THE COST OF INDIFFERENCE IN A MEDICAL NEGLIGENCE CASE:

Lushaba v MEC for Health, Gauteng (17077/2012 [2014] ZAGPJHC 407 (16 October 2014))

> "[T]here can be little doubt that the defendant was negligent. An emergency was met with indifference. That, of itself, is negligent." (*Lushaba v MEC for Health, Gauteng* (17077/2012) [2014] ZAGPJHC 407 (16 October 2014) par 118 (hereinafter "The original case")).
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> "Erring when trying to do one's work well is one thing. Not even caring about doing so is quite another. The public should not have to suffer this complete indifference and incompetence at the hands of public servants." (*L v MEC for Health, Gauteng* (17077/2012) [2014] ZAGPJHC 337 (26 Nov 2014) par 70 (hereinafter "The *rule nisi* case")).

1 Introduction

The much-debated diagnostic report, the National Development Plan 2030 (NDP), paints a worrying picture about the state of the health system in South Africa. The NDP simply states that, "At institutional level, healthcare management is in crisis" (Republic of South Africa 2012, National Development Plan of 2030: 52). One of the remedial measures proposed by the NDP is the introduction of the National Health Insurance in South Africa (Republic of South Africa 2012, National Development Plan of 2030: 52). It is hoped that the National Health Insurance "will ensure that everyone has access to appropriate, efficient and quality health services" (Republic of South Africa 2012, National Development Plan of 2030: 4).

The Constitution of the Republic of South Africa, 1996 sets the benchmark and the ideals towards which public servants must strive as they deliver the much-needed services to the general populace (s 195(1)(a)−(i)). Among others, public servants must promote and maintain a high standard of professional ethics (s 195(1)(a)). Further, the *Batho Pele* Principles require it of government institutions to, *inter alia* communicate the level and quality of service, which the public must expect from them (*Batho Pele Principles* Principle 2). It is therefore not misguided to say that generally, people are aware of the standard of service they should expect from state institutions. As a matter of fact, people have gone to the courts of law to hold state institutions accountable. In this regard the medical fraternity has in the recent past witnessed an upsurge of court cases of negligence against the health department (Makatile "Gauteng's Medical Negligence Shame" 2015 www.iol.co.za/news/crime-courts/gauteng-medical-negligence-shame-1911421 (accessed 2016-05-30)). This rise in litigation has led to a crisis of another kind. According to the Minister of Health, healthcare in South Africa

is facing a crisis because some medical practitioners, particularly gynaecologists and obstetricians, have opted not to perform operations for fear of lawsuits (Mbanjwa "Negligence Claims affect Healthcare, Hike Doctor's Fees" 2015 www.news24.com/SouthAfrica/News/Motsoaledi-Negligence-claims-affect-healthcare-hike-doctors-fees-20150309 (accessed 2015-08-15).

The concerns of the Minister notwithstanding, the daily experiences of people point to the fact that despite the lofty ideals in the Constitution and the *Batho Pele* Principles, the general public continues to receive sub-standard service from public institutions, especially from public hospitals (Ncayiyana "Creeping Mediocrity in Public Governance threatens the Public Health" 2008 98 *South African Medical Journal* 407). The case of *Lushaba v MEC for Health, Gauteng* (The original case) provides a good illustration of a nation, which is in a state of paralysis ethically. The case paints a picture of "state employees who could not be bothered to do their work" (The *rule nisi* case par 87). What is even more ominous is the observation by Robinson JA that shaming such public officials no longer has any effect (The *rule nisi* case par 90).

The *Lushaba* case has all the hallmarks of the cost of indifference on the ethical values of a nation. Axiomatically, such a cost cannot only be measured in Rands and cents. Later in the discussion, we hope to make it clear that indifference impacts on the valuable time of the court and the plaintiff, the reputation of the various institutions involved, quality of life of the child born with cerebral palsy as a result of indifference, the dignity of both the mother and her son and, of course, the taxpayers' money. These factors combined provide a good basis for reflection on the cost of indifference in this case. To provide some background, the facts of the *Lushaba* case are discussed briefly, after which the indifference of every role player in the events leading up to the two court cases are highlighted. In the process, our discussion also makes mention of the trajectory that the case followed from the court *a quo* all the way to the Constitutional Court (*MEC for Health, Gauteng v Lushaba* [2015] ZACC 16). In the Constitutional Court's judgment, even the High Court judge came under scrutiny.

2 Factual context of the discussion

In 2000 (fourteen years before the final judgment), Ms Lushaba in the last trimester of her pregnancy went to the Charlotte Maxeke Johannesburg Academic Hospital for help. She complained of dizziness and constant pain in her abdomen. The pain was non-intermittent and therefore did not suggest labour contractions, but she was extremely pale (The original case par 1). Her symptoms were indicative of *abruptio placentae*, a condition that occurs when the placenta separates (or begins to separate) from the uterine wall (*Abruptio placentae* is an extremely serious condition. It could be lethal to both mother and the unborn child; see the original case par 30). The condition constitutes a danger to both the mother and her unborn child (The original case par 30 and 78). Urgent medical attention was necessary. If not urgently attended to, the mother could suffer from severe internal bleeding (The original case par 30). For the unborn child, delayed medical attention could lead to deprivation of oxygen, which would lead to cerebral palsy (The

original case par 2 and 21; Cerebral palsy is a condition resulting from a deprivation of oxygen to the brain of the unborn child during pregnancy. Cerebral palsy is associated with brain damage. Brain development is impaired and the child cannot walk because of spasms). Given the lurking danger, it was imperative that Ms Lushaba receive the urgent medical intervention. The baby needed to be delivered as soon as possible (The original case par 2). However, the hospital staff met the emergency with complete indifference. The indifference resulted in the birth of a severely disabled baby, suffering from spastic quadriplegic cerebral palsy and not being able to ever sit or walk (The original case par 4).

The plaintiff, Ms Lushaba, instituted an action against the defendant, the Member of the Executive Council (MEC) claiming that the hospital was negligent in not providing her with adequate medical care by performing a caesarean section immediately upon her arrival at the hospital (The original case par 6). She further claimed that the delay in performing the caesarean permitted the progression of the separation of her uterine wall, which in turn led to the baby's oxygen supply being cut off, resulting in the baby being born with cerebral palsy. As the incident happened in a public hospital the MEC of Health for the Province, where it occurred is cited as the defendant. The case is actually against the medical practitioners in the hospital, who are employees of the Department of Health. On the basis of vicarious liability, the MEC is responsible for all employees under her control. The issue to be decided by the court was whether the defendant's (hospital staff) negligence caused or materially contributed to the baby's condition (The original case par 7).

Having been subjected to the indifference of medical practitioners, Ms Lushaba's attempt to approach the courts for a remedy was also met with the arrogant indifference of the legal team representing the MEC for Health. As the judge noted: "Indifferent to the plaintiff's medical needs, the defendant was indifferent to the conduct of litigation" (The original case par 129). The judge had no difficulty establishing that what happened at the hospital was a case of medical negligence and the doctors and nurses were therefore responsible for the child's condition.

In our view, the *Lushaba* case holds valuable lessons as it highlights the impact that indifference can have on a society as a whole. The judge was at pains to point out that:

> "[I]ncompetence undermines the Constitution and, with it, the social contract underlying it. Our Constitutional order was not arrived at easily. One might argue that we have been fighting for this for a number of millennia. It cannot be permitted to die with a whimper, sunk away under a swamp of slothful indifference. Drastic measures are called for to turn the tide (The *rule nisi* case par 88).

In our view, the conduct of the parties involved in the case, from the medical practitioners to the legal team, to which we now turn, provides an opportune moment for some ethical reflection.

2 1 The State Attorney

For lawyers, the importance of the case is not so much in determining a case of medical negligence, but rather in the costs order awarded by the court against the defendant. The team that acted on behalf of the MEC included a state attorney, a senior legal, administrative officer employed in the legal services section of the Department of Health and a medical practitioner employed as a medico-legal advisor by the department. On the face of it, there is nothing wrong with the state attorney defending the case on behalf of the MEC. This is a constitutional right that is available to every individual, entity and institution in the Republic of South Africa, including the state. What is worrying, though, is how the state attorney went about handling the case. The defendant not only denied negligence – but its plea amounted to a bare denial (The original case par 6). Further, it was clear that the state attorney did not pay attention to the report by their own expert and, therefore, proceeded with defending the case, believing they would be able to prove that there was no negligence (The *rule nice* case par 51; see also par 58−62, which includes the full report by the expert in which it is clear that no basis is established on negligence which could be contested). To defend the case was therefore reckless and should never have been done (The *rule nisi* case par 26; the judge questioned the advocate for the defence to indicate the nature of the defence, he could not do so).

The state attorney asked for an expert opinion from an obstetrics and gynaecology specialist a mere nine days before the trial. This led to a delay during the week of the trial, as the matter had to stand down for a joint minute between the two expert witnesses. The matter only proceeded a month later – wasting valuable court time (The original case par 11−12). The defendant's expert did not get the neonatal hospital records, the labour records, the Liability Bundle or the report of the plaintiff's expert witness. To this, the court pointed out that the expert for the state was inadequately briefed and was therefore not placed in a position to adequately and meaningfully advise on the merits of the case (The *rule nisi* case par 15.1).

It should be pointed out that once the intention to litigate has been made clear, litigating parties have to adhere to strict timeframes relating to the filing and exchange of the necessary documents as prescribed by the High Court Rules. The state attorney failed entirely to respond to the plaintiff's requests for further particulars. During the pre-trial conference, he undertook to respond to certain issues – "he did not do so" (The *rule nisi* case par 11.2). He also did not respond to faxes sent to him concerning the case. Eventually, it took a court order compelling the defendant to respond. His reaction was merely that he (the state attorney) "was dealing with a number of matters and I forgot to attend to the reply" (The *rule nisi* case par 18.4). To this, the judge remarked: "This answer is unsatisfactory." Attorneys deal routinely with a number of matters at once. Faced with the indifference of the state attorney, the plaintiff was forced to go to court and incur costs to compel a response from the defendant. "The indifference of the defendant's advisors to these documents is one of the staggering features of this case" (The *rule nisi* case par 12.3). The defendant's expert witness report was also not provided to the plaintiff. No explanation was provided for this. The state attorney said he instructed the messengers at the offices of the State

Attorney to deliver the report – he "appears not to have given further attention to the matter …" (The *rule nisi* case par 17.2).

The state attorney also never attended the case (The *rule nisi* case par 27) as he had family matters to look after and their counsel was also not briefed properly; he (counsel) was, for example, without a copy of the extract of the plaintiff's expert report and was handed a copy by the plaintiff's representatives. The judge did not take kindly to the indifference of the defendant's legal team (The original case par 134−136; see also par 10−12). Further, the judge ordered a *rule nisi* calling on the defendant to show cause why he should not be held personally liable *de boniis propriis* on the attorney and client scale, for the costs, meaning the MEC should pay all costs in the case from her own pocket and not from taxpayers' money (The original case par 135). In the alternative to this order the judge said if the defendant should be of the view that he should not be held personally liable, he should identify such persons in the Department of Health, Gauteng, as well as such persons in the office of the state attorney, who should be personally held liable for the costs as well as the reasons why they should be so held liable (The original case par 136). Costs *de boniis propriis,* as the judge pointed out, are not easily awarded; it only happens when there is "negligence in a serious degree" meaning conduct which substantially and materially deviates from the standard expected of the legal practitioner (The *rule nisi* case par 68; the judge referred to S*outh African Liquor Traders Association v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC); examples of such conduct of attorneys warranting a *de boniis propriis* order are: dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court and gross incompetence and lack of care" *Multi-Links Telecommunication Ltd v Africa Prepaid Services Nigeria Ltd*; *Telkom SA Soc Limited v Blue Label Telecoms Limited* [2013] 4 All SA 346 (GNP) par 35). According to the judge, the indifference and incompetence of the defendants evidenced in this case warranted such a cost order because exceptional circumstances were indeed present (The *rule nisi* case par 69−72).

2 2 The Legal Administrative Officer/Administrator

The legal administration officer employed by the Department of Health stated under oath that he had not seen any of the relevant documents. To this, the judge remarked that it was a startling claim to make as it was obvious he should have seen all the relevant documents (The *rule nisi* case par 10.2). The officer also could not explain the process followed in deciding to defend the matter. The judge doubted whether the matter was "fully considered" (The *rule nisi* case par 36). Both the legal, administrative officer and the medico-legal advisor claim to have consulted with the employees in the hospital with knowledge of the relevant facts and having perused the hospital records. However, from statements made under oath by the medical expert for the state, crucial documents were not made available to him.

2 3 The Medico-legal Advisor

The medico-legal advisor is a medical practitioner employed by the Department of Health. Concerning his affidavit in the *rule nisi* case, the judge remarked that he could not have been in possession of the antenatal or delivery records and could therefore not base his recommendation on such. Had he read the report of the expert he would have noticed that the expert did not express an opinion on the absence or presence of negligence, nor did he list reasons for any such opinion – he could not form an opinion as he did not have the relevant records. The advisor also ignored the expert opinion of the plaintiff's specialist (The *rule nisi* case par 46.1).

2 4 The MEC for Health

The MEC for Health indicated that she does not have hospital records of state hospitals under her jurisdiction and under her power and control. The judge could not understand this, but the issue was not explained (The *rule nisi* case par 10.3). In her affidavit, she explained that it is a departmental procedure not to question an expert's opinion. The decision to defend the case, therefore, was based on the view of the expert and that it would have been unreasonable to expect the attorney to go against the evidence of the expert and not defend the case (The *rule nisi* case par 48).

2 5 The Medical Expert

In his oral testimony, the expert made different comments to the conclusion reached in the joint minute. His explanation was that at the time of the joint minute he did not have insight into the hospital records as he had not been provided with such. The doctor also suggested that the situation was not an emergency and could not be considered one unless one had made a diagnosis. Of interest to note is that this assertion was not in line with his agreement in the joint minute (The original case par 86). The court struggled to get evidence out of him and noted that "[I]t was often impossible to get a straight answer out of him. He was evasive, refused to commit himself and attempted to avoid the logical consequences of both his expert report and the joint minute. He contradicted himself. It is difficult to avoid the impression of bias on his part" (The original case par 101).

According to the Medical Protection Society (The Medical Protection Society is a member-driven medical indemnity insurance company in the United Kingdom, South Africa and several other Commonwealth countries) medical litigation in South Africa since 2012 increased by more than 30 per cent, while the rise in the claim costs rose over 132 per cent. Out of court, settlements have probably doubled (Howarth "Time for Law Reform in Medical Negligence" 2012 11 *South African Medical Chronicl*e 1). In the Gauteng Province, alone, the medical malpractice/negligence claims against the provincial hospitals are far over R 573 million (Howarth 2012 11 *South African Medical Chronicl*e 1). This should be indicative of a medical litigation storm that is brewing (Pepper and Slabbert "Is South Africa on the verge of a Medical Malpractice Storm" 2011 4 *South African Journal of Bioethics and Law* 29). In order to decide whether to institute action because of presumed

medical negligence or to defend a case of alleged medical negligence, the opinion of a medical expert witness is essential, as lawyers cannot decide a case fairly without expert guidance (See Scharf *The Medico-legal Pitfalls of the Medical Expert Witness* (Unpublished LLM dissertation, UNISA) 2014). The opinion of a skilled witness is also admissible when it can help the court appreciably in reaching a fair, reasonable, just and justifiable finding (Schwikkard and Van der Merwe *Principles of Evidence* (2009) 93). It is important, though, that the expert should not express an opinion on hypothetical facts, which have no bearing on the case, or which cannot be reconciled with other evidence and the facts of the case.

On the issue whether the defendant's negligence caused or materially contributed to the child's condition, Robinson JA quoted Corbett AJ who asked in another medical negligence case "[d]id negligence on the part of the respondent's cause or materially contribute to this condition in the sense that the respondent by the exercise of reasonable professional care and skill could have prevented it from developing" (*Blyth v Van den Heever* [1980] 1 All SA 148 (A) 150). In determining whether the hospital acted reasonably in the case under discussion, the court had regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which they belong (*Van Wyk v Lewis* 1924 AD 438 444). When a patient that clearly needs help enters a hospital the hospital has a duty to take care of that patient (See *Ntsele v MEC for Health, Gauteng Provincial Government* [2013] 2 All SA 356 (GSJ) 364; *Cassidy v Ministry of Health (Fahrni, Third Party)* [1951] 1 All ER 574 584−585 as quoted by Robinson AJ in the original case par 116). This did not happen as the emergency experienced by Ms Lushaba was met with indifference. In order to determine whether there is, in fact, a link between the hospital staff's indifference and the medical condition of the child, expert evidence was indeed necessary.

The physician who acts as an expert witness is one of the most important figures in medical negligence cases. An expert witness should make his knowledge of a specified field available to a court to help it understand the issues of a case and to reach a sound and just decision. The expert should focus solely on the evidence he or she is given in a scientific context without being influenced by the goals of the party who asked them for their expert opinion (Grobler "The Role of the Expert Witness" 2007 *The South African Gastroenterology Review* 11). The test for the admissibility of the opinion of a medical expert witness is whether the expert is better qualified than the judicial officer to draw inferences or whether, although the court can come to an unassisted opinion, the help of the expert would be useful. (Meintjes-Van der Walt "Science Fiction: The Nature of Expert Evidence in General and Scientific Evidence in particular" 2000 *South African Law Journal* 772; see also Meintjes-Van der Walt "Ethics and the Expert: Some suggestions for South Africa" 2003 4(2) *Child Abuse Research a South African Journal* (CARSA) 42−53; Slabbert "Superfluous Litigation in a Wrong Forum about Nothing: When Lawyers and Experts Collude" 2013 34(1) *Obiter* 166−173; Zeffert and Paizes *The South African Law of Evidence* (2009) 321−330). The evidence of an expert witness is, therefore, admissible if it can assist the court to make a finding. As Schreiner JA remarked that relevance is "based upon a blend of logic and experience lying outside the law" (*R v Matthews*

1960 (1) SA 752 (A) 758B; see also *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA)). The High Court Rules require a party who wishes to call expert evidence in a civil trial to give notice to the other party (High Court Rules 36(9)(a) and (b)). If the expert has not fully researched his opinion, he must say that it is provisional; and if something stated in his opinion requires qualification, he must say so (*Schreiner NO v AA* 2010 (5) SA 203 (WCC); see also Zeffert and Paizes *Essential Evidence* (2010) 103−107).

In the *Lushaba case*, there were three medical witnesses, one as an expert for the plaintiff and the other one as an ordinary witness for the defendant as well as a medical expert for the defendant. The first specialist testifying for the defence said that she was the doctor who delivered the baby. In addition, she agreed that the first time she saw the plaintiff, "no drip, no catheter and no CTG were attached to her" (The original case par 66). She also confirmed that she considered the situation an emergency (The original case par 68).

The expert for the defendant agreed in the joint minute that Ms Lushaba's case was an emergency but in oral evidence; he removed the objective urgency of the condition. His explanation was that at the time of the joint minute he did not have insight into the hospital records. As mentioned above, in such a case the expert should disclose his lack of access to the records when concluding the joint minute. He should have qualified his opinion as provisional as he was inadequately briefed "as a result of which he was not placed in a position to advise adequately and meaningfully on the merits" (The *rule nisi* case par 15.1). This he did not do and for us, this demonstrates clearly his indifference to the matter.

The only point on which the two expert witnesses differed was whether Ms Lushaba's case was an emergency or not. The defendant's expert felt it could not be considered an emergency unless a diagnosis was made (The original case par 86). This seemed to be illogical as *abruptio placentae*, being an objective condition, presents an emergency regardless of whether a diagnosis is made. As mentioned in the *Michael v Linksfield Park Clinic*-case, what is required in the evaluation of conflicting expert evidence "is to determine whether and to what extent their opinions are founded on logical reasoning" (*Michael v Linksfield Park Clinic (Pty) Ltd supra* par 36). By referring to the case of *Bolitho v City and Hackney Health Authority* [1997] UKHL 46, the Supreme Court of Appeal (SCA) in *Linksfield Park* said:

> "[I]t would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide the benchmark by reference to which the defendant's conduct falls to be assessed" (*Michael v Linksfield Park Clinic (Pty) Ltd supra* par 39).

The full report of the defendant's expert as quoted in the *rule nisi* case consisted of just more than one page. No basis for contesting the plaintiff's claim of negligence was established and this explains the conclusion of the judge that to defend this case was reckless and should not have happened. Judge Robinson found the expert witness for the plaintiff a good witness, the doctor responsible for the caesarean was also complimented by the judge as a trustworthy witness. The judge could not say the same of the defendant's

expert witness and rejected his evidence (The *rule nisi* case par 61). The two lawyers and the medical practitioner acting for the defence wasted the court's time on numerous grounds and should never have defended the case.

The judge went on to say that, the patient was let down, as she is entitled to more than the indifference that met her in each encounter with the state and the provincial structures (The *rule nisi* case par 81). Although, strictly speaking, a medical expert witness is not part of the defence team, he or she should be briefed properly by the legal team. The expert in the *Lushaba* case did not do what was expected of a medical expert witness as highlighted above, and he was also not briefed correctly and timeously which once again highlights the unprofessional conduct of the three others. As expert witnesses are paid for their report and court appearance, the taxpayer's money should not be squandered in this way. The judge went on to point out that, the taxpayer's money is wasted each time the state attorney and public service lawyers fail to comply with the time periods and Rules of Court (The *rule nisi* case par 85). The court was keen to stem the tide of indifference by inculcating a culture of accountability. And "[i]f personal accountability does not come naturally it must be inculcated" (The *rule nisi* case par 88) as per a de *boniis propriis* order as well as notification to the Law Society of the Northern Provinces (The *rule nisi* case par 102). While the cost *de boniis propri*is order is welcome, what is evident from the case is that the cost of indifference cannot be quantified in monetary terms alone.

2 6 Appeal

The MEC approached the High Court in February 2015 (*Lushaba v MEC for Health, Gauteng* (17077/2012) [2015] ZAGPJHC 13 (2 February 2015)) asking for leave to appeal against the original order of October 2014 (The original case) and the costs orders made in the *rule nisi* case in November 2014 (The *rule nisi* case). This was refused. As the *rule nisi* judgment determined that the state attorney, the legal, administrative officer and the medico-legal advisor had to pay 50 per cent of the costs *de boniis propriis* jointly and severally (The *rule nisi* case par 136), the other 50 per cent being the responsibility of the MEC. The MEC petitioned the Supreme Court of Appeal, but the application was dismissed (*MEC for Health, Gauteng v Lushaba supra* par 2). The MEC then applied for leave to appeal to the Constitutional Court. This was granted.

In a unanimous judgment, the Constitutional Court per Jafta J stated that:

> "It is understandable that trial courts are concerned about the flood of medical negligence litigation aimed at provincial health departments. It is on public record that staggering increases in claims have occurred in recent years… it is equally understandable that at times trial courts feel frustration that litigation costs mount up, as delays become more and more protracted, while injured claimants suffer. Worst of all litigious lawyers seem to prosper and bureaucrats seem to get off scot-free." (*MEC for Health, Gauteng v Lushaba supra* par 11).

He confirmed that there is indeed a structural problem in medical negligence cases but the judgment of October 2014 (The original case) was a "strange and an incompetent order" (The *rule nisi* case 136; s 136 reads as follows: Alternatively to the preceding paragraph and should the defendant be of the view that he should not be held personally liable, he should identify such persons in the Department of Health, Gauteng, as well such persons in the office of the state attorney, who should be personally liable for the costs as well as the reasons why they should be so held liable). He stressed that this is not how parties who were not involved in particular litigation should be joined (*MEC for Health, Gauteng v Lushaba supra* par 13). The order made by the trial judge authorised one of the parties before it to exercise judicial power (*MEC for Health, Gauteng v Lushaba supra* par 13). He went further to say a High Court judge cannot expect a MEC to be the judge of whether he should be held personally liable and if he should not be held personally liable, to identify who should be (*MEC for Health, Gauteng v Lushaba supra* par 14). This is not in line with section 165 of the Constitution, which determines that no one should be a judge in their own case (s 165(1). The judicial authority of the Republic is vested in the courts). In the *rule nisi* case, the MEC indicated he should not be held personally liable but he did not indicate who should be held liable. Despite this, the Robinson AJ ordered the following in the *rule nisi* case:

> "Messrs Matlou and Macheke and Dr Cele have addressed in their affidavits issues around their conduct and decision making in this case and I am satisfied that they have properly been heard. The *rule nisi* foreshadows the consideration of a special cost order against responsible officials." (The *rule nisi* case par 101).

The three men were thus responsible from their own pockets for 50 per cent of the costs. The Constitutional Court found this irregular as the *rule nisi* case did not call any of them to show the cause why they should not be held liable. Their affidavits were only in support of the MEC's position of being liable. The court also disagreed with the judge that the three "have been properly heard" as the affidavits were not in their own interests, they were filed in support of the MEC's case. The three men's right to a fair hearing as guaranteed by section 34 of the Constitution were thus violated (*MEC for Health, Gauteng v Lushaba supra* par 19; s 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum). Consequently, they were not heard and this warranted an appeal in the Constitutional Court (*MEC for Health, Gauteng v Lushaba supra* par 21). The judges in their final order dismissed the appeal against the order of October (The original case) on the merits of the case but they ordered that the case in November – the *rule nisi* case be set aside. Alternatively to the preceding paragraph should the defendant be of the view that he should not be held personally liable, he should identify such persons in the Department of Health, Gauteng, as well, such persons in the office of the state attorney, who should be personally liable for the costs as well as the reasons why they should be so held liable. Paragraph 136 of the October case was also set aside (The *rule nisi* case 136; s 136 reads as follows: Alternatively to the preceding paragraph and should the defendant be of the view that he should not be held personally liable, he should identify such

persons in the Department of Health, Gauteng, as well, such persons in the office of the state attorney, who should be personally liable for the costs as well as the reasons why they should be so held liable).

Even though the Constitutional Court judges had regard for the possible frustration the trial judge could have experienced due to the terrible handling of the case by the defendant's team, they felt he himself should have applied his mind to the constitutional requirements of a fair hearing. Although he wanted to assist Ms Lushaba in the best possible way, while at the same time reprimanding the defendant's team, he, unfortunately, himself, through his oversight has complicated matters for her, as she will have to go back to court again.

For Ms Lushaba, her disabled son will forever be a constant reminder of the indifference she suffered at the hands of medical practitioners and the legal team alike. Concerning the medical negligence the judge said:

> "I observed the plaintiff, a far from hefty, young woman carry her fourteen-year-old son out of court on her back. She did not have a wheelchair in court. During the court proceedings, she had to cradle him in her arms because, paralysed as he is, he could not sit by himself. This is symbolic of the destruction wrought by the callous, *incompetent indifference* on the part, of public officials inflicting South Africa at the moment. The plaintiff and her son deserved much better." (The *rule nisi* case par 89. Emphasis added).

She also deserved a better legal process.

3 An ethical reflection

Ethical values unfold within a complicated web of relationships arising from societal expectations, institutional norms, personal decisions and standards. According to Rossouw, the concept of ethics evokes a triadic relationship between the self, the other and the good (Rossouw "Key Concepts in Business and Professional Ethics" in Rossouw, Du Plessis, Prinsloo, Prozesky (eds) *Ethics for Accountants and Auditors* (2009) 17). How the self relates to the other has always been at the centre of ethics in that conduct becomes ethical if it is not only good for the self but also good for others. From this flows the golden rule of ethics, which states, "that we should do to others as we would like them to do to us" (Rossouw in Rossouw *et al Ethics for Accountants and Auditors* 18).

The idea of doing good to others has been a constant theme in ethics for centuries. Doing good is a foundational value for most world religions and cultures. How exactly this is to be enforced is dependent on a complex web of relationships that inform ethical responsibilities and the institutions empowered to enforce discipline. For instance, there are certain unethical actions that cannot be remedied through the institutions of the law. Typical examples in this regard would be moral actions that invoke a sense of shame and guilt to the actor. Remedial measures for such actions may lie with the actor's self-introspection, family, cultural or religious group. The states, as the custodian of the common good, facilitate an environment conducive for the inculcation of ethical values and norms by putting in place a legislative and policy framework. Acting professionally includes, among others, compliance with the legislation and set standards (Draai "Citizen

Perceptions of Service Quality: An Exploration of Clients' Satisfaction of Service Delivery within selected National Departments in South Africa" 2012 47 *Journal of Public Administration* 487). From ancient times, individuals called to serve the public had to be those who aspired to advance the same common good as the state. In this regard, being a politician, judge or a physician, for example, requires that one should take an oath of office (Hulkower "The History of the Hippocratic Oath: Outdated, Inauthentic, and yet still relevant" 2010 25/26(1) *The Einstein Journal of Biology and Medicine* 44). The South African government has since 1994 taken positive steps towards facilitating an enabling environment to ensure an ethical society (Ramafoko "Reflections of an Ethical Public Service and Delivery" 2010 From the desk of the editor, Official magazine of the Public Service Commission www.psc.gov.za/newsletters/docs/2010/PSC520NEWS.pdf (accessed 2015-10-10). In addition, through the Charter of Values of the Moral Regeneration Movement, South Africans have committed themselves to "A sense of social responsibility by respecting the rule of law, honesty, hard work and standards of ethical decency" (Republic of South Africa "Charter of Values of the Moral Regeneration Movement" 2015 www.mrm.org.za/report/charter/ (accessed 2015-10-10)). Despite all these noble ideals, indifference continues to thrive.

What the *Lushaba* case highlights is an ethical conundrum that has dominated the ethical discourse for centuries (for a discussion of three of the ethical theories see Rossouw in Rossouw *et al Ethics for Accountants and Auditors* 57−69). If ethics is about rules, then South Africa should thrive as an ethical society because the necessary legislative and policy framework is in place. However, South Africa is not, and the increasing cases of medical negligence and unethical conduct of legal practitioners bear testimony to this fact. Equally, if one looks at the professional bodies empowered to regulate the different professional bodies, it is clear that they too do not have unfettered powers (see in this regard Slabbert "The Requirement of being a "Fit and Proper" Person for the Legal Profession" 2011 14 *PER* 209−231). For instance, the court can only impose a sanction that is within its ambit, in this case, the cost *de boniis propriis* (The *rule nisi* case par 102.1 and 102.2). Further, the least that the court could do was to order that a copy of its judgment be given to the Law Society of the Northern Provinces with a request that the Law Society should investigate. This then shifts to the character of the professionals involved in the *Lushaba* case. Questions of integrity, shame and guilt operate within the realm of personal integrity, value system and ethics (see also Slabbert 2011 14 *PER* 209; Nicolson and Webb *Professional Legal Ethics: Critical Interrogations* (1999)*;* Luban *Legal Ethics and Human Dignity* (2007)*;* Dare "Virtue Ethics and Legal Ethics" 1998 28 *Victoria University of Wellington Law Review* 141). With these come respect for processes, procedures, authority and the dignity of fellow human beings, regardless of their status on the social ladder. No single societal institution has the sole authority to inculcate these values; it is the task of a society as a whole.

What is evident to us is that, in addition to the legislative and policy framework that South Africa has put in place, there is a need to go back and inculcate ethical values to the simple units that make up who we are as South Africans. Perhaps, the National Development Plan 2030 provides a

good starting point in its assertion that, “Institutions improve through continuous learning and incremental steps; tackling the most serious problem, resolving it and moving to the next priority. This requires good management, a commitment to high performance, an uncompromising focus on ethics and a willingness to learn from experience.” (Republic of South Africa “National Development Plan of 2030” 2012 http://www.record.org.za/national-development-plan?executive-summary/pdf (accessed 2015-12-12) 59).

4 Conclusion

Societal relations are premised on a sense of predictability. State employees across all levels are a representative sample of how the state relates to the general public. How these employees relate to the public impacts on the reputation of the entity they represent. When people approach state institutions, they expect a certain level of service and care, not indifference. This article has pointed out that from the moment Ms Lushaba presented herself to the hospital, she was greeted with indifference – which indifference came at a cost that goes beyond monetary value. Her claim for negligence in court was also met with indifference from another set of state employees.

Our argument is not that state employees should be infallible in the execution of their tasks. On the contrary, we are alert to the fact that inevitably, mistakes will happen as state employees perform their duties. Equally, we are aware that the state also has a right to defend legal claims made against its employees and its departments. The key, however, is how the state asserts its rights. Professionals who hold certain skills regardless of who their employer is, have a duty to discharge their tasks professionally. Failure to do this has ethical implications as the discussion has pointed out. The article has further highlighted the fact that the enforcement of ethical standards goes beyond institutions such as the state and the courts of law. An ethical renaissance, this paper has argued, comes from within an individual and then flows outward towards the society as a whole.

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