

MEDICINE AND THE LAW

Should a provincial MEC responsible for health, registered with the Health Professions Council of South Africa, who publicly humiliates a vulnerable undocumented foreigner who has received urgent medical attention for childbirth at an understaffed government hospital, be disciplined for unprofessional conduct?

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The Limpopo MEC for Health, during a hospital visit, was recently shown in a video to have humiliated a vulnerable undocumented Zimbabwean woman patient, resulting in the hospital workers present laughing at the unfortunate patient. The patient had arrived at a hospital in the province that was short-staffed and under-resourced because of failings on the part of the Department of Health. She wished to give birth to her child in a safe environment, because the shortage of proper facilities in Zimbabwe posed a threat to her and her unborn child. The conduct of the MEC is measured against the patient's rights under the Constitution of South Africa and the National Health Act 61 of 2003, and her conduct is discussed in the light of the Health Professions Act 56 of 1974 and the Ethical Rules of Conduct of the Health Professions Council of South Africa (HPCSA). The conclusion reached is that the MEC had breached the Constitution, the National Health Act, the Health Professions Act and the Ethical Rules of Conduct of the HPCSA, and should be disciplined by the HPCSA, as required by the Health Professions Act.

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An incident recently occurred in which the Limpopo MEC for Health, during a hospital visit, was recorded on video as humiliating a vulnerable undocumented Zimbabwean woman patient, much to the amusement of the hospital workers present.^[1] The patient had arrived at a hospital in the province that was overworked and understaffed as a result of departmental failures^[1] to give birth to her child, because the shortage of proper facilities in Zimbabwe posed a threat to her and her unborn child.

The hospital staff had attended to the patient professionally as they were legally and ethically obliged to do, even though she was an undocumented foreigner.^[2] However, the conduct of the MEC, who was registered with the Health Professions Council of South Africa (HPCSA), raises the question whether such conduct was reasonable and justifiable, given that many undocumented foreign patients are unable to pay for the service they receive, and the patient's country – in this case, Zimbabwe – had failed in its duty to compensate the provincial authority concerned for the health services provided to its citizens. The matter of non-payment should have been dealt with by the Department of International Relations and Cooperation. Likewise, lapses in border control leading to the presence of numerous undocumented foreigners should have been rectified by the Department of Home Affairs.^[1]

The question of whether or not the MEC's conduct was legal and ethical may be answered by considering the provisions of: (i) the South African (SA) Constitution;^[2] (ii) the National Health Act;^[3]

(iii) the Health Professions Act;^[4] and (iv) the HPCSA's Ethical Rules of Conduct.^[5]

The Constitution

The Constitution^[2] provides that everyone has the right of access to healthcare services within available resources (section 27(1)(a)), while every child has the right to basic healthcare services – not merely access to healthcare (section 28(1)(c)). Therefore, the right of access to healthcare by adults, and the right to basic healthcare services for children, apply to 'everyone' and 'every child' in the country, and are not limited to SA citizens. Likewise, no one may be refused emergency medical treatment (section 27(3)). In addition, according to the Constitution, everyone is entitled 'to have their dignity respected and protected' (section 10), to have their privacy respected (section 14), and to 'the full enjoyment of all rights and freedoms' (section 9(2)). Furthermore, no one may be unfairly discriminated against on certain listed grounds, including ethnicity or social origin (sections 9(3) and 9(4)). In the case of discrimination on listed grounds, unfairness will be presumed (section 9(5)). However, the listed grounds are not exhaustive, and persons suffering harm may prove that they have been discriminated against on some other unfair ground (section 9(5)), e.g. because they are undocumented foreigners.^[6]

The manner in which the Limpopo MEC for Health addressed the Zimbabwean patient was in conflict with the right of access

to healthcare by undocumented foreigners.^[6] By humiliating the patient in front of hospital workers and causing them to laugh, the MEC was also violating the patient's right to 'protection and respect' for her dignity as provided for in the Constitution (section 10). By mentioning the patient's circumstances and allowing her conversation to be videoed, she violated the patient's right to privacy, as some of the workers present would have known the patient's identity. As a member of the Executive Council of the province, the MEC would have sworn an oath to obey the Constitution as required by section 135 of the Constitution, in which she would have stated, *inter alia*:

'I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other laws of the Republic; and I undertake to hold my office as a member of the Executive Council of the province of Limpopo with honour and dignity.'

The MEC's conduct towards the patient was not only in conflict with the patient's constitutional rights, but also in conflict with her solemn oath to hold her office as MEC 'with honour and dignity'. At the same time, as an MEC she should not interfere with the day-to-day running of a hospital, by giving staff the false impression that it was acceptable to berate and humiliate undocumented foreign patients.

The National Health Act

The National Health Act 61 of 1974^[3] was introduced to implement the provisions of the Constitution regarding access to healthcare (section 2(c)), the right of patients to confidentiality (section 14) and the need for patients to give informed consent (section 7). The Act does not limit access to healthcare services on the grounds of nationality or immigration status. It states that – subject to any conditions prescribed by the Minister of Health, the state, publicly funded clinics and community health centres (section 4(3)) – everyone is entitled to free primary healthcare services at government facilities (section 4(3)(a)). It also states that all women who qualify under the Choice on Termination of Pregnancy Act 92 of 1996^[7] (in terms of section 2) are entitled to free termination of pregnancy at government facilities (section 4(3)(b)). Likewise, all pregnant and breastfeeding women, and children under the age of 6, are entitled to free healthcare services at government clinics or hospitals (section 4(3)(c)).

The above provisions have been incorporated in the 2007 directive of the Chief Financial Officer (CFO) of the National Department of Health (NDoH) to all health departments,^[6] and are in line with the Constitution (section 4(3)). Any new conditions imposed by the Minister, the State, or publicly funded clinics and community health centres must conform to the Constitution. Attempts to limit the rights of undocumented migrants or asylum seekers would have to be shown to be reasonable and justifiable in terms of the Constitution (section 36(1)).

The remarks of the MEC to the Zimbabwean patient were in direct conflict with the National Health Act and the directive issued by the CFO of the NDoH. If she sought to criticise the directive, she should have addressed her comments to the Minister of Health and the CFO of the NDoH, and she should not have humiliated the patient in front of healthcare workers by accusing her of abusing her rights under the Constitution and the departmental directive.

The Health Professions Act

The Health Professions Act 56 of 1974^[4] establishes the HPCSA (section 2), the functions of which include: (i) to uphold and maintain professional and ethical standards within the health

professions (section 3(m)); (ii) to ensure the investigation of complaints concerning persons registered in terms of this Act (section 3(n)); and (iii) to ensure that appropriate disciplinary action is taken against such persons to ensure that persons registered in terms of this Act behave towards users of healthcare services in a manner that respects their constitutional rights to human dignity, bodily and psychological integrity and equality, and that disciplinary action is taken against persons who fail to act accordingly (section 3(o)).

Did the MEC uphold and maintain the professional and ethical standards of the health professions?

In order to uphold and maintain professional standards, the HPCSA has published a set of Ethical Rules of Conduct^[5] and a booklet on ethical guidelines on good ethical practice in the healthcare professions^[8] for practitioners registered in terms of the Health Professions Act.^[4]

Rule 13 of the Ethical Rules of Conduct regarding confidentiality states that:

- '(1) A practitioner shall divulge verbally or in writing information regarding a patient which he or she ought to divulge only – (a) in terms of a statutory provision; (b) at the instruction of a court of law; or (c) where justified in the public interest.
- (2) Any information other than the information referred to in subrule (1) shall be divulged by a practitioner only – (a) with the express consent of the patient ...'

Did the MEC, by discussing the circumstances of the patient in the presence of the healthcare workers (some of whom would know the patient's identity), and allowing her conversation to be videoed, respect the patient's right to confidentiality as provided for in Rule 13? There was no statutory provision requiring her to do otherwise – on the contrary, both the Constitution^[2] (section 14) and the National Health Act^[3] (section 14) protect the patient's privacy and confidentiality. There was no court ordering the MEC to disclose the patient's personal circumstances. Regarding consent, it is most unlikely, because of their power relationship, that the vulnerable patient voluntarily consented to the MEC's disclosing her personal circumstances in the presence of the healthcare workers, who then went on to humiliate her by laughing at her discomfort.

Did the MEC raise an important issue in the correct forum?

The MEC may have raised an important issue, but it was not in the public interest for her to confront the vulnerable undocumented patient personally, and in the presence of healthcare workers. In berating the patient personally, the MEC was guilty of using the wrong forum. She should have made her complaint to the relevant government authorities at a national level, who could then have contacted their equivalent colleagues in Zimbabwe. Or she could have interviewed the patient in private, without berating and humiliating her in the presence of the healthcare workers and without allowing the conversation to be videoed. The MEC must have foreseen that if she allowed the incident to be videoed, it might be published on social media and in the mass media.

Should the MEC be disciplined by the HPCSA for breaching the provisions of the Health Professions Act and the HPCSA's Ethical Rules of Conduct and Ethical Guidelines?

As indicated above, the MEC's conduct towards the patient falls to be dealt with in terms of the delegated powers and functions

of the HPCSA under the Health Professions Act^[4] (section 2), which require the HPCSA 'to ensure that appropriate disciplinary action is taken' against registered practitioners who fail to 'behave towards users of health services in a manner that respects their constitutional rights to human dignity, bodily and psychological integrity and equality' (section 3(o)). The MEC's behaviour violated the dignity of the patient and the patient's right to psychological integrity by invading her privacy^[8] and humiliating her in the presence of the healthcare workers. She also unfairly discriminated against the patient on the grounds that she was an undocumented foreigner. In the event, it is clear that she should be disciplined by the HPCSA as required by the Health Professions Act (section 2).

Conclusion

In the light of the above, the MEC's behaviour was in conflict with the Zimbabwean patient's rights in terms of the Constitution,^[2] the National Health Act,^[3] the Health Professions Act^[4] and the Ethical Rules of Conduct of the HPCSA.^[5] The MEC's failure to respect 'the constitutional rights to human dignity, bodily and psychological integrity and equality' of the patient was unprofessional, and she should be disciplined by the HPCSA, as required by the Health Professions Act (section 3(o)).

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