted in the ward and dished up the food, whilst volunteers fed the patients.
- 2.2.3. At 11h00, it was reported that there were no nursing personnel in Kosmos ward 6A. The patients in Kosmos 6A, are dependent on external forces to cater for all their basic human needs, such as cleaning, feeding, turning and toilet habits. No nursing personnel in this ward meant that the patients had not received any food since the last person was on duty, and have not had their diapers changed since the last change was done when the nursing personnel were on duty. The circumstances in which the patients were found was terrible, as patients continued to suffer from extreme hunger, whilst some had faeces in their diapers consequent to diapers not being changed.



2.3. 24 July 2020:

From around 11h00, a call for assistance went out again in wards 1E, 3B, 3E and 6A. It was reported that there had been no personnel in 4D and that the patients had again not had their diapers changed yet. The nursing personnel had merely placed the medication of each patient at their beds.

2.4. 27 July 2020:

It is alleged that negotiations commenced with some of the personnel from the South African National Defence Force who started to assist at the Centre.

2.5. It is unthinkable that the Department, the MEC and the HOD, are not prepared to make to provide patients at the Centre with the healthcare they deserve. It is also unclear whether the Department has any working and efficient mechanisms in place to protect and safeguard against violation of patients' rights in the form of a complaints register available at all service delivery points. This would enable patients to register their complaints and have them addressed through the Clinical Investigation Committee.

2.6. The state is obliged to provide the right for people in disaster situations or in dire need when an individual or group is unable, for reasons beyond their control, to realise that right themselves with the means at their disposal.⁵

3. ISSUE

The non-adherence to legislative prescripts by the Department, implicitly or explicitly have the effect of:

3.1. Not recognising the fundamental Constitutional values of human dignity, equality, freedom, as well as the right to access to healthcare.

3.2. Not recognising that the state is obligated to utilise their reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights, with the ultimate aim being to achieve the sustainability of these rights for the benefit of all citizens.

3.3. Not recognising that the protection of the quality of healthcare services is necessary to protect the values of human dignity, equality and freedoms for all citizens.

⁵ General Comment No. 14 of UN Committee of ESCR, 2000, para 34-37.



- 3.4. Not recognising that there is a duty on the Department to ensure that healthcare services are provided in a manner which is efficient, equitable and sustainable.
- 3.5. Not recognising that the provision of healthcare services, must be undertaken in a manner consistent with the broader goals of health management.
- 3.6. Undermining individuals' collective rights of access to basic healthcare and basic sanitation.
- 3.7. Proving that there remains a severe lack of effective monitoring of healthcare services in the Free State.
- 3.8. Failing to provide a framework for a structured uniform healthcare system within the Republic of South Africa, taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments with regard to healthcare services.

4. RULE OF LAW

In the midst of this contributory negligence exhibited by the Department, these parties have *inter alia* violated the following legislative prescripts:

Constitution of the Republic of South Africa No 108 of 1996:

"10 - Everyone has inherent dignity and the right to have their dignity respected and protected".

"11 - Everyone has the right to life".

"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".⁶

National Health Act No 61 of 2003:⁷

"5 - A health care provider, health worker or health establishment may not refuse a person emergency medical treatment".

⁶ Constitution of the Republic of South Africa No 108 of 1996.

⁷ National Health Act No 61 of 2003.



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“20(3) - Subject to any applicable law, every health establishment must implement measures to minimise - (a) injury or damage to the person and property of health care personnel working at that establishment; and (b) disease transmission”.

“25(1) - The relevant member of the Executive Council must ensure the implementation of national health policy, norms and standards in his or her province. (2) The head of a provincial department must, in accordance with national health policy and the relevant provincial health policy in respect of or within the relevant province - (a) provide specialised hospital services; (b) plan and manage the provincial health information system; (c) participate in interprovincial and intersectoral co-ordination and collaboration; (d) co-ordinate the funding and financial management of district health councils; (e) provide technical and logistical support to district health councils; (f) plan, co-ordinate and monitor health services and must evaluate the rendering of health services; (g) co-ordinate health and medical services during provincial disasters; (h) conduct or facilitate research on health and health services; (i) plan, manage and develop human resources for the rendering of health services; (j) plan the development of public and private hospitals, other health establishments and health agencies; (k) control and manage the cost and financing of public health establishments and public health agencies; (l) facilitate and promote the provision of port health services, comprehensive primary health services and community hospital services; (m) provide and co-ordinate emergency medical services and forensic pathology, forensic clinical medicines and related services, including the provision of medico-legal mortuaries and medico-legal services; of health services; (n) control the quality of all health services and facilities; (o) provide health services contemplated by specific provincial health service (p) provide and maintain equipment, vehicles and health care facilities in the public sector; (q) consult with communities regarding health matters; (r) provide occupational health services; (s) promote health and healthy lifestyles; (t) promote community participation in the planning, provision and evaluation of health services; (u) provide environmental pollution control services; (v) ensure health systems research; (w) provide services for the management, prevention and control of communicable and non-communicable diseases. (3) The head of a provincial department must - (a) prepare strategic, medium term health and human resources plans annually for the exercise of the powers of, the performance of the duties of and the 5 provision of health services in the province by the provincial department; and (b) submit such plans to the Director-General within the time frames and in accordance with the guidelines determined by the National Health Council. (4) Provincial health plans must conform with national health policy”.

“81 - A health officer must monitor and enforce compliance with this Act”.

5. APPLICATION

The failure to provide access to adequate healthcare makes the Department, together with the Free State MEC for Health, Montseng Tsiu and the HOD, Dr David Motau, directly complicit in obstructing human dignity, social justice and the advancement of human rights and freedoms and as such are jointly and severally liable for the consequences of the these acts. The negligence demonstrated by



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the MEC and HOD, purport to demonstrate an inherent negligence and underlying stubbornness, in that these acts:

- 5.1. Ignore the state's obligation in respect hereof as is qualified by these provisions, and the failure to provide these fundamental rights give rise to a collective Constitutional infringement by the Department, the MEC and the HOD.
- 5.2. Negligently interfere in an unlawful manner, with the legislative obligations to provide adequate healthcare services to patients at the Centre, which is inconsistent with the provisions embodied by section 81 of the National Health Act 61 of 2003.
- 5.3. Are accordingly invalid, unlawful and unconstitutional in terms of section 27(1) of the Constitution of the Republic of South Africa, No. 108 of 1996, which lends itself *inter alia* towards the fact that "everyone has the right to have access to health care services".

6. CONCLUSION

- 6.1. I therefore submit the view, on behalf of the patients at the Centre, that the acts exhibited by the Department, the MEC and the HOD, are grossly negligent and aligns itself with aspects of severe constitutional and legislative injustices.
- 6.2. The Department, the MEC and the HOD should know that their conduct (or the lack thereof), has far reaching consequences for the patients at the Centre. Accordingly, the Department, the MEC and the HOD, have a moral and legal duty to demonstrate leadership and provide the requisite healthcare to patients, and as such, their moral compass leaves much to be desired.
- 6.3. It is for this purpose that appropriate institutions, such as the Human Rights Commission (HRC), deal with issues that have an impact on social cohesion and an inherent infringement upon human dignity. This complaint is the most responsible course of action to be pursued in these emotional and volatile times in our young democracy. The effect of these negligent acts are grave. This conduct needs to stop and sanctioned to the full extent permitted by the law.
- 6.4. In accordance with provisions contemplated within the Constitution and the National Health Act No 61 of 2003, I am desirous to request that the HRC investigate this complaint against the Department, the MEC and the HOD, in terms of the relevant legislative prescripts and through the submission of this complaint hereby wish notify the HRC of my intention to do so.

Your immediate consideration would be highly appreciated.



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Yours truly,

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