

## MEDICINE AND THE LAW

# Is there a legal and ethical duty on public sector doctors whose complaints to hospital administrators have been ignored to inform the public about harm to child patients due to intentional maladministration, negligence or indifference at the local and provincial level?

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The case involving Dr Tim De Maayer in Gauteng Province, South Africa (SA), raises the question whether there is a legal and ethical duty on public sector doctors whose complaints to hospital administrators have been ignored, to inform the public about harm to child patients due to intentional maladministration, negligence or indifference by the local and provincial authorities. An analysis of the SA Constitution, the National Health Act No. 61 of 2003, the Children's Act No. 38 of 2005, the Health Professions Act No. 56 of 1974 and the Rules and Guidelines of the Health Professions Council of South Africa (HPCSA) established in terms of the Health Professions Act indicates that Dr De Maayer acted both legally and ethically to protect the child patients at Rahima Moosa Hospital. As the complaints of harm caused to the patients because of conditions in the hospital were raised three times with the official functionaries concerned, and ignored by them, he was fully justified to try other measures to protect the patients. It seems that he hoped that by bringing the conditions at the hospital to the attention of the media, the public reaction would be such as to pressurise the administrators to redress the situation. The irony is that the officials who sought to discipline him were themselves guilty of violating the Constitution, the National Health Act and the Children's Act, and should be disciplined. Furthermore, if they are registered with the HPCSA, they should be reported and disciplined for violating the HPCSA's Ethical Rules of Conduct and its Ethical Guidelines on good practice.

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The recent case involving Dr Tim De Maayer, a paediatrician based at Rahima Moosa Mother and Child Hospital in Gauteng Province, South Africa (SA),<sup>[1]</sup> raises the question of whether there is a legal and ethical duty on public sector doctors whose complaints to hospital administrators have been ignored, to inform the public about harm to child patients due to intentional maladministration, negligence or indifference by the local and provincial authorities.

According to reports,<sup>[1]</sup> Dr De Maayer had written an open letter to the local and provincial health administrators in Gauteng, publicly disclosing that three child patients had died and other children were being harmed at the hospital, where he had worked since 2009. The complaints that had been ignored were reportedly raised in 2016, 2021 and 2022 with both the local and provincial management.<sup>[1]</sup> They included such matters as: (i) the effect of load shedding when the hospital had a back-up generator that was too small to warm incubators for newborns; (ii) doctors having to try to intubate children and administer cardiopulmonary resuscitation by their mobile phone's torch because of continuous power failures; (iii) brain scans not being done because the brain scanner had been broken for 3 months; (iv) no water for taps and toilets, causing hospital infections; (v) broken toilet seats; (vi) blood test results having a more than 24-hour turnaround period; (vii) doctors having to visit other hospitals to try to obtain essential supplies; and (viii) during the COVID-19 pandemic when the provincial health budget was cut, scarce funds being allocated to dysfunctional main hospitals, while

Rahima Moosa Hospital and others had to take on additional cases as a consequence, without receiving additional funding.<sup>[1]</sup>

In deciding whether Dr De Maayer had acted legally and ethically in such circumstances, it is necessary to consider the relevant provisions of: (i) the SA Constitution;<sup>[2]</sup> (ii) the National Health Act No. 61 of 2003<sup>[3]</sup> (NHA); (iii) the Children's Act No. 38 of 2005;<sup>[4]</sup> and (iv) the Health Professions Act No. 56 of 1974,<sup>[5]</sup> and the Health Professions Council of South Africa (HPCSA)'s Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act<sup>[6]</sup> and General Ethical Guidelines for the Health Care Professions.<sup>[7]</sup>

### The Constitution

The Constitution<sup>[2]</sup> states that everyone has the right to life, which obviously applies to children (section 11), and the right to an environment that is not harmful to their health or wellbeing (section 24). The Constitution specifically mentions the rights of children to basic healthcare (section 28(1)(c)) – not merely the right of access to such healthcare – and that children also have the right to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d)). Furthermore, in all matters involving children, the child's best interests must be paramount (section 28(3)).

The Constitution also provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights (section 7). In this respect, if the functionaries in the employ of the state, or representing the state in the case of political appointees, such as an MEC

responsible for health or a Premier, have failed in their constitutional duties, they can be held personally liable for such failures.<sup>[8]</sup>

There is no doubt that Dr De Maayer was trying to uphold the rights of child patients in the Constitution to life (section 11) and basic healthcare (section 28(1)(c)), as well as to an environment that is not harmful to their health or wellbeing (section 24). He was also trying to protect them from maltreatment, neglect, abuse or degradation (section 28(1)(d)) and had used the official channels to do so, but had been ignored.<sup>[1]</sup> Instead of letting the matter rest, he went further in trying to uphold the constitutional rights of the children at the hospital, by alerting the public to the situation in the media.

The irony is that it is not Dr De Maayer who violated the Constitution, but the official functionaries who sought to discipline him, and it is they who should be disciplined for dereliction of duty and intentional maladministration, negligence or indifference.<sup>[8]</sup>

### The National Health Act

The objects of the NHA<sup>[3]</sup> are to regulate national health and to 'provide uniformity in respect of health services' including by 'protecting, respecting, promoting the rights of children to basic healthcare services' under the Constitution,<sup>[2]</sup> and 'vulnerable groups such as women, children, older persons and persons with disabilities' (section 2(c)). The NHA further states that it is the responsibility of the National Department, every provincial department and every municipality to establish such health services as are required in terms of the Act. Furthermore, all health establishments and healthcare providers in the public sector must equitably provide healthcare services within the limits of available resources (section 3(2)).

In addition, the National Department of Health has produced a National Patients' Rights Charter,<sup>[9]</sup> setting out the rights and duties of patients when accessing health services in terms of the Constitution,<sup>[2]</sup> which includes the following: '[E]veryone has the right to a healthy and safe environment that will ensure their physical and mental health or well-being, including adequate water supply, sanitation and waste disposal, as well as protection from all forms of environmental danger, such as pollution, ecological degradation and infection.'<sup>[9]</sup>

Once again it is clear that Dr De Maayer was attempting to do what the NHA requires him to do as a healthcare provider in the public sector.<sup>[3]</sup> However, the health officials and the health establishment where Dr De Maayer works were not providing 'such health services as are required in terms of [the NHA] Act'<sup>[3]</sup> and the Patients' Rights Charter;<sup>[9]</sup> for instance, they had failed to provide basic healthcare services and a healthy and safe environment for children at Rahima Moosa Hospital.<sup>[1]</sup>

As previously stated, it is the official functionaries, not Dr De Maayer, who should be disciplined for failing to carry out their duties<sup>[8]</sup> in terms of the NHA<sup>[3]</sup> and the Patients' Rights Charter.<sup>[9]</sup> It also seems that the provincial health functionaries and the MEC for health were not 'equitably providing' health services within the available resources, by prioritising the main dysfunctional hospitals over under-resourced local hospitals that were carrying the additional load from the dysfunctional main hospitals during the COVID-19 pandemic.<sup>[1]</sup>

### The Children's Act

The objectives of the Children's Act<sup>[4]</sup> are to give effect to the constitutional rights of children, including: (i) to ensure that the best interests of a child are of paramount importance in every matter concerning the child; (ii) to make provision for structures, services

and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children; (iii) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards; and (iv) generally to promote the protection, development and wellbeing of children. Furthermore, in the Children's Act (section 9), as in the Constitution,<sup>[2]</sup> in all matters concerning the care, protection and wellbeing of a child, the child's best interests are 'paramount'.

The Children's Act provides that all actions or decisions in a matter concerning a child must: (i) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights in the Constitution,<sup>[2]</sup> and the rights and principles set out in the Children's Act, subject to any lawful limitation; (ii) respect the child's inherent dignity; and (iii) treat the child fairly and equitably (section 2). The Children's Act must be implemented by organs of state in the national, provincial and local spheres of government in 'an integrated, co-ordinated and uniform manner' (section 4(1)). Where applicable, 'local spheres of government must take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of [the] Act' (section 4(2)).

Dr De Maayer was clearly acting in the best interests of the child patients when the complaints were laid, and when he went public, after requests for improvements to the services provided to children in the hospital had fallen on deaf ears. Children in the hospital were not having their dignity respected, nor were they being treated fairly and equitably.<sup>[1]</sup>

In addition, by ignoring the concerns raised by Dr De Maayer about the plight of children at the hospital, official functionaries in the relevant organs of state were not acting in 'an integrated, co-ordinated and uniform manner' in the best interests of the child patients. Furthermore, the local hospital authorities failed to take reasonable steps to implement the constitutional rights of child patients as required by the Children's Act, and should be disciplined for this failure.<sup>[8]</sup>

### The Health Professions Act and HPCSA Rules and Guidelines

The Health Professions Act<sup>[5]</sup> establishes the HPCSA (section 2(1)), which has promulgated Ethical Rules of Conduct for the healthcare professions<sup>[6]</sup> and introduced General Guidelines for good practice in the healthcare professions<sup>[7]</sup> in a series of booklets.

The Ethical Rules of Conduct of the HPCSA<sup>[6]</sup> clearly state that a practitioner must at all times 'act in the best interests of his or her patients' (rule 27A). Likewise, the HPCSA's General Ethical Guidelines for the Health Care Professions<sup>[7]</sup> state that health practitioners should: (i) always regard concern for the best interests or wellbeing of their patients as their primary professional duty (para 5.1.1); (ii) respond appropriately to protect patients from any risk or harm (para 5.1.9); (iii) act quickly to protect patients from risk due to any reason (para 7.1); and (iv) report violations and seek redress in circumstances where they have a good or persuasive reason to believe that the rights of patients are being violated (paras 7.2 and 10.1.1).

It is trite that provisions in public service employment contracts may not impose conditions on state employees that undermine their ability to carry out their constitutional, professional legal and ethical duties. Whether health practitioners are employed in the private or public sector, they are bound by the same ethical and professional rules.

There is no doubt that Dr De Maayer was legally and ethically obliged to act in the best interests of his patients to protect them from harm or risk, when he reported the violations to his superiors. He sought redress for the patients by insisting on their being

provided with proper health services within the available resources. Furthermore, he responded appropriately by reporting the matter to the officials on three occasions.<sup>[1]</sup> When this failed, he was still legally and ethically bound to continue to take steps to protect his patients, and he did this by raising his concerns in the media. He was fully justified in doing so in the hope that public reaction to the untenable situation facing child patients at Rahima Moosa Hospital would cause the situation to be rectified.

As previously stated, the officials who sought to discipline him were themselves guilty of violating the Constitution,<sup>[2]</sup> the NHA<sup>[3]</sup> and the Children's Act,<sup>[4]</sup> and should be disciplined. Furthermore, if they are registered with the HPCSA they should be reported and disciplined for violating the HPCSA's Ethical Rules of Conduct<sup>[6]</sup> and its General Ethical Guidelines.<sup>[7]</sup>

## Conclusion

The Dr Tim De Maayer case raises the question whether there is a legal and ethical duty on public sector doctors whose complaints to hospital administrators have been ignored, to inform the public about harm caused to child patients due to intentional maladministration, negligence or indifference by the responsible local and provincial functionaries. While Dr De Maayer has acted in accordance with the Constitution,<sup>[2]</sup> the NHA,<sup>[3]</sup> the Children's Act,<sup>[4]</sup> the Health Professions Act<sup>[5]</sup> and the Rules and Guidelines of the HPCSA,<sup>[6,7]</sup> it appears that the official functionaries seeking to discipline him have violated the rights of the child patients in the Constitution and relevant legislation. As the complaints about the untenable conditions in the hospital were raised three times with the official functionaries concerned, and ignored by them, he was more than justified trying to take other measures to protect the child patients. In the circumstances, it seems perfectly reasonable to hope that by bringing the conditions at the hospital to the attention of the media, the public reaction might result in pressure on the administrators to address the situation.

It appears that the officials who sought to discipline Dr De Maayer were guilty of violating the Constitution and the relevant legislation affecting children, and should be disciplined. If they are registered with the HPCSA, they should be reported and disciplined for violating the Council's Ethical Rules of Conduct and General Ethical Guidelines for healthcare practitioners.

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