# Silent Killer

*When institutional obligations restrict public health workers' moral duty to save lives*

**By Hanifa Manda**

PROTECTING AND EXPANDING THE RIGHT TO FREEDOM OF EXPRESSION FOR ALL

Campaign for Free Expression

PROGRESSIVE HEALTH FORUM

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## *When institutional obligations restrict public health workers' moral duty to save lives*

*A report by Hanifa Manda*

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[1] The author declares that they have no financial or personal relationships that may have inappropriately influenced them in writing this report.

# Executive summary

Public health workers in South Africa must (against their moral duty to save lives) contend with watching their patients die from preventable causes due to the fear of speaking out. The Public Service Rules and Regulations restrict public health workers from engaging with the media. This leaves room for authorities to control the information that the public can access from and about the sector. Such control appears to emanate from the politicisation of senior public offices, which undermines independence and public accountability.

Public health workers are required to raise issues internally only, regardless of the public interest, against what the law recommends. Those who speak out publicly regarding the state of public hospitals and their working conditions consequently face disciplinary action or worse, under the Public Service Code of Conduct.

Some health workers interviewed and surveyed by CFE said they feared that if they spoke out, they would face intimidation, harassment, and potential death. An example of this was the killing last year of a hospital whistle-blower, Babita Deokaran. The lack of protection for those who challenge misconduct has created a culture of silence among workers, permitting maladministration and corruption in the sector to be covered up. Additionally, it hinders the ability of public health workers to dutifully serve the public and ensure that the right to health is observed and honoured.

This report unpacks these challenges and the broader issues in the public health sector that have exacerbated them which must be addressed. It highlights the potentially damaging effects of limiting freedom of expression and access to information.

This report demonstrates that although health workers' rights to seek, receive and impart information and ideas may be subject to certain restrictions, the restrictions must be constitutional and proportionate; specifically aimed at a relevant legitimate purpose that is in the public's best interests, and not be oppressive. When authorities victimise public health workers for exercising their right to freedom of expression around their working conditions and health and safety at work, this not only impacts their individual rights but also those of the public. Further, it could constitute a contravention of the Constitution and the relevant laws, regulations and policies, particularly the Batho Pele Principles, the Promotion of Access to Information Act (PAIIA) and the Protected Disclosures Act (otherwise known as the Whistle-blower Act).

While much of the analysis in this report is drawn from De Maayer's case, due to the better understanding of his case, the analysis and need for protection extends to the wider public health sector and all public health workers.



# Acknowledgements[1]

This report was made possible through several senior public health workers affiliated to the Progressive Health Forum,[2] whose voluntary participation provided insight into the state of freedom of speech and freedom of information in the public health sector. They were also the main lead in the initial investigation conducted to establish the facts surrounding the case of Dr Tim de Maayer; whose case incentivised the research.

Special thanks to Gareth Newham (Institute for Security Studies) and Alex van den Heever (Wits University/Progressive Health Forum), whose insight and input during the compilation of the report is invaluable.

[1] Due to limitations in the sample size for the research, some views or findings may not be representative of the entire sector. However, this does not impact the applicability of the research findings, conclusions, and recommendations. This report should be treated as an outcome of a preliminary study highlighting issues that require more in-depth research to ascertain the extent of the problem.

[2] The Progressive Health Forum is a national health advocacy network of progressive health workers, professionals, experts, and activists concerned with the condition and responsiveness of the healthcare delivery system in South Africa. See https://progressivehealthforum.net .

**Photograph: ALON SKUY**



# 1. Introduction

This report began as an investigation into the infringement of an individual public health worker's right to freedom of expression in the workplace. It later evolved into a wider, cross-sectional issue in the South African public health sector and the public sector at large. This followed the unearthing of evidence suggesting the widespread silencing of public health workers by senior public officials.

Inspired by the case of Dr Tim de Maayer, the Campaign for Free Expression (CFE) commissioned this report to assess the level of freedom of expression in the public health sector. The findings reveal that public health workers' right to speak out and address issues in the sector is severely constrained. This causes grave professional and ethical problems for them as it limits their ability to uphold their moral duty to save lives. This is enabled by:

- Abuse of power and misapplication of the laws and regulations governing the public service
- The problematic appointment of public hospital boards and senior management, where political interests are trumping professional skills and experience; and
- Maladministration by senior public health officials and lack of accountability for it

These issues also affect professionals in the rest of the public service, and the public's access to information.

De Maayer was disciplined for publishing an open letter in which he called for officials to address the collapse of facilities at the hospital where he worked. According to the letter, the situation was resulting in the needless deaths of innocent children. Although the paediatrician was later reinstated following a public outcry, several public health workers spoke up about the use of laws, policies, rules and regulations to suppress dissent in the sector. A group of more than 7 000 health professionals have since started a movement to demand reform in the sector, including by reviewing the regulations that hinder health workers from speaking publicly about their working conditions.

This report demonstrates the various ways in which public health workers are intimidated, harassed, and sometimes even killed for daring to speak out. It unpacks some of the weaknesses in the law and opportunities to address this issue.

# 2. Methodology

The report is based on a mixed research methodology using purposive sampling. Methods employed in collecting data were a qualitative survey; interviews and expert opinions conducted with and gathered from several public health practitioners; and a review of various documents such as legal frameworks, international instruments and media reports.



# 3. Public Health Workers Censored

There is a growing pattern signifying an attempt to silence the voices of public health workers. This all points to efforts to cover up maladministration, corruption and the violation of human rights emanating from government's failure to provide basic health care services to the public. Some health workers interviewed and surveyed by the Campaign for Free Expression highlighted intimidation, harassment, killings, and lack of protection for those who speak out in their sector as some of the silencing factors.

In June 2022, Dr Tim de Maayer, a paediatrician at the Rahima Moosa Mother and Child Hospital in Johannesburg, was suspended[1] following the *Daily Maverick*'s publication of his open letter on 22 May of the same year.[2] The letter was addressed to the hospital administrators and the Department of Health. In the letter, De Maayer bemoaned the deteriorating working conditions at his hospital, which were making it difficult for him and his co-workers to execute their duties efficiently, contributing to the needless deaths of children.

***An estimated 300,000 South Africans died from HIV and Aids due to government policies against anti-retroviral drugs. Yet public health workers who spoke out faced disciplinary action***

De Maayer was put on precautionary suspension in terms of clause 7.2 (a)(i)(ii) of the Public Service Disciplinary Code and Procedure, Resolution 1 of 2003 as amended,[3] to allow the department to conduct investigations into "allegations of unbecoming conduct".[4] The resolution allows a government employer to suspend or transfer an employee that is alleged to have committed an offence **of a serious nature**. The suspension is meant to be temporary, to allow for an investigation to take place, following which a disciplinary hearing should be held within a month or sixty days, depending on the severity of the matter. The chair for the hearing is appointed by the employer – normally

[1] See https://www.thesouthafrican.com/news/gauteng-doctor-suspended-after-open-letter-rahima-moosa-hospital-10-june-2022-latest-breaking-news.

[2] See https://www.dailymaverick.co.za/article/2022-05-22-a-wake-up-call-for-health-department-heads-children-are-dying-because-of-horrendous-state-of-our-public-hospitals/

[3] Resolution 01 of 2003 Amendment to Resolution 2 of 1999 Disciplinary Code and Procedures for the Public Service.

[4] Quoted from a copy of the suspension letter that De Maayer was served.

a senior government employee. After the hearing, the chair may find the alleged offender to have committed misconduct and issue a relevant sanction. The sanction may include a written warning, suspension without pay, demotion, a combination of these, or dismissal.

The overwhelming media attention that De Maayer received, and pressure[1] from the *I Am* movement of the Progressive Health Forum,[2] influenced the hospital to make a quick U-turn, reinstating De Maayer[3] within a few days without completing their investigation. However, the message had been sent and the precautionary suspension was successful in silencing the doctor and demonstrating to others that there would be consequences for those who spoke out publicly. CFE would later confirm this upon trying to get an interview with the doctor.

***Varavia reported being falsely accused of stealing hospital equipment, harassing a co-worker, followed by forced anger management therapy with no proper diagnosis***

De Maayer's close associates who agreed to speak to this writer, described him as a "private person" who did not wish to continue receiving any media attention, hence his refusal to comment on the matter. However, based on the contents of the suspension letter, it was clear that there would be consequences if the doctor continued to open up. De Maayer's suspension letter explicitly forbade him from giving media interviews or statements or taking to any social media platforms on matters relating to the case.

The decision of hospital authorities to take disciplinary action against an employee exercising his rightful duty to serve the interests of the public appears flawed. This is an issue that dates back many years and has been ongoing. The Freedom of Expression Institute has previously called for the 'ungagging' of health workers' voices and the promotion of free speech in the sector.[4]

During President Thabo Mbeki's tenure, an estimated 300,000 South Africans died from HIV and Aids related illnesses due to government's policies against anti-retroviral drugs.[5] Yet, public health workers and officials that chose to speak out faced disciplinary action. These include Dr Nokuzola Ntshona, then medical superintendent at Frere Hospital, who in August 2007 wrote to President Thabo Mbeki accusing then Health Minister Manto Tshabalala-Msimang of turning a blind eye to the crisis.[6] Former Deputy

[1] https://ewn.co.za/2022/07/25/sa-s-medical-fraterning-calls-for-reform-in-healthcare-sector.

[2] https://progressivehealthforum.net/the-i-am-movement/.

[3] https://www.sabcnews.com/sabcnews/dr-tim-de-maayer-reinstated-following-suspension-over-open-letter-on-poor-public-healthcare-system/.

[4] see: https://ifex.org/prison-doctor-suspended-faces-defamation-suit-for-criticising-government-minister/.

[5] https://www.hsph.harvard.edu/news/magazine/spr09Aids/.

[6] See https://www.news24.com/News24/Health-whistle-blower-fired-20070925



Health Minister Nozizwe Madlala-Routledge was fired in the same year for sharing the same sentiments and attending an Aids conference without the President's approval.[1] Another doctor victimised for speaking out against the issue was Dr Costa Gazi. He was fired for publicly criticising Health Minister Manto Tshabalala-Msimang's refusal to supply zidovudine to all HIV-positive pregnant women, calling it an abuse of human rights.[2]

Recently, during the outbreak of the Covid-19 pandemic, there were widespread attempts to similarly limit public health workers from speaking out in the name of managing misinformation. This inhibited public health workers from speaking out against the shortage of personal protective equipment, safety-related concerns at work, and other issues.

In June 2020, renowned internal medicine specialist, Professor Ebrahim Variava, who at the time was head of internal medicine at Tshepong Hospital in Klerksdorp, was suspended after commenting publicly that the North-West was ill-equipped to deal with the Covid-19 crisis. He had highlighted that the province required a response strategy that was locally tailored.[3] Previously, Variava had spoken publicly when his attempt to raise issues internally failed to yield a response. He had raised concerns with the North-West Department of Health concerning irregular drug stock outs for common infections, and medication required for patients in Intensive Care Units (ICU).

> "It is horrendous … Innocent people are being denied their basic right to [healthcare]. People are being killed…. Some people may die during this time, and it would be recorded as a natural death because of the illness, yet something could have been done sooner, but we couldn't because they can't access care," Variava said.[4]

The Department of Health alleged that Variava had brought the department into disrepute. His suspension sparked outrage amongst several health workers who launched a petition to have him reinstated. Variava's supporters deemed his suspension as unfounded due to the lack of clarity on the allegations levelled against him. Following pressure from this group, Variava was reinstated on 29 June 2020, two weeks after his suspension.[5]

[1] See https://allafrica.com/stories/200708130279.html.

[2] https://health-e.org.za/2008/05/22/doctors-under-siege-living-with-Aids-350/.

[3] See https://www.spotlightnsp.co.za/2020/06/17/controversy-as-north-west-health-dept-suspends-leading-doctor/.

[4] https://www.news24.com/citypress/News/north-wests-fatal-strike-innocent-people-being-denied-healthcare-20180507.

[5] https://www.spotlightnsp.co.za/2020/06/29/u-turn-as-suspension-of-prominent-north-west-doctor-lifted/.

These silencing tactics by the Department of Health have had devastating effects. They unwittingly enabled the massive looting of Covid-19 funds meant to benefit the public. Babita Deokaran paid the highest price when she was assassinated in August 2021 after flagging up to R850 million in suspicious payments authorised at Tembisa Hospital in Johannesburg. At the time of her assassination, Deokaran was the acting Chief Financial Officer (CFO) at the Gauteng Provincial Government Department of Health [1]

In the case of the Life Esidimeni crisis, such silence cost the lives of 144 psychiatric patients. They died from various causes including starvation and neglect. This followed the Gauteng Health Department's attempt to save money by cancelling its outsourced contract with Life Esidimeni, transferring thousands of patients out of the facility.[2] *Spotlight* – a public interest health newsletter - quoted Professor Neil Martinson, Chief Executive Director of the Perinatal Research Unit at the University of Witwatersrand (Wits), saying: "The Life Esidimeni tragedy should have reinforced the lesson that doctors and nurses have a responsibility to act not as employees first and doctors and nurses second."[3]

***Varavia reported being falsely accused of stealing hospital equipment, harassing a co-worker, followed by forced anger management therapy with no proper diagnosis***

These cases account for what is in the public domain, while many others have gone unreported, as CFE established from speaking to senior public health workers who are concerned about the trend.

When CFE spoke to Variava, he recalled his personal ordeal at the hands of the system after speaking out publicly. He reported having been falsely accused of stealing donor-funded hospital equipment, harassing a co-worker, followed by forced anger management therapy with no proper diagnosis of his 'problem', all to paint him as a trouble-maker. He confirmed that while he was able to get the support he needed to be reinstated, his fellow accused, who happened to be more junior and whose cases did not draw enough public attention, went unnoticed. According to him, these cases remain open and those accused remain on suspension several years later, with no idea when the cases might be resolved.[4]

[1] https://specialprojects.news24.com/silenced/index.html#:~:text=Babita%20Deokaran%20was%20a%20corruption,against%20irregular%20and%20dubious%20payments.

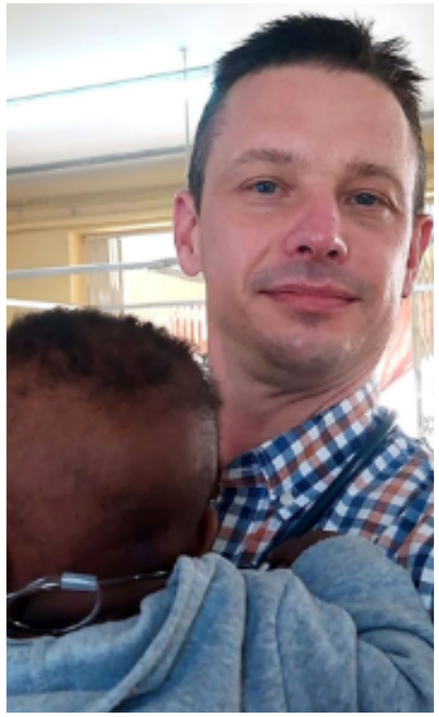
[2] https://www.news24.com/News24/four-years-on-a-joint-hearing-into-life-esidimeni-deaths-is-set-to-be-conducted-20200205

[3] Ibid.

[4] Telephonic conversation between CFE researcher and Prof. Viaravia, Friday 23 September 2022.



Photograph courtesy of DAILY MAVERICK



Dr Tim de Maayer

Professor Ebrahim Variava

According to Martinson, Variava's case presented some important lessons. Speaking immediately after Variava's reinstatement he said: "Prof Variava's case got attention because it is high-profile and he had a lot of support, but we've heard about other high-handed suspensions in the province that have not been resolved for months and years."[1]

*Spotlight* went on to report that the North-West Department of Health had confirmed, following Martinson's remarks, that 26 of its employees in the province were on suspension. Eleven of these cases were said to have been open for longer than six months "due to the nature and complexity of the investigations".[2] These statistics are from one province alone. The question that remains is how many other unreported cases are there across all nine provinces, and how long have they been outstanding?

The Department of Public Service and Administration's Guide on Disciplinary and Incapacity Matters lays out the process for taking disciplinary action in the public service. It explains that, according to the Labour Relations Act, if an employee is accused of

[1] Ufrieda Ho (2020), "U-turn as suspension of prominent North West doctor lifted", Spotlight, Public Interest Health Newsletter.

[2] Ibid.

wrongdoing, they should be informed of the allegations levelled against them and a hearing should be held **within a reasonable time,** to allow the accused to give their side of the story. Following which, **a decision must be made also within reasonable time**.[1] By law, the prolonged suspension of Variava's colleagues and others is unfair treatment of the employees. It is a way of instilling the fear of speaking out among other employees, and to discourage the challenging of misconduct.[2]

In solidarity with De Maayer, an anonymous doctor recently wrote:

> "More than a decade ago, when I was a medical student, I once wrote to the media. It was an anonymous letter, but the university and hospital figured out who I was. My concerns were legitimate, but they caused me many problems and almost ruined my career. I learnt my lesson: never again."[3]

The anonymous doctor went on to say:

> "As a doctor, you……try to help and save as many (patients) as possible, but under no circumstances publicly speak out. That will be career suicide."[4]

They added that:

> "There is no other way to become a specialist in South Africa. If you are a whistle-blower, you can forget about it. And do not think if you burned bridges here, you can go work elsewhere. You will never be employed as a doctor in a foreign country without a certificate of good standing from your current medical council."[5]

There is an apparent need for the effective application of the law to protect those who are brave enough to expose wrongdoing in all sectors, particularly when the perpetrators are in positions of authority. However, as it stands, the law is being used as a weapon to silence those who try to speak out.

[1] Guide on Disciplinary and Incapacity Matters, PART A, 1: Key Points: Discipline, p6.

[2] It can also be a case for wasteful expenditure if it is proven that those on prolonged suspension are still on full pay.

[3] See https://www.news24.com/news24/opinions/letters/letter-to-the-editor-we-salute-you-dr-tim-de-maayer-for-speaking-out-20220615.

[4] Ibid.

[5] Ibid. It is worth noting that the medical councils are politically appointed by the Minister of Health.



# 4. How the law is being misconstrued to censor public health workers

The Public Service Rules and Regulations (the Rules and Regulations) prohibit public workers from engaging with the media without approval from their superiors. Public workers are required to raise issues internally, following a bureaucratic process that does nothing to demonstrate accountability to the public or to address pertinent issues, but leaves workers frustrated. In this way, the Rules and Regulations are being weaponised to cover up misconduct and corruption.

Chapter 2, section 3.3, of the new Public Service Rules and Regulations as amended in 2016[1] (the Public Service Code of Conduct)[2], stipulates that a public service employee should use "appropriate channels" to air grievances or to direct representations. The "appropriate channels" mentioned in the code of conduct are unpacked in the Explanatory Manual on the Code of Conduct for the Public Service[3] under section 4.3.4, which specifies that such channels are laid out through the grievance procedure described in section 35 of the Public Service Act, 1994 read with Rules for dealing with complaints and grievances of officials in the Public Service, Regulation no 6575, dated 1 July 1999.[4] This procedure requires any employee with a grievance to bring such a grievance/dispute to the attention of the immediate supervisor who must refer it to higher levels of authority if the supervisor cannot succeed in resolving it.

Such channels can only work where the supervisors or higher-level authorities are not implicated in the case. Public employees are silenced in this way because it is self-evidently futile to report issues to their perpetrators. Employees should be allowed to raise their grievances directly with the public if a public employer repeatedly fails to address issues relevant for the provision of quality services to the public, which was the case for De Maayer.

[1] The Public Service Code of Conduct, 2016. Available at https://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations2016/PUBLIC service regulations 16 April 2019.pdf .

[2] Available at http://www.dha.gov.za/index.php/notices/2-uncategorised/29-code-of-conduct-for-public-servants.

[3] Available at http://www.psc.gov.za/documents/docs/guidelines/Explanatory Manual on the Code of Conduct for the Public Service.pdf .

[4] Available at http://www.psc.gov.za/forms/Annexure14_2002.pdf.

Variava, in support of this view said, *"I believe in appropriate action and following the channels, but when we've done what we can and nothing changes, we should not be afraid to speak out immediately."*[1]

Other channels for reporting directly to the public can be through the media or the Public Protector. The law does provide for such an alternative approach in the Protected Disclosures Act (also known as the Whistle-blower Act). However, it seems that emphasis is currently placed on upholding the Public Service Rules and Regulations with no flexibility. This will be discussed further in sections to follow.

The Rules and Regulations, in Chapter 1 section 6.3 state that "An employee, in his or her official capacity, may not communicate with the media unless so authorised by the head of department".[2] Section 6.4 tasks the head of department with establishing a policy regulating communication by its employees with the media. However, 11 out of the 13 senior public health workers that CFE spoke to (85%) had never seen their hospital communications policy. The problem with this is that the regulation of communication with the media is meant to be guided by these communications policies, yet most health workers do not have access to them (if they exist). On the other hand, these policies are meant to lay out conditions under which issues may be addressed through alternative procedures. These alternative procedures should ideally not require prior authorisation from the head of department where the interest of the public is at stake.

***Preventing employees from making defamatory comments about colleagues or expressing personal grievances, must be weighed against the value to the public***

In terms of Section 20 (t) of the Public Service Act, 1994, an employee shall be guilty of misconduct, and may be dealt with in accordance with the relevant sections of the Act, if he or she contravenes or fails to comply with *any provision* of the Code of Conduct. This provision has become a loophole used by officials to discourage public workers from speaking publicly.

Limiting public workers' freedom to address the media may be justified if there is a balance between legitimately protecting the reputation of the institution and enabling free speech. For example, preventing employees from making slanderous or defamatory comments about colleagues, or those who may have a personal grievance that could be addressed from bringing their employee into disrepute has to be weighed against the value that it has to the public. Without such a balance, in cases where corruption, misconduct and maladministration are perpetrated by senior government officials and

[1] See https://www.spotlightnsp.co.za/2020/06/29/u-turn-as-suspension-of-prominent-north-west-doctor-lifted/.

[2] Public Service Rules and Regulations, Chapter 1. General Provisions. Communication with the Minister.



employees, no room exists for employees to overcome the barrier created by this bureaucratic communication procedure.

To that extent, some of the provisions in the Public Service Rules and Regulations contravene Section 195 of the constitution (the Batho Pele Principles)[1] which gives effect to a transparent, accountable, ethical, efficient, and effective public service that responds to people's needs. It is reminiscent of pre-democracy times where secrecy and fear were used to crush dissent. The Public Service Rules and Regulations need to include a clause that lays out circumstances under which an employee may take to the media without seeking the approval of their superiors, in alignment with the Protected Disclosures Act.

## *i. Why would communicating with the media as a public employee constitute a severe transgression?*

As already indicated before, there are many cases like De Maayer's that demonstrate the silencing of public health workers. However, only an account of De Maayer's experience will be used for analysis.

The classification of De Maayer's engagement with the media to address maladministration at Rahima Moosa as "serious misconduct" or a severe transgression appears flawed. The hospital CEO appears not to have applied the law appropriately in serving a precautionary suspension letter to De Maayer. The law requires an assessment of the seriousness of an alleged misconduct **by considering the actual or potential impact of the alleged misconduct on the public service's ability to serve the public**. [2] Therefore, the CEO should have been guided by the benefit or harm that De Maayer's open letter brought to the public. Since the letter brought to light issues that were hindering service delivery at the public hospital where he worked, there is a strong argument that the letter served, rather than harmed, the interests of the public.

The suspension letter, signed by the Rahima Moosa Mother and Child Hospital CEO read:

> "1. You Dr T. de Maayer an employee of the Gauteng Department of Health (GDoH), and therefore being an officer of the Public Service of South Africa, are hereby given notice of your PRECAUTIONARY SUSPENSION until such time as the investigation into allegations of unbecoming conduct has been finalized.
>
> 2. Reasons for your PRECAUTIONARY SUSPENSION are as follows:
>
> i. You are alleged to have **committed a very serious misconduct.**

[1] "The Hippocratic oath in practice: the ethics, challenges and strategies for healthcare worker reporting", Dr Prinitha Pillay, Rural Health Advocacy Project. SECTION24.

[2] See The Public Service Disciplinary Code and Procedure, Resolution 1 of 2003 and the Guide on Disciplinary and Incapacity Matters.

ii. It is believed that your presence in the workplace may jeopardize the investigation process.

iii. It is further believed that you may r**epeat the same offence** and or interfere with witnesses.

3. The decision of this suspension as at paragraph 2 above comes as a consequence of **your unbecoming conduct,** in that on or about the 21st of May 2022, you took to the media or have given an interview to the Daily Maverick **without knowledge, permission and authorization from the Management of the hospital or the Gauteng Department of Health (GDoH).**

4. You were found to have repeated the same behaviour again on or about the 25th of May 2022, after the release of an official Media statement by the office of the Executing Authority (MEC) on the 24th [of] May 2022."

Disciplinary action in the public service is guided by the Public Service Disciplinary Code and Procedure, Resolution 1 of 2003 and the Guide on Disciplinary and Incapacity Matters. According to these, management should take progressive disciplinary action in four steps:

**1.Corrective counselling.**
**2.Verbal warnings.**
**3.Written warnings.**
**4.Final written warnings.**

The Disciplinary Code states that these corrective steps should not be applied mechanistically (one building upon another), but, **depending on the severity of the transgression** (which the person taking the decision to discipline would have to judge); the discipliner may use their discretion to decide which action to take. For example, the discipliner may employ a written warning or a final written warning in the first instance, for a very serious transgression.

The question to be asked, however, is what criteria should be used for the classification of an alleged offence as a severe transgression? In De Maayer's case, did the CEO consider the interests of the public in her judgement? Because De Maayer's alleged offence was classified as severe, he could have potentially received a written warning or been fired if the disciplinary committee had found it necessary.

CFE received conflicting statements from those that were interviewed, with some senior officials alleging that De Maayer was issued a written warning before he was reinstated, while others maintained that the matter was never explored further, following the officials' sudden reinstatement of De Maayer. The fear of disclosing details around the case was apparent. This could also be seen even in the way that a request made by CFE for a communications policy from Rahima Moosa Hospital's communications office led to an immediate escalation of the matter to the Member of the Executive Council (MEC)'s office. Even then, the MEC's office ignored CFE's several follow-up requests



**Photograph: ALON SKUY**

for the policy, until it was established through a reliable source that the hospital did not have such a policy, or at least it had never been shared with staff.

De Maayer's case demonstrates not only the culture of silence that grips the public health sector but also a failure to correctly apply the law, which creates an ethical dilemma for public health workers - as will be demonstrated below.

## *ii. Institutional obligations versus moral obligations*

In the Explanatory Manual on the Public Service Code of Conduct, it is stipulated that the Code acts as, "a guideline for employees to know what is expected of them from an *ethical* point of view, both in their individual conduct and in their relationship with others." It further states that, "compliance with the Code can be expected to enhance professionalism and *help to ensure confidence in the Public Service."* However, what happens when compliance with the Code of Conduct is neither ethical nor helps to ensure confidence in the public service?

According to the Public Service Rules and Regulations, De Maayer should have raised his grievances internally, to his immediate supervisor. The head of the Paediatrics Department, De Maayer's immediate supervisor, confirmed to CFE that he had followed that process fruitlessly, in 2016 and 2021.[1] De Maayer's supervisor had raised grievances with both the local and provincial management on behalf of all the staff, which included De Maayer, but had been ignored. This accounts for De Maayer's decision to take the matter to the media. He acted in the interest of the public, with the intention of saving children's lives - his moral obligation as a health worker.

According to Professor McQuoid-Mason, a Professor of Law at the University of KwaZulu-Natal, an analysis of the Constitution, the National Health Act, the Children's Act, the Health Professions Act and the rules and guidelines of the Health Professions Council of SA (HPCSA) indicates that De Maayer acted both legally and ethically to protect the child patients at Rahima Moosa Hospital.[2] CFE's research supports his observation. Health care workers/practitioners have moral or ethical duties to others and society. These duties are generally in keeping with the principles of the South African Constitution (Act No. 108 of 1996) and the obligations imposed on health care practitioners by law. They are articulated in the Ethical Guidelines for Good Practice in the Health Care Professions[3] and further cemented by the Hippocratic Oath[4] that health care practitioners take upon starting to practise.

There are *13* core ethical values and standards that underlie professional and ethical practice in health care professions, according to the ethical guidelines. These are:

- Respect for persons
- Best interests or well-being: non-maleficence
- Best interests or well-being: beneficence
- Human rights
- Autonomy
- Integrity
- Truthfulness
- Confidentiality

[1] From a telephonic interview held on 12 October 2022.

[2] See https://www.timeslive.co.za/news/south-africa/2022-06-22-law-expert-says-officials-who-tried-to-discipline-doctor-must-face-the-music/.

[3] Ethical Guidelines for Good Practice in the Health Care Professions. Available at https://www.hpcsa.co.za/Uploads/Professional_Practice/Ethics_Booklet.pdf.

[4] See https://www.gov.za/we-swear-hippocratic-oath.



- Compassion
- Tolerance
- Justice
- Professional competence, and
- Self-improvement.

For this analysis, the focus will be on three of these:

- **Best interests or well-being: Non-maleficence:** Health care practitioners should not harm or *act against the best interests* of patients, even when the interests of the latter conflict with their own self-interest.
- **Best interest or well-being: Beneficence:** Health care practitioners should act in the *best interests* of patients even when the interests of the latter conflict with their own personal self-interest.
- **Human rights:** Health care practitioners should *recognise the human rights* of all individuals.

According to the HPCSA's Ethics Booklet section 4.4, "To have a duty is to ask the question, "What do I owe others?". The ethics booklet clearly specifies under section 1.4. that:

> It is impossible, (however), to develop a complete set of specific ethical prescriptions applicable to all conceivable real-life situations. In concrete cases, health care professionals may have to work out for themselves what course of action can best be defended ethically. This requires ethical reasoning.

In 2.2 it says, "In concrete cases, the demands of these core values and standards may clash, thus making competing demands on health care practitioners. The only way to address such clashes is through ethical reasoning." The Ethical Guidelines for Good Practice in the Health Care Professions lay out how one might resolve conflict/ethical dilemmas. For example, how health practitioners may handle difficult situations where two (or more) principles appear to be in conflict. They recommend making a moral assessment where the ethical content of each option should be weighed by asking the following questions:

1. **What are the likely consequences of each option?**
2. **What are the most important values, duties, and rights?**
3. **Which weighs the heaviest?**

This moral assessment is what constitutes ethical reasoning. Based on such a moral assessment, it is justifiable, under certain circumstances, for health care workers to set aside what is expected of them in the Rules and Regulations for Public Service and prioritise the welfare of their patients.

According to the Explanatory Manual on the Code of Conduct for the Public Service**, the Rules and Regulations are applicable to persons who are employed in the public service "only insofar as they are not contrary to the laws governing their employment."**[1]

The law governing health workers is the National Health Act, 61 of 2003 along with the Ethical Code of Conduct for Healthcare Practitioners. These provide a framework

[1] Explanatory Manual on the Code of Conduct for the Public Service



that considers the obligations imposed by the Constitution and other laws with regard to health services. By law, health care practitioners are expected to respect human rights. The right to the highest attainable standard of health is a human right recognised in the South African Constitution and in international human rights law.

The Universal Declaration for Human Rights asserts in Article 3 that everyone has the right to life, liberty, and security of person. It also affords to humans the right to health. Article 12 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Under the Covenant, which South Africa has ratified, states must protect this right by ensuring that everyone within their jurisdiction has access to the *underlying determinants of health*, such as clean water, sanitation, food, nutrition and housing. Article 12.2 requires parties to take specific steps to improve the health of their citizens*, including reducing infant mortality and improving child health*, among other things. This is usually the basis for many public doctors' grievances – to be able to uphold their moral obligation to respect the public's right to health and to act in the best interests of the public.

Based on this argument, speaking to the media as a public employee should not constitute a severe transgression, or indeed any transgression, when ethical reasoning is applied, and it justifies the action as benefiting the public's interest. Yet, the Rules and Regulations have been used to victimise and intimidate De Maayer and others for speaking in the media.

This is a clear demonstration of either an abuse of power or a lack of understanding of the law by officials in the sector.

***By remaining silent about corruption, offences or other malpractices in the workplace, an employee enables, and becomes part of, a culture of fostering such improprieties***

## *iii. The Public Service Rules and Regulations and The Code of Conduct vs The Protected Disclosures Act*

In principle, the Public Service Rules and Regulations provisions which prohibit public employees from communicating with the media without the approval of their superiors should be superseded by the Protected Disclosures Act, where applicable. The Act outlines procedures to be followed by employees in both the private and the public sector for disclosing information regarding unlawful or irregular conduct by their employers or fellow employees. It provides for the protection of employees who make a disclosure which is protected in terms of this Act.

The Act allows the employee to make what it calls a *general disclosure* to any person, for example, a member of the media, the South African Police Service (SAPS) or a person

working for an organisation which keeps watch over the public or the private sector. Under this law, an employee is not restricted only to following internal procedures if the grievance stands to benefit the public. As such, De Maayer's open letter may qualify as a protected disclosure (even though it is noted that he had tried following internal procedures to no effect). The nature of the grievance implied incompetence and negligence by the hospital management. Therefore, reporting through the recommended channels as per the Public Service Code of Conduct was not expected to yield positive results for the public interest. Under the Protected Disclosures Act the channel that De Maayer used can be justified. Alternatively, he could have reported the matter to the Public Protector.

The preamble to the Protected Disclosures Act states that "criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage." It adds that "every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace…[and] every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure."

The Practical Guidelines for Employees for The Protected Disclosures Act[1] specify that "by remaining silent about corruption, offences or *other malpractices* taking place in the workplace, an employee enables, and becomes part of, a culture of fostering such improprieties, which is detrimental to the legitimate interests of the South African society in general. Every employer and employee has a responsibility to disclose criminal and other irregular conduct in the workplace." Further, it states that "every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information **are protected from any reprisals as a result of such disclosure."**

De Maayer and his peers who choose to speak out ought to be protected by this law when they face disciplinary action for making their disclosures. According to the Protected Disclosures Act, a disclosure represents any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show, among other things, that: (d)… **the health or safety of an individual has been, is being or is likely to be endangered** (in this case the lives and safety of little children); or (g)…matters are likely to be deliberately concealed. The Act also prohibits 'occupational detriment' of employees on account of having made a protected disclosure. This involves **protection against (a) being subjected to any disciplinary action; and (b) being dismissed, suspended, demoted, harassed or intimidated.** These are deemed to be "unfair labour practices" as contemplated in the Labour Relations Act, 1995. Again, the above clearly demonstrates the misapplication of the law by the Department of Health officials who discipline public workers for exposing maladministration in the sector through the media.

[1] See https://www.gov.za/documents/protected-disclosures-act-practical-guidelines-employees.



## *iv. The Public Service Rules and Regulations and The Code of Conduct vs The Promotion of Access to Information Act*

The Promotion of Access to Information Act 2 of 2000, (PAIA) is in fulfilment of Section 32 of the Constitution, which affords every individual the right to access information held by the State, as well as information held by another person (or private body) when such privately held information is required for the exercise and protection of rights. PAIA positions access to information as critical for fostering a culture of transparency and accountability in a democratic society. It is modelled around addressing the secretive and unresponsive culture in public and private bodies in South Africa before 1994, which often led to an abuse of power and human rights violations. However, the current Public Service Rules and Regulations and the Code of Conduct for Public Service contain clauses that compromise these principles.

*Issues include a lack of preventative maintenance, poor administration, corruption, poor forward planning, and a lack of strong governance*

By restricting employees to addressing grievances internally, and to seek permission from superiors before taking to the media, the Rules and Regulations assume that all systems in the public service work in good faith. The assumption that superiors will always act in an ethical manner when matters are reported, or permission is sought, is wrong. The Constitution provides in section 32(1)(h), for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights.

As explained earlier, prohibiting public workers from communicating with the media without the approval of their seniors deters the cultivation of a culture of transparency and accountability. It hinders the public's ability to access information necessary for them to hold the government accountable. It may be argued that in some instances, it is reasonable to limit public workers' ability to address the media. However, in cases where corruption and maladministration are perpetrated by senior government officials and employees, it leaves no room for employees to manoeuvre the barrier created by this bureaucratic communication procedure. In short, it is unconstitutional and reminiscent of pre-democracy times where secrecy and fear were used to crush dissent.

**Photograph:** LUCAS LEDWABA, Mukurukuru Media

# 5. Calls to strengthen accountability in the Public Health Sector

The lack of transparency and accountability in public health institutions is compromising the quality of healthcare services in the sector. The role played by whistle-blowers in exposing the rot in public hospitals and facilitating public participation in holding those responsible to account cannot be downplayed.

Head of Clinical Medicine at the University of the Witwatersrand, Professor Daynia Ballot, has warned of the possible collapse of public hospitals[1] in the foreseeable future

[1] See https://www.medicalbrief.co.za/the-long-slow-collapse-of-south-africas-top-hospitals/.



due to several issues. These range from a lack of preventative maintenance, poor administration, corruption, poor forward planning, and a lack of strong governance to power outages. Four of the largest public hospitals – Charlotte Maxeke Johannesburg Academic Hospital (CMJAH), Chris Hani Baragwanath Hospital in Soweto, Helen Joseph Hospital, and Rahima Moosa Mother and Child Hospital were said to be among the hardest hit.

Although the Covid-19 pandemic and other incidents such as the fire that gutted CMJAH in April 2021, destroying medical equipment worth R40 million,[1] were partial causes of the growing issues in public hospitals,[2] many public health practitioners operating in that space pointed out that most issues could easily be resolved through better management. For example, the damage and spiralling effects of the fire that broke out at Charlotte Maxeke Johannesburg Academic Hospital could have been limited if fire safety compliance measures had been in place before the fire. Instead, longstanding deficiencies such as ill-equipped fire hydrants, non-functional fire doors and a lack of emergency lighting in the stairwells[3] were among the issues that allowed the fire to cause severe damage. As a result of the fire damage, other major hospitals in the region like Chris Hani Baragwanath are bearing the brunt by having to contend with patient over-overcrowding. The hospital is struggling to cope with providing timeous life-saving surgeries[4]. There is not enough theatre time, ICU beds are limited, and surgical equipment is broken.

***Nominations should be accompanied by supporting evidence for fitness and qualifications to become a board member. However, this is currently not happening***

For a healthcare system that fares well on a global scale, this downward trend is alarming and could potentially spill into the private sector, warns Ballot. She argues that the country has one healthcare system because the public academic institutions are responsible for training the healthcare workers who work in both the private and public sector. Therefore, if the public healthcare sector collapses, the private sector will be affected. Ballot fears that, over and above the already mentioned infrastructural and management issues, ongoing power cuts, water shortages, sewage leaks and inadequate plumbing all increase the risk of infections and negatively affect patient care. This is exacerbated by the fact that healthcare workers are

[1] See https://www.news24.com/news24/southafrica/news/charlotte-maxeke-hospital-fire-caused-by-arson-report-20220905.

[2] See https://www.timeslive.co.za/news/south-africa/2022-09-04-surgery-backlogs-soar-at-bara-hospital-as-patients-suffer/.

[3] Ibid.

[4] Ibid.

exhausted and burned out. She recommends proper hospital management and accountability at all levels as critical solutions.

CFE's research established that the main concern regarding the running of public hospitals was around the appointment of senior management officials, including board members. A majority of the participants in the study felt that the appointments needed more transparency. Senior public health workers who responded to the survey and with whom CFE held interviews reported not at all being familiar with the board appointment process. Some did not even know whether their hospitals had a board and if they did, who the board members were.

Currently, public hospital boards are appointed by the MEC and academic hospital boards by the Minister.[1] The law requires that before the appointment of these individuals, the Minister gazettes a public notice in at least two national newspapers calling for nominations from members of the public. The nominations should be accompanied by supporting evidence for fitness and qualifications of the nominee to become a board member. However, this is currently not happening. The appointments currently point towards being politically motivated. According to the few senior health officials who reported familiarity with the board appointment process, board members are allegedly handpicked without following due process.

In terms of subsection (2) of the National Health Act, the Minister may only handpick a person where a suitable person or the required number of persons is not nominated. It is worth noting that board members are currently reported to be ineffectual. They do not exercise any power beyond playing an advisory role. Board members should be appointed based on merit and should hold the power to make executive decisions in the interest of the public.

As for senior management officials, the complaints were around their qualifications and competence. The consensus from the research participants was that some of the public hospitals' top management did not demonstrate the core competencies required to exercise executive leadership. In an open letter published by Nadya Swart[2], calling for the fixing of the public health sector, she points out that "there appears to be a remarkable lack of seriousness when appointing people to key leadership positions in [the] health system."[3] She gave an example of the appointment of Dr David Motau in 2021, as registrar of the HPCSA – the body responsible for the registration of healthcare workers in South Africa. Motau was suspended only a few weeks into his appointment, in connection with grave allegations of fraud and corruption amounting to R8.7- million during his tenure as head of the Free State Department of Health.[1]

[1] According to Adjunct Professor Alex van den Heever, Chair in the Field of Social Security Systems, Administration and Management Studies at Wits School of Governance.

[2] Nadia Swart is a Health Editor at BizNews.com.

[3] Nadya Swart, (2022) "Open letter to Dr Joe Phaahla – fix the public health sector!" https://www.biznews.com/health/2022/06/23/public-health-sector.



Corruption and fraud are some of the leading challenges for the sector. Many public and donor funds meant to be used to fight the Covid-19 pandemic were misappropriated or squandered as a result of irregular tender processes. In September 2021, the Special Investigation Unit (SIU) released a report into the National Department of Health's controversial R150 million tender awarded to Digital Vibes. The money which was intended for the National Health Insurance (NHI) campaign and crucial public communications around the Covid-19 pandemic was diverted for the personal benefit of individuals, their family members, and associates.[2]

Several other cases have been reported, including that of the former Gauteng Health MEC Brian Hlongwane. Between 2006-2009, Hlongwane is alleged to have defrauded the department of several millions rands earned in tender kickbacks and irregular trips.[3]

More recently, the Tembisa Hospital scandal involving R1 billion in corruption erupted, which was exposed by Deokaran, leading to her assassination. The money was lost to irregular tenders issued at the hospital.[4]

Such high-level corruption cases are not limited to the health sector. This challenge exists across the entire public service, which calls for greater efforts in creating transparency and accountability not only in the public health sector, but the public service at large. Although fixing the management would contribute greatly to fixing the problems, whistle-blowers play a central role in ensuring accountability. It is through whistle-blowers like Dr Tim de Maayer and others that most of the current rot in the public health sector has come to light.

***Standards in the public health sector will continue to deteriorate if hospital management is not significantly improved and transparency and accountability is not strengthened***

[1] See https://www.dailymaverick.co.za/article/2021-08-04-blow-to-health-professions-council-as-new-registrar-david-motau-faces-serious-charges/.

[2] http://www.thepresidency.gov.za/press-statements/president-authorises-release-siu-investigation-digital-vibes-matter.

[3] https://www.news24.com/news24/southafrica/news/just-in-former-gauteng-health-mec-brian-hlongwa-to-appear-in-court-more-than-a-decade-after-corruption-claims-20211206.

[4] See: https://www.iol.co.za/pretoria-news/news/babita-deokaran-killed-for-exposing-r1bn-corruption-at-tembisa-hospital-says-panyaza-lesufi-fbdb09a1-6e0e-4006-bbb3-a90f17b22279.

**Photograph:** LUCAS LWEDABA, Mukurukuru Media

# 6. Conclusion



Public health workers, and potentially officials in the rest of the public service, are being silenced and censored through systemic and administrative victimisation and intimidation; and even the elimination of those who choose to speak publicly against maladministration and corruption in this space. De Maayer's case signifies unlawful silencing of a responsible official in the proper exercise of their duties. It gives reason to believe that there was never an intention to execute justice when he was reprimanded, except to intimidate those willing to speak out. The same can be said for many other similar reported cases where public health workers faced disciplinary action for speaking out.

Standards in the public health sector will continue to deteriorate if hospital management is not significantly improved and transparency and accountability is not strengthened.

The public service regulatory framework, to a large extent, encompasses the tenets of democracy. However, the existence of loopholes in policy and legislation such as the Public Service Act, read with the Public Service Rules and Regulations, allows for the misapplication of the law as an abuse of power by authorities. This hampers the promotion of transparency and accountability in the public sector. Some clauses in the Rules and Regulations for the Public Sector, and the Code of Conduct for the Public Sector, which are informed by the Public Service Act, need strengthening for better alignment with the Batho Pele Principles outlined in the constitution and Promotion of Access to Information Act.

The protection of whistle-blowers can promote access to information. Whistle-blower protection and the ability of the public to access information held by (and on) government institutions is pivotal to create an open and accountability-driven environment in the sector.

The Public Service Rules and Regulations need to be applied more flexibly to allow public workers more freedom to engage with the media, particularly when they do so in the interests of the public.

A thorough review of the public service regulatory framework is needed to remove any ambiguity and ensure alignment with the constitutional provisions that promote transparency and accountability. Freedom of expression and access to information in the sector should be enhanced as a result. Furthermore, the public service policy and regulatory framework needs to be more cohesive in dealing with moral and ethical obligations as well as disciplinary procedures, or at least public workers need to be made aware of their rights and provisions in the law that protect them when they speak out.

***Policies guiding disciplinary procedures in the public sector should incorporate ethical reasoning and decision-making that is in the best interests of the public***



# 7. Recommendations: Opportunities for increasing transparency and accountability in the public sector

Below are some recommendations for increasing transparency and accountability in the public health sector and the public sector as a whole, based on findings and conclusions from this research:

1. **The Public Service Rules and Regulations should be revised** to
   a) **Remove ambiguous clauses that may be subject to various interpretations or create confusion, permitting an abuse of power by authorities.** For example, the Public Service Act 1994 stipulates that an employee shall be guilty of misconduct if they contravene or fail to comply with **any provision** of the Code of Conduct, while the explanatory manual to the Code of Conduct says that the Code is only applicable as far as it does not contravene relevant laws. It would be better to align the regulations with applicable legislation.
   b) Given that corruption in the public sector is found even at the highest political and managerial levels, expecting internal processes alone to address grievances is inadequate. **The Rules and Regulations should lay out circumstances under which an employee may take alternative procedures to raise grievances (such as going to the media).** This could be in instances where following the internal procedures have failed to yield a positive response, or where the grievance implicates senior management and compromises the interests of the public. These alternative procedures should ideally not require prior authorisation from the head of department.

2. The government should give urgent attention to **the establishment of a dedicated and independent whistle-blower support and protection agency.** This was recommended by the Zondo Commission of Inquiry into State Capture – a public inquiry established

**Photograph:** LUCAS LEDWABA, Mukurukuru Media



in January 2018 by former President Jacob Zuma to investigate allegations of state capture, corruption, and fraud in the public sector in South Africa[1]

3. Where people face physical threats, an alternative support framework is required. Whistle-blowers also need to be protected from physical threats that are not made directly in the context of the workplace.
4. **Popularising explanatory manuals and codes of good practice that are meant to give guidance to public bodies on interpretations of the law and implementation of policies** could aid in the correct application of the law. It would also deal with the issue of abuse of power.
5. **Government institutions' policies should complement each other across all departments, including communications policies.** The research found that while regulation of communication with the media should be guided by communications policies, most health workers do not have access to them. These policies should be **easily accessible to every worker, including the public.** They can be posted online or made readily available in print at any given time.
6. **Policies guiding disciplinary procedures in the public sector should incorporate ethical reasoning and decision-making that is in the best interests of the public.**

When employees are issued a temporary suspension letter, the criteria for the classification of their alleged misconduct as a severe transgression or serious misconduct should be laid out in the letter. The letter should preferably highlight how the misconduct harms the interests of the public.

7. **Following the review and alignment of all policies, heads of departments should ensure that their staff are acquainted with the policies; measures stipulated for them, and that they accept and abide by them.** In the case of health care professionals, they should primarily adhere to their code of ethics where ethical conflicts exist.
8. **Further research** is needed to:
    a) **Determine how many reported and unreported cases of prolonged precautionary suspensions** are there across all the 9 provinces.
    b) **Establish how long the cases have been outstanding and whether these people are on paid suspension**, which would point to wasteful expenditure. The health sector could potentially be bleeding millions of rands should it turn out that these employees are all on full pay. Chances are that, due to the prolonged period that many have not been at work, replacements have been found for them – who are also earning salaries, leading to double costing. The cases should have been investigated and closed timeously.
9. **Public Hospital management should be appointed based on relevant skills-sets,** ensuring sound qualifications and capability to hold such office. **Supervisory boards should be appointed according to the law**, ensuring that independence

[1] See https://www.statecapture.org.za/

and competence are at the core of these appointments. The law requires the Minister to publish a notice calling for qualified nominees from members of the public. Currently the Minister is said to be handpicking board members, without following the procedure required by law.

10. **The need exists for support for freedom of expression expansion opportunities that are already available at national level**, such as the *I Am* movement of the Progressive Health Forum, to reclaim, repair and restore the public health service. Such support could be in the form of solidarity campaigns, lobbying and advocacy.

1.



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