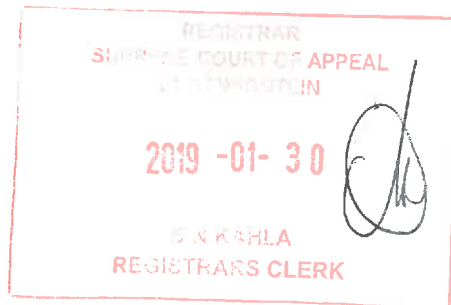


The Registrar
Supreme Court of Appeal
BLOEMFONTEIN



Your Ref

Our Ref SEC 4/0008 / M Koller / L van Schalkwyk

30 January 2019

Sir

CASE: 754/2018 and 1051/2018

APPEAL: R.M. KOMAPE & 3 OTHERS vs MINISTER OF BASIC EDUCATION & 3 OTHERS

We hand you herewith the following in the above Appeal:

1. Filing Notice bearing proof of service;
2. Six sets of the Appellants' Practice Note and List of Authorities.
3. Filing Notice bearing proof of service;
4. Six sets of the Appellants' Heads of Argument, Certificate, Chronology and List of Authorities.
5. Filing Notice bearing proof of service;
6. Six sets of the Appellants' Bundle of Authorities.

Yours faithfully

WEBBERS

E-mail: appeals@webberslaw.com

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**CASE NO: 754/2018
1051/2018**

In the matter between:

ROSINA MANKONE KOMAPE

First Appellant

MALOTI JAMES KOMAPE

Second Appellant

MOKIBELO LYDIA KOMAPE

Third Appellant

LUCAS KHOMOTSO KOMAPE

Fourth Appellant

and

MINISTER OF BASIC EDUCATION

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
LIMPOPO DEPARTMENT OF EDUCATION**

Second Respondent

**PRINCIPAL OF MAHLODUMELA LOWER
PRIMARY SCHOOL**

Third Respondent

**SCHOOL GOVERNING BODY, MAHLODUMELA
LOWER PRIMARY**

Fourth Respondent

And

EQUAL EDUCATION

Amicus Curiae

FILING NOTICE

**APPELLANTS' PRACTICE NOTE & LIST OF AUTHORITIES
SERVED AND LODGED HERewith**

DATED at BLOEMFONTEIN on this 29th day of JANUARY 2019.



ATTORNEY FOR APPELLANTS

SECTION 27

c/o WEBBERS ATTORNEYS

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TO:

THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

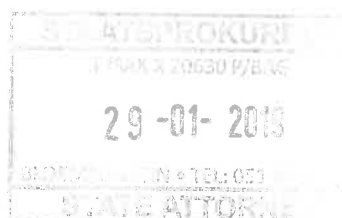
AND TO:

ATTORNEY FOR RESPONDENTS
STATE ATTORNEY POLOKWANE
c/o **STATE ATTORNEY BLOEMFONTEIN**
49 CHARLOTTE MAXEKE STREET
BLOEMFONTEIN CENTRAL
BLOEMFONTEIN
Ref: Mr I Gough/ Ms E Kock

2 COPIES hereof received on this
the 29th day of JANUARY 2019.

For: ATTORNEY FOR
RESPONDENTS

12-30
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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**APPEAL CASE NUMBERS: 754/2018; 1051/2018****COURT A QUO CASE NUMBER: 1416/2015**

In the matter between:

ROSINA MANKONE KOMAPE

First Appellant

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and

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MAHLODUMELA LOWER PRIMARY SCHOOL**

Fourth Respondent

and

EQUAL EDUCATION

Amicus Curiae

APPELLANTS' PRACTICE NOTE

A. NATURE OF THE APPEAL

1. This is an appeal against the judgment and order delivered by his Lordship Mr Justice Muller in the Polokwane High Court on 23 April 2018. The appellants (plaintiffs in the court a quo) sued for damages arising from the death of their five-year-old son and brother after he fell into a pit toilet at his Limpopo school and drowned. The appeal relates to the court a quo's dismissal of the appellants' claim for damages for emotional shock (Claim A) and associated future medical expenses (Claim C). The appellants also appeal the court a quo's dismissal of their claim for damages for grief, based on a development of the common law (Claim B), alternatively constitutional damages (alternative Claim B), as well as a declaratory order arising from the respondents' breach of several constitutional rights.

B. BASIS FOR JURISDICTION

2. The appellants applied to the court a quo for leave to appeal in terms of Uniform Rule 49. On 5 June 2018, the court a quo granted leave to appeal in respect of Claim B.
3. The appellants subsequently applied to this Court for leave to appeal the refusal of claim A, claim C, the alternative to claim B and the declaratory order, in terms of Rule 6 of the Rules Regulating the Conduct of the Proceedings in the Supreme Court of Appeal. Leave to appeal was granted on 5 September 2018.

C. CONSTITUTIONAL QUESTION: DEVELOPMENT OF THE COMMON LAW

4. In Claim B, the appellants seek a development of the common law to recognize a claim for damages for grief, where that grief is prolonged and complicated and in circumstances where the death of the appellants' son and brother was

caused by the wrongful and negligent conduct of the state and where the state had a duty to protect, inter alia, the deceased from harm.

5. As an alternative to claim B, the appellants seek an award of constitutional damages arising from the breaches by the respondents of their rights – leading up to the death of Michael and the absence of another remedy at common law to address these violations. The award of constitutional damages would have the effect of vindicating the relevant constitutional rights and underlying values.

D. ISSUES ON APPEAL

6. Whether the appellants are entitled to a claim for damages for emotional shock where the respondents have conceded liability for damages for emotional shock, and, if so, the quantum of damages to be awarded.
7. Whether the common law should be developed to recognize a claim for grief in the extraordinary circumstances of this case, and, if so, the quantum of damages to be awarded.
8. Alternatively, whether the appellants are entitled to an award of constitutional damages to vindicate their constitutional rights and, if so, the quantum of damages to be awarded.
9. Whether the respondents should be liable for the payment of future medical expenses for counseling for Moses Komape.
10. Whether the appellants are entitled to declaratory relief.

E. ESTIMATED DURATION OF THE ARGUMENT

11. The appellants estimate that their argument will be two hours. The full hearing will not exceed one day.

F. PORTIONS OF THE RECORD IN A LANGUAGE OTHER THAN ENGLISH

12. None.

G. PARTS OF THE RECORD NECESSARY FOR THE DETERMINATION OF THE APPEAL

13. The key documents are contained in the Core Bundle.

H. SUMMARY OF ARGUMENT

14. Claim A: the respondents conceded liability for damages for emotional shock.

The evidence adduced by the appellants confirmed this. The amount that the appellants claim is reasonable.

15. Claim B: the common law does not recognize a claim for damages arising from grief. The extraordinary circumstances of this case warrant the development of the common law. This would not open the floodgates to ordinary claims for grief.

16. Alternative to claim B: the respondents' conduct breached the appellants' constitutional rights. If claim B is not granted, the appellants have no other remedy to vindicate these rights.

17. Claim C: the uncontested evidence establishes that Moses Komape requires counseling. This claim falls within the appellants' claim for further and/or alternative relief.

18. Declaratory order: it is common cause that the respondents' conduct violated the Constitution; the Court is obliged to confirm this through a declaratory order.

I. RULE 8(8) and 8(9) COMPLIANCE

19. The appellants have complied with Rule 8(8) and 8(9). This is reflected in the appeal record.

J. REPRESENTATIVES

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**APPEAL CASE NUMBERS: 754/2018; 1051/2018****COURT A QUO CASE NUMBER: 1416/2015**

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and

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**MEMBER OF THE EXECUTIVE COUNCIL,
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Third Respondent

**SCHOOL GOVERNING BODY
MAHLODUMELA LOWER PRIMARY SCHOOL**

Fourth Respondent

and

EQUAL EDUCATION

Amicus Curiae

APPELLANTS' LIST OF AUTHORITIES

SOUTH AFRICAN CASES

1. AB v Minister of Social Development 2017(3) SA 570 (CC)
2. Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd 2002 (4) SA 681 (SCA)
3. Allie v Road Accident Fund [2003] 1 All SA 144 (C)
4. August v Electoral Commission 1999 (3) SA 1 (CC)
5. Barnard v Santam Bpk 1999 (1) SA 202 (SCA) *
6. Beja v Premier of the Western Cape 2011 (10) BCLR 1077 (WCC)
7. Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A) *
8. Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC)
9. Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) *

10. Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)
11. Dikoko v Mokhatla 2006 (6) SA 235 (CC)
12. Dladla v City of Johannesburg 2018 (2) SA 327 (CC)
13. Equal Education and another v Minister of Basic Education and others (Basic Education for All, amicus curiae) 2018 (9) BCLR 1130 (ECB)
14. Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) *
15. Families of Mental Health Care Users Affected by the Gauteng Mental Health Marathon Project v National Minister of Health and others (19 March 2018) available at <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf>. *
16. Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) *
17. Gory v Kolver NO and others 2007 (4) SA 97 (CC)
18. Governing Body of the Juma Musjid Primary School and others v Essay NO and others 2011 (8) BCLR 761 (CC)

19. Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC)
20. Hing and others v Road Accident Fund 2014 (3) SA 350 (WCC) *
21. JT Publishing v Minister of Safety and Security 1997 (3) SA 514 (CC)
22. K v Minister of Safety and Security 2005 (6) SA 419 (CC)
23. Kritzinger and another v Road Accident Fund (337/2008) [2009] ZAECPEHC 6 (24 March 2009)
24. KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and others 2013 (4) SA 262 (CC)
25. Maart v Minister of Police [2013] ZAECPEHC 19 (19 April 2013)
26. Majiet v Santam Limited [1997] 4 All SA 555 (C)
27. Mazibuko and others v City of Johannesburg and others 2010 (4) SA 1 (CC) *
28. Mbhele v MEC for Health for the Gauteng Province [2016] ZASCA 166 (18 November 2016) *
29. MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) *

30. Member of the Executive Council for Health and Social Development Gauteng v DZ obo WZ (Member of the Executive Council for Health Eastern Cape and Member of the Executive Council for Health Western Cape as Amici Curiae) 2018 (1) SA 335 (CC)
31. Minister of Defence and Military Veterans v Motau and others 2014 (5) SA 69 (CC) *
32. Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 (5) SA 721 (CC) *
33. Minister of the Interior and another v Harris and others 1952 (4) SA 769 (A)
34. Modderfontein Squatters Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae) 2004 (6) SA 40 (SCA) *
35. National Director of Public Prosecutions v Mohamed NO and others 2003 (1) SACR 561 (CC)
36. Port Nolloth Municipality v Xhalisa and others; Luwalala and others v Port Nolloth Municipality 1991 (3) SA 98 (C)

37. President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amici curiae) 2005 (5) SA 3 (CC)

38. Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) *

39. Road Accident Fund v Ruth FS Draghoender [2006] JOL 18271 (SE)

40. Road Accident Fund v Sauls 2002 (2) SA 55 (SCA)

41. S v Makwanyane and another 1995 (3) SA 391 (CC)

42. S v Williams 1995 (3) SA 632 (CC)

43. Swartbooi v Road Accident Fund 2013 (1) SA 30 (WCC)

44. Thebus and another v S 2003 (6) SA 505 (CC)

45. Walters v Minister of Safety and Security [2012] ZAKZDHC 19(12 April 2012)

FOREIGN CASES

46. Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383

47. *Vernon v Bosley* [1997] 1 All ER 577

48. *White and others v Chief Constable of South Yorkshire and others* [1991] 1 All ER 1 (HL)

LEGISLATION

49. Constitution of the Republic of South Africa Act, 1996

50. Constitution of the Republic of South Africa Act 200 of 1993

51. Superior Courts Act 10 of 2013

INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

52. African Charter on Human and People's Rights

53. International Covenant on Civil and Political Rights

54. International Covenant on Economic, Social, and Cultural Rights

55. The Convention on the Rights of the Child

TEXTBOOKS

56. J Neethling, J Potgieter and P Visser, *Law of Delict*, 5ed, 2006 (LexisNexisButterworths, Durban)

57. J Neethling, J Potgieter and P Visser, *Neethling's Law of Personality*, 2ed, 2005, (LexisNexis Butterworths, Durban)

58. M de Villiers, *The Roman and Roman-Dutch Law of Injuries*, 1899 (Juta&Co, Cape Town)

59. RJ Koch's *Quantum Yearbook 2017*

60. P Visser and J Potgieter, *Law of Damages*, 1993 (Juta&Co Ltd, Cape Town)

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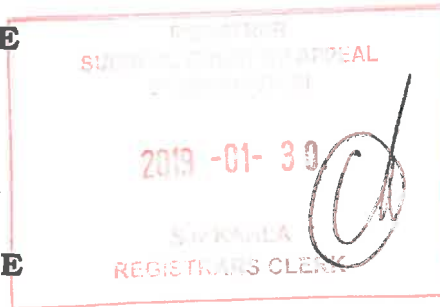
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and

MINISTER OF BASIC EDUCATION

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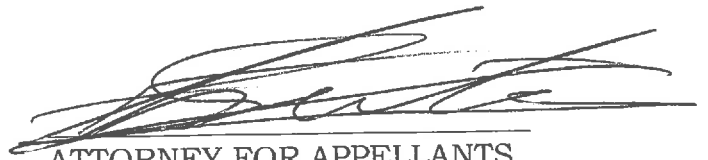
EQUAL EDUCATION

Amicus Curiae

FILING NOTICE

**APPELLANTS' HEADS OF ARGUMENT, CERTIFICATE,
CHRONOLOGY & LIST OF AUTHORITIES SERVED AND
LODGED HEREWITH**

DATED at BLOEMFONTEIN on this 29th day of JANUARY 2019.



ATTORNEY FOR APPELLANTS
SECTION 27

c/o WEBBERS ATTORNEYS

WEBBERS BUILDING

96 CHARLES STREET

BLOEMFONTEIN

Ref: M Koller/L van Schalkwyk

TO:

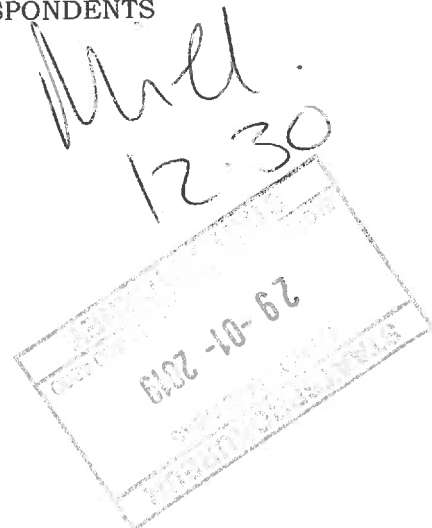
THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO:

ATTORNEY FOR RESPONDENTS
STATE ATTORNEY POLOKWANE
c/o **STATE ATTORNEY BLOEMFONTEIN**
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Ref: Mr I Gough/ Ms E Kock

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For: ATTORNEY FOR
RESPONDENTS



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APPELLANTS' HEADS OF ARGUMENT

INTRODUCTION

1. In essence this case concerns an appropriate remedy for a bereaved family who have lost their young son and sibling Michael Komape ("Michael") in deplorable circumstances through the negligence of government officials while he was at school and in the care of the state. The case is about the abject failure of the state to comply with its constitutional obligations, in particular, to those who are most in need. The violations by the state take place at the nexus of the rights to dignity, equality and basic education and the right of children to have their interests held paramount in all matters concerning them. It is the ultimate betrayal of the constitutional promise.
2. Michael died on 20 January 2014. He went to the toilet at school and because the dilapidated structure could not support the weight of his five-year-old body, he fell into a pit of human waste and drowned.¹ His death cannot be a mere matter of tragic statistics or the ordered way of life. That ought not be the case because it took place while he was in the care of public officials who were in loco parentis in relation to him; and as a result of manifest multiple breaches of constitutional obligations which were foreseeable. Its occurrence may not have been fully revealed because of attempts by public officials to conceal evidence of relevance to the tragic loss of life.
3. The cause of Michael's death, its aftermath and the continuing risk of other deaths and injuries in similar circumstances, all of which are borne out by uncontested evidence, require a judicial sanction that is tailored to provide an effective remedy to the appellants and to ensure that this type of harm does not recur. Michael lost his life in unimaginably horrific circumstances. At least one other child has lost her life in almost exactly the same way.² Two

¹ Particulars of claim volume 1, p 12, para 17.

² Plaintiffs' affidavit in response to report filed on 31 August 2018, supplementary record vol 1, p 1954, para 22.

other children died after their school toilet structures collapsed on top of them.³ And rather than taking urgent action to mitigate these risks – which action was promised at least as early as 2012 – the respondents intend to begin to provide safe sanitation structures eight years from now.⁴

4. The tailored relief that the appellants seek includes, in addition to damages for the emotional shock they sustained,⁵ development of the common law to hold the respondents accountable for grief that, in these circumstances, is distinct from emotional shock and exceeds the ordinary experience of grief in both its nature and duration.⁶ It is characterized by a stripping of the dignity of marginalized South Africans. In the alternative, the appellants seek constitutional damages to vindicate the rights that the respondents violated.⁷
5. The justification for such relief, in the context of the painful facts of the present case, is that it represents the only effective remedy that vindicates the appellants' constitutional rights. Ordinary forms of compensation bear no proportional relation to the defendants' egregious conduct, and will hardly reflect the constitutional values of accountability, responsiveness,⁸ and advancement of equality and human rights and freedoms.⁹
6. The uncontested evidence reveals that the Komape family is indigent, and sits at the margins of our society. It lacks the financial resources to cope with the burden of the loss of their child. They relied on financial contributions from caring members of the public to bury their child,¹⁰ and the assistance of a public interest organisation to prosecute the present litigation to establish the truth about the cause of their son's death, and the liability of the respondents to compensate them. In the High Court proceedings the respondents opposed the Komapes'

³ Plaintiffs' affidavit in response to report filed on 31 August 2018, supplementary record vol 1, p 1954, paras 23.1 – 2.

⁴ Defendants' report on compliance with paragraph 2 of court order of 23 April 2018, supplementary record vol 1, p 1839, para 9.3.

⁵ Particulars of claim, volume 1, p 22, paras 29 – 30.

⁶ Particulars of claim, volume 1, p 23, para 31.

⁷ Particulars of claim, volume 1, p 24, para 32.

⁸ Section 1(d) of the Constitution.

⁹ Section 1(a) of the Constitution.

¹⁰ Transcript, volume 5, p 791, lines 10 – 12.

claims with unmitigated intensity. During cross-examination, they advanced an incomprehensible case, with ferocity. The purpose of that case reflected a determined effort to resist the appellants' claim, despite its modest quantum.

7. Despite all of this and the High Court finding that Michael's death resulted from the negligent conduct of the respondents it dismissed all of the appellants' claims barring that related to future medical expenses for two of the three minor children.¹¹ As we set out below the learned judge erred in finding that –

- 7.1. a declaratory order stipulating the breach of constitutional obligations was not appropriate;
- 7.2. the fact that the appellants suffered emotional shock was not established despite the concession of liability in this regard by the respondents;
- 7.3. the need for further counselling of Moses Komape was not proven despite the undisputed evidence before the court;
- 7.4. that there is no basis for developing the common law in terms of section 39(2) of the Constitution to compensate the appellants for the grief that was caused by the loss of their son and brother where the respondents had wrongfully and negligently breached their constitutional obligations. The court a quo declined to consider development of the common law because of its finding that the appellants had not established emotional shock, which is a separate claim based on a distinct form of harm; and
- 7.5. the appellants were not entitled to constitutional damages as the effect of this would be to overcompensate them, and unduly punish the respondents.

¹¹ Order of the court a quo, volume 10, p 1731 - 1733.

8. The final result of the court order and judgment is to deny the appellants an effective remedy even though the respondents conceded liability and did not controvert any of the evidence that was led during the trial. The effect of this is to strip the appellants' rights of meaning. Section 38 of the Constitution provides that where a right in the Bill of Rights has been infringed, the court may grant appropriate relief. The provision does not provide relief "where appropriate" but "appropriate relief" per se. The remedy is, indeed, part and parcel of the right as expressed in the maxim "*ubi jus, ibi remedium*."¹²

APPLICATION TO INTRODUCE NEW EVIDENCE

9. The appellants have applied for leave to introduce new evidence, in the form of the respondents' report filed in terms of paragraph 2.3 of the order of the court a quo,¹³ and the responses to that report filed on behalf of the appellants and the amicus curiae.
10. The evidence the appellants seek to introduce came into effect after the order of the court a quo and was in fact created pursuant to that order. For that reason, it could not be introduced at the trial. It goes to the heart of the claims for declaratory relief and constitutional damages.¹⁴
11. It consists of affidavits generated by the respondents in response to the order of the court a quo, and affidavits served on them in response and well in advance of the hearing of this matter. It is based on objective information that ought to be in the respondents' possession in any event and as such they will not be prejudiced by the introduction of the evidence in these appeals.¹⁵

¹² *Minister of the Interior and another v Harris and others* 1952 (4) SA 769 (A) at 780-1, quoted by Sachs J in *August v Electoral Commission* 1999 (3) SA 1 (CC) at para 34.

¹³ Order of the court a quo, volume 10, p 1732, para 2.3.

¹⁴ Application for leave to introduce new evidence, supplementary record vol 1, p 1817, para 7 and p 1824, para 24.

¹⁵ Application for leave to introduce new evidence, supplementary record vol 1, p 1825, para 25.3.

12. The respondents have not filed a notice of intention to oppose the application for leave to introduce new evidence, nor have they filed an answering affidavit. If they intended to oppose this application, they were required to do so by 23 January 2018.
13. We submit that this Court should exercise the discretion conferred on it in terms of section 19(b) of the Superior Courts Act 10 of 2013. We do so on the basis that the evidence concerns the respondents' obligations arising from a series of social rights, discussed in further detail below. It establishes that, despite being able to afford to do so, the respondents have, since Michael's death and the death and serious injury of several other learners across South Africa, made no significant progress in providing safe and adequate sanitation facilities at schools, nor do they have any plans to do so in the immediate future. It evidences a sustained violation of constitutional rights, and informs the appropriate remedy to be granted.
14. In *Mazibuko v City of Johannesburg*, the Constitutional Court recognised two qualifications to the general rule militating against the introduction of new evidence on appeal. The first qualification is specific to social rights. The Court reasoned that the character of the obligations imposed on the state by social rights requires an ongoing assessment of compliance with the rights. Therefore, in *Mazibuko*, new evidence tendered by the state to show improved compliance with the right to water was allowed on appeal. In this matter, the appellants wish to tender evidence which demonstrates the ongoing *failure* by the state to comply with its obligations in respect of social rights.¹⁶
15. The second qualification is that in matters concerning social rights new evidence may be relevant to determining the appropriate relief.¹⁷ It is precisely because the Constitution has radically altered the legal landscape of state obligations that new evidence, relevant to relief, may be admitted.

¹⁶ See *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para 40.

¹⁷ *Id* at para 41.

16. We accordingly submit that the admission of the new evidence would promote the interests of justice and assist the appellants in securing a remedy that appropriately vindicates their rights.

JUST, EQUITABLE, APPROPRIATE AND EFFECTIVE RELIEF

17. Our courts are empowered to award relief that is “just and equitable”.¹⁸ Where a case involves infringement of a right in the Bill of Rights, that relief must be “appropriate”.¹⁹
18. It is now a well-established principle of law that, in addition to empowering courts to tailor remedies for the violation of rights, they have a clear duty to ensure that any relief that they grant is effective in vindicating the rights in question.²⁰ Indeed, our Constitutional Court has noted the following in this regard:

*[W]ithout effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.*²¹

19. An effective remedy must therefore be “specially fitted or suitable” to vindicate rights. In certain circumstances, it will be necessary to grant relief that, in addition to providing compensation for harm suffered, also deters future rights violations.²²
20. As we discuss in further detail below, the key facts giving rise to the tragic death of five-year-old Michael Komape are common cause. The court a quo held that the respondents had

¹⁸ Section 172(1)(b) of the Constitution.

¹⁹ Section 38 of the Constitution.

²⁰ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

²¹ *Id* para 69. See also *Gory v Kolver NO and others* 2007 (4) SA 97 (CC).

²² *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC) para 85. See also the minority decision of Kriegler J in *Fose* above n 20 para 97.

violated a series of fundamental rights, including Michael's rights and the rights of his family,²³ and that finding remains unchallenged. Yet the court denied the appellants an effective remedy to vindicate their rights. Not only does this amount to allowing the respondents to breach these fundamental rights repeatedly and with no consequence; it is also a failure by the court a quo to discharge its obligations to grant just, equitable, appropriate and effective relief to the parties before it.

21. We submit that, given the circumstances of this case, just, equitable, appropriate and effective relief must include a combination of remedies that address different instances of violations by the respondents of their constitutional, statutory and common-law obligations. Only if this Court exercises its powers²⁴ to grant the combination of remedies sought will the appellants' rights be fully vindicated.

THE KOMAPE FAMILY SUFFERED EMOTIONAL SHOCK (CLAIM A)

22. That the Komape family sustained emotional shock was common cause before the High Court:

22.1. The pre-trial minute records that "[t]he defendants admit only that as a result of Michael's death, the plaintiffs and the first and second plaintiffs' minor children suffered emotional trauma and shock."²⁵

22.2. The joint minute of the expert clinical psychologists records the experts' agreement that the appellants suffered severe trauma and that they required psychotherapy.²⁶

²³ Judgment of the court a quo, volume, 10, p 1722, para 63.

²⁴ As confirmed in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 107.

²⁵ Pre-trial minute, core bundle volume, p CB13, para 43.2.

²⁶ Joint minutes of expert psychologists, core bundle volume, CB 20 - 21.

22.3. The respondents made a “with prejudice” offer of settlement on 11 October 2017, in which they stated that they “concede merits in relation to the delictual claim”.²⁷ On the first day of the trial, the respondents’ counsel confirmed the respondents’ concession of the merits in relation to the claim for damages for emotional shock.²⁸

22.4. The respondents’ concession of liability for claim C,²⁹ being the cost of future counselling sessions, must necessarily have meant that they accepted that the claimants³⁰ had suffered emotional shock, at least insofar as the appellants themselves were concerned.

22.5. The judgment of the court a quo records this concession, noting that, in respect of the claim for damages for emotional shock, only the quantum was in dispute.³¹

23. Despite this, the court a quo found that because the appellants had not led evidence to prove the existence of emotional shock, the claim should be dismissed. This is incorrect for two reasons:

23.1. First, because the existence of emotional shock was common cause. It is axiomatic that where a set of facts is agreed between the parties, it is not necessary to lead evidence to prove these facts. Indeed, leading evidence on facts that were conceded would have prolonged the trial unnecessarily and could have attracted an adverse costs order.³²

²⁷ With prejudice settlement offer, core bundle volume, CB 22 - 23, para 1.

²⁸ Transcript, volume 5, p 746, lines 20-25.

²⁹ This is reflected in the order of 17 November 2017, which was granted by consent between the parties. See Order of the court a quo, volume 5, 201.2, para 2.

³⁰ We use this term to describe the appellants and the three minor children, who are represented in these proceedings by the first and second appellants.

³¹ Judgment of the court a quo, volume 10, p 1708, para 16.

³² See *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) para 37.

23.2. Second, because the appellants did lead evidence of the shock and trauma that they sustained, for the purpose of proving the quantum of damages. This evidence – all of which was undisputed – in addition to establishing the extent and duration of their shock and trauma, also established its existence, in line with this Court's decision in *Mbhele*.³³

24. The only outstanding issue for determination by the Court therefore was the quantum of damages to be awarded for emotional shock. In this regard the appellants claimed R250 000 for each of Michael's parents, R100 000 each for his two major siblings and R80 000 each for his three minor siblings.³⁴

The trauma sustained by the claimants

25. The claimants' specific experiences of shock and trauma are illustrated by the following undisputed evidence:

25.1. Mrs Komape fainted upon seeing Michael's body in the pit.³⁵ She had nightmares, loss of appetite and would cry continuously. She testified that *"the way I felt the pain I do not think I will even forget it now."*³⁶ Mrs Sodi, the plaintiffs' expert clinical psychologist who provided initial diagnoses for each of the claimants, diagnosed Mrs Komape with post-traumatic stress disorder, bereavement and major depressive disorder. These conditions, according to Mrs Sodi, *"caused clinically significant distress and impairment in Mrs Komape's social, occupational, or other important areas of functioning."*³⁷ When Mr Molepo, the clinical psychologist providing treatment to the family, consulted Mrs Komape in October 2015, she was still isolated and

³³ *Mbhele v MEC for Health for the Gauteng Province* [2016] ZASCA 166 (18 November 2016).

³⁴ Particulars of claim, volume 1, p 22, para 29.

³⁵ Transcript, volume 5, p 760, lines 17 – 22.

³⁶ Transcript, volume 5, p 779, lines 6 – 10.

³⁷ Psychological assessment report of Rosinah Komape, volume 1, pp 47 – 49, para 8.

irritable and demonstrated many symptoms of major depression.³⁸ During the trial, Mrs Komape testified that she had still not found closure.³⁹

25.2. Mr Komape sat with his son's body after it was removed from the pit and until emergency services arrived. He witnessed Michael's body being removed from the pit and covered with cloth.⁴⁰ He testified that he *"was hurt very much. Because I see that thing every day. Every day when I go to sleep I see Michael's hand."*⁴¹ Mrs Sodi diagnosed Mr Komape with post-traumatic stress disorder and bereavement.⁴² When Mr Molepo consulted with Mr Komape in October 2015 he was still struggling to cope, having difficulty sleeping and experiencing sadness and irritability. He was reliving the trauma, including flashbacks to Michael's outstretched hand.⁴³

25.3. Lydia Komape took on a parental role in relation to Michael: she bathed him, helped him prepare for school and he slept in her bedroom.⁴⁴ Lydia did not believe that Michael had died until she saw his body for herself and after seeing his body experienced trouble sleeping and had flashbacks to that moment.⁴⁵ Mrs Sodi reported that Lydia had extreme symptoms of post-traumatic stress disorder and diagnosed her with both post-traumatic stress disorder and bereavement.⁴⁶ Mr Molepo stated that Lydia's reaction was similar to her mother's.⁴⁷

25.4. Lucas Komape shared a close relationship with Michael. Upon hearing about Michael's death, Lucas tried to get to the toilet to see what happened, but the police stopped him from doing so.⁴⁸ Mrs Sodi reported that Lucas displayed symptoms

³⁸ Transcript, volume 6, p 970 line 24 to p 972 line 7.

³⁹ Transcript, volume 5, p 773 lines 3 – 10.

⁴⁰ Transcript, volume 5, p 826 lines 13 – 21 and p 830 lines 15 – 19.

⁴¹ Transcript, volume 5, p 831 lines 12 – 14.

⁴² Psychological assessment report of James Komape, volume 1, pp 38 – 39, para 9.

⁴³ Transcript, volume 6, p 976 lines 11 – 25; p 977, lines 1 – 2.

⁴⁴ Transcript, volume 5, p 898 lines 16 – 19.

⁴⁵ Transcript, volume 5, p 902 line 16 to p 903 line 20.

⁴⁶ Psychological assessment report of Lydia Komape, volume 1, pp 55 – 56, paras 8 – 9.

⁴⁷ Transcript, volume 6, p 981, lines 16 – 24.

⁴⁸ Transcript, volume 5, p 922, line 1 to p 923, line 11.

related to post-traumatic stress disorder and bereavement.⁴⁹ When Mr Molepo saw Lucas in December 2015 he was still very sad and struggling to cope, experiencing disturbances in sleep and concentration and difficulty in leading a full and independent life.⁵⁰

25.5. Onica Komape was diagnosed with post-traumatic stress disorder and bereavement, causing clinically significant distress and impairment in her social, occupational and other important areas of functioning.⁵¹ When Mr Molepo consulted Onica in December 2015, she was still tearful, irritable, isolated and experiencing nightmares.⁵²

25.6. Maria Komape also showed symptoms related to post-traumatic stress disorder and bereavement.⁵³ When Mr Molepo saw Maria in December 2015 he described her as emotionally withdrawn and very sad. She had trouble sleeping and concentrating and isolated herself from her friends.⁵⁴

25.7. Moses Komape was Michael's immediately older sibling. While Mrs Sodi did not observe any clinical symptoms during her session with Moses, his mother reported forgetfulness and difficulty concentrating.⁵⁵ Mr Molepo described Moses as very tearful whenever Michael's name was mentioned and diagnosed bereavement.⁵⁶ Mrs Komape further observed disturbances in Moses' sleep, observing that he appeared to be dreaming about his brother.⁵⁷

⁴⁹ Psychological assessment report of Lucas Komape, volume 1, p 62, para 9.

⁵⁰ Transcript, volume 6, p 985 line 14 to p 986 line 17.

⁵¹ Psychological assessment report of Onica Komape, volume 1, p 69, paras 9 – 10.

⁵² Transcript, volume 6, p 992 line 15 to p 993 line 21.

⁵³ Psychological assessment report of Maria Komape, volume 1, p 75, paras 9 – 10.

⁵⁴ Transcript, volume 6, p 997, lines 17 – 20.

⁵⁵ Psychological assessment of Moses Komape, volume 1, p 78, para 5.

⁵⁶ Transcript, volume 6, p 1000 line 15 to p 1001, line 8.

⁵⁷ Transcript, volume 5, p 772, lines 8 – 18.

26. The emotional shock that the claimants sustained presented, in all cases, with prolonged signs and symptoms of post-traumatic stress disorder, with Mr Komape, Mrs Komape, Lydia Komape and Onica Komape all receiving a formal diagnosis. According to Mr Molepo, these signs and symptoms were still present more than two years later, and all of the claimants required further counselling from a clinical psychologist to assist them in working through their trauma.

The court a quo failed to apply the binding decision in Mbhele

27. Despite the evidence before it, the court a quo declined to acknowledge the existence of emotional shock. In response to the argument on behalf of the appellants that, even without a formal expert diagnosis through oral testimony, the *Mbhele* case allowed a finding of emotional shock, the Honourable Judge indicated that he did not consider himself bound by *Mbhele*. He did so because, in his view, that decision is a "radical departure" from this Court's previous decisions in *Bester*⁵⁸ and *Barnard*,⁵⁹ which, according to him, made clear that expert psychiatric evidence is always required to prove psychiatric injury, and *Mbhele* did not expressly overrule these decisions as clearly wrong.⁶⁰
28. We submit that the evidence led by the appellants as to the existence of emotional shock is sufficient as expert evidence of psychiatric injury. If the Court is minded not to accept that evidence as establishing emotional shock, we submit that *Mbhele*, which did not require expert evidence of psychiatric lesion but other factual evidence of emotional shock and trauma, and which we read as entirely consistent with previous decisions of this Court, ought to be applied.
29. *Bester* was the first case in which this Court's predecessor, the Appellate Division, recognised a claim for emotional shock. The rationale for this was that the distinction that

⁵⁸ *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A).

⁵⁹ *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA).

⁶⁰ Judgment of the court a quo, volume 10, p 1715, para 40.

operated at the time between physical injury and psychiatric injury is an artificial one;⁶¹ “[t]he emotional or mental system is, in any case, just as much a part of the physical body as is an arm or leg and an injury to the emotional or mental system is just as much an injury to a physical organism as an injury to the arm or leg.”⁶² A claim for damages for emotional shock, however, requires more than the establishment of emotional shock of short duration that has no substantial effect on a claimant’s health.⁶³

30. The Court did not delineate how the injury to the claimant’s emotional or mental system must be proved.
31. This Court next considered the question of damages for emotional shock in *Barnard*. In that case, the parties were in agreement that the appellant had suffered nervous shock resulting in psychiatric trauma, and the court therefore made no finding as to the existence of nervous shock. It was concerned with whether nervous shock in so-called “hearsay cases” – where the claimant does not witness the traumatic incident first-hand, but hears about it from someone else – sustains a claim for damages.⁶⁴
32. The Court’s only reference to expert psychiatric evidence is to reject the argument that allowing a claim for emotional shock in “hearsay” cases would open the floodgates and create a danger of simulated claims. The Court held that any claimant, whether or not they witnessed the incident directly, would need to prove that they had suffered recognised psychological harm. The Court held that “as a rule” such a claimant would need to rely on supporting psychiatric evidence.⁶⁵

⁶¹ *Bester* above n 58 at 776.

⁶² *Id* at 779.

⁶³ *Id* at 779G.

⁶⁴ *Barnard* above n 59.

⁶⁵ *Id*. This phrase is taken from the translation of this judgment available at <http://saflii.org/za/other/ZAENGTR/1998/1.pdf>, p 16.

33. The emphasis in that case was on the need to prove emotional shock, rather than the manner of such proof. Indeed, the term “as a rule” suggests on a plain reading that while in some cases psychiatric evidence will prove the existence of emotional shock there may be other means of proof that will still be acceptable.

34. *Mbhele* was one such case: that case involved damages for emotional shock arising from a fresh stillbirth, caused by the negligence of employees of the Gauteng Department of Health. The court found, based on common cause facts, that –

*After the birth of her stillborn baby, [the claimant] was inappropriately taken to the maternity ward where she had to contend with an empty cot; she was made to watch other mothers who were breastfeeding their babies. She collapsed after she had to identify the dead body of the child at the mortuary. Her behavior months after the death of the baby shows that she had difficulty coping and that she has still not recovered completely.*⁶⁶

35. Based on these findings this Court was satisfied that the plaintiff had made out a case for emotional shock, even though there was no expert evidence of psychiatric lesion.

36. There is therefore no “radical departure” in *Mbhele* from *Bester* and *Barnard*. In all three cases, considered on their own merits and in their own context, the Court was satisfied that the evidence before it established emotional shock and awarded damages accordingly.

37. In *AB v Minister of Social Development*, in the context of section 12(2) of the Constitution, Khampepe J recognizes the impact of the Constitution on assessment of psychological harm. Justice Khampepe reasons that the Constitution builds on the recognition in *Barnard* that “a person’s psychological integrity, independent of their body, can be harmed in numerous ways by the actions of others.” In the same vein, Justice Khampepe cites the

⁶⁶ *Mbhele* above n 33 para 11.

example of the non-consensual disclosure of a person's HIV status as a basis for the award of damages.⁶⁷

The appropriate quantum of damages

38. There is no set formula in the determination of damages for emotional shock.⁶⁸ The overarching considerations are those of fairness and justice.⁶⁹ Courts will also take account of the extent and the duration of the emotional shock in determining the appropriate quantum of damages.⁷⁰
39. The common cause evidence that we set out above establishes that each of the claimants suffered severe emotional shock and trauma. The signs and symptoms were, in all cases, present almost two years after Michael's death and all of the claimants still require further counseling to help them to cope.
40. We submit that both the extent and the duration of the emotional shock were exacerbated by the unique features of this case: a five-year old child was entrusted to the care of his school. His teachers had specific constitutional and statutory duties to keep him safe. He died in the most undignified way, and the respondents continued to strip away his dignity even after his death. His parents and siblings were similarly treated with disdain.
41. The quantum of damages that the appellants claimed is not excessive. Courts have in the past awarded damages in the following amounts⁷¹ for emotional shock:
- 41.1. R109 000 to a mother who saw her son lying in the road shortly after he was struck and killed by a motor vehicle;⁷²

⁶⁷ *AB v Minister of Social Development* 2017(3) SA 570 (CC) at para 68.

⁶⁸ *Barnard* above n 59.

⁶⁹ *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) para 17.

⁷⁰ *Bester* above n 58 at 779G; *Swartbooi v Road Accident Fund* 2013 (1) SA 30 (WCC) para 20.

⁷¹ All of these have been adjusted to 2017 values in accordance with RJ Koch's *Quantum Yearbook* 2017.

⁷² *Majiet v Santam Limited* [1997] 4 All SA 555 (C). The quantum awarded was R35 000.

- 41.2. R182 000 to a man who witnessed his wife being flung through the windscreen of a car, and later her death after police on the scene refused to call an ambulance;⁷³
- 41.3. R230 000 to a father who was informed of a collision and discovered on arrival at the scene that his two daughters had been killed;⁷⁴
- 41.4. R251 000 to a mother whose son was shot at close range and killed in her presence by police officers that she had summoned;⁷⁵
- 41.5. R245 000 to the wife of a man who committed suicide while in police custody;⁷⁶ and
- 41.6. R157 000 to the mother of a child who was killed by a car in front of the family home.⁷⁷
42. The quantum of damages claimed for emotional shock, given the circumstances of Michael's death and the extent and duration of the emotional shock that the family members sustained, is well within these bounds.

FUTURE MEDICAL EXPENSES FOR MOSES KOMAPE (CLAIM C)

43. The evidence before the court a quo was that Moses Komape, Michael's brother, was withdrawn, quiet and tearful following Michael's death. On the basis of his symptoms the appellants' expert clinical psychologist, Mr Molepo, confirmed his diagnosis of bereavement.⁷⁸ The respondents did not challenge this during cross-examination.

⁷³ *Allie v Road Accident Fund* [2003] 1 All SA 144 (C). The quantum awarded was R80 000.

⁷⁴ *Kritzinger and another v Road Accident Fund* (337/2008) [2009] ZACPEHC 6 (24 March 2009). The quantum awarded was R150 000.

⁷⁵ *Maart v Minister of Police* [2013] ZACPEHC 19 (19 April 2013). The quantum awarded was R200 000.

⁷⁶ *Walters v Minister of Safety and Security* [2012] ZAKZDHC 19 (12 April 2012). The quantum awarded was R185 000.

⁷⁷ *Road Accident Fund v Ruth FS Draghoender* [2006] JOL 18271 (SE). The quantum awarded was R80 000.

⁷⁸ Transcript, volume 6, p 1000, line 15 to p 1001, line 8.

44. On 6 November 2017, and after eight counselling sessions with the clinical psychologist, Moses' psychological state had improved, but Mr Molepo still observed "a lot of sadness and tearfulness."⁷⁹ On this basis Mr Molepo recommended between six and ten further counselling sessions for Moses, stating that he needs counselling "a little more than his sisters would."⁸⁰
45. Neither the existence of Moses' bereavement, nor the recommended number of further counselling sessions, was placed in genuine dispute during cross-examination. Moreover, the respondents did not lead any evidence from their own expert psychologist who could testify as to Moses' psychological state and the need for further counseling sessions, if any. Indeed, the respondents' expert psychologist did not even assess Moses and so could not have been in a position to give evidence of his psychological state to contradict Mr Molepo's evidence.⁸¹
46. The court a quo declined to award damages for future medical expenses for Moses, on the basis that there was no specific prayer for this.⁸²
47. We submit that the court was competent to award these damages, in terms of the prayer for "further and/or alternative relief",⁸³ and ought to have done so, for the following reasons:⁸⁴
 - 47.1. It is common cause that Moses suffered emotional shock. The need for counseling arises as a direct and natural consequence of this;
 - 47.2. The particulars of claim set out all of the facts necessary to sustain the claim for future medical expenses for Moses. These facts were supported by the evidence of an

⁷⁹ Transcript, volume 6, p 1001, lines, 15 – 20.

⁸⁰ Transcript, volume 6, p 1002, lines 22 – 24; p 1003, line 5.

⁸¹ Transcript, volume 6, p 956, lines 1 – 8.

⁸² Judgment of the court a quo, volume 10, p 1719, para 54.

⁸³ Particulars of claim, volume 1, p 27, para 41.7.

⁸⁴ See *Port Nolloth Municipality v Xhalisa and others; Luwalala and others v Port Nolloth Municipality* 1991 (3) SA 98 (C) 112D-G.

expert clinical psychologist, which evidence was not disputed or contradicted by the respondents through their own expert;

47.3. The respondents admitted that Moses suffered emotional trauma and shock.⁸⁵ They further did not challenge Mr Molepo's recommendation for future counseling sessions for Moses.

48. The respondents have never asserted that they are prejudiced by the inclusion of the claim for Moses' future medical expenses under the prayer for further and/or alternative relief. They can raise no prejudice.⁸⁶ We submit that the appellants have made out a proper claim for this head of damages.

THE COURT SHOULD DEVELOP THE COMMON LAW TO RECOGNISE GRIEF

49. In addition to the emotional shock that immediately followed Michael's death, the Komape family also suffered a profound loss. They lost their son and brother, and with him the sense of completeness of their family. The contempt with which the respondents treated them following their loss further stripped them of their dignity.

49.1. Rather than directly telling Mr and Mrs Komape that there was a problem with Michael, the respondents telephoned them with ambiguous questions as to his whereabouts.⁸⁷

49.2. When Mrs Komape arrived at the school, she was sent on a contrived search for Michael, both inside and outside the school premises. When she tried to search the toilets, the staff at the school prevented her from going inside.⁸⁸

⁸⁵ Pre-trial minute, core bundle volume, CB13, para 43.2.

⁸⁶ In this regard see the minority judgment of Froneman J in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and others* 2013 (4) SA 262 (CC) para 79, in which he suggested that substance should take priority over form, and the formal legal label attached to a set of facts should not be decisive in determining whether to grant relief.

⁸⁷ Transcript, volume 5, p 753, line 17 to p 754, line 5; p 822, lines 20 – 26.

⁸⁸ Transcript, volume 5, p 755, line 16 to p 760, line 15.

- 49.3. Mr Komape arrived at the school and immediately wanted assistance to remove Michael's body from the pit of waste. The principal refused to assist him, telling him that it was too late to save Michael anyway.⁸⁹ Mr Komape and Mr Malebana were also forced to delete photographs that they had taken of the scene because they "did not want the incident to be spread", and threatened with false criminal charges.⁹⁰
- 49.4. Lydia Komape was traumatized by the sight of her brother in the pit.⁹¹ Lucas Komape wanted to see what had happened to him but was prevented from doing so because "no one is supposed to go there."⁹²
- 49.5. The respondents provided no apology or acknowledgement of their responsibility for Michael's death, until three and a half years later when they made a settlement offer⁹³ that the appellants described as "insulting".⁹⁴
- 49.6. The evidence showed that the first contact that the school staff made with the appellants following Michael's death was to ask if they could use Michael's name on a donation of furniture that they received after his death.⁹⁵
- 49.7. The appellants sourced donations from members of the public to assist them with burying Michael. The burial service itself was offered to them free of charge.⁹⁶
50. The way in which the respondents treated the appellants aggravated their loss and eroded their dignity, as well as the dignity of their son and brother.
51. Our common law does not recognize a claim for a loss of this nature. In Roman law, actions for personality infringements were developed casuistically. These "sentimental damages"

⁸⁹ Transcript, volume 5, p 825, lines 6 – 19.

⁹⁰ Transcript, volume 5, p 827, line 20 to p 830, line 11; p 861, line 20 to p 863 line 21.

⁹¹ Transcript, volume 5, p 905, line 6 to p 906, line 3.

⁹² Transcript, volume 5, p 923, lines 5 – 7.

⁹³ Core bundle, pp CB 22 – 23.

⁹⁴ Transcript, volume 5, p 819, lines 20 – 21; p 908, lines 9 – 10; p 918, lines 6 – 12; p 941, line 21.

⁹⁵ Transcript, volume 5, p 767, line 16 to p 768, line 10.

⁹⁶ Transcript, volume 5, p 791, lines 10 – 12; p 832, lines 7 – 12.

could only be claimed for intentional misconduct and mostly pertained to personality infringements that related to physical injury,⁹⁷ though the Twelve Tables did recognise an action for the use of abusive language against another in public, or the defamation of another.

52. The Lex Aquilia, by contrast, was only concerned with patrimonial loss – the loss of property and earnings. This too was received into Roman-Dutch and then South African law. The action for pain and suffering, however, was not recognised in Roman law.⁹⁸ Instead it originated in Germanic customs. It was developed in Roman-Dutch law by Grotius as an extension of the Aquilian action. Later, this form of relief was understood as a sui generis remedy that was a hybrid of the Aquilian action and the actio injuriaum.
53. Courts have been reluctant to recognise a claim for pain and suffering for plaintiffs who experienced emotional shock without any physical injury. The courts feared opening the floodgates to “unlimited liability” where every bystander or distant relative might have a claim. In addition, there were no clear principles in this field from Roman law on pain and suffering, and the Roman-Dutch authorities were brief on the subject. The courts were therefore guided by English principles that took a fairly restrictive view of “emotional shock”.⁹⁹
54. Drawing on the English common law approach, the South African courts have not permitted an action for grief. The High Court in *Hing* provided a useful account of the current position:

Grief and sorrow over the death of anyone held in deep affection is a natural phenomenon. The closer the relationship the greater the hurt that falls to be resolved in the grieving process and the longer and more disabling the effect of the process is going to be. That much is a matter of common human experience, which expert

⁹⁷ M de Villiers, *The Roman and Roman-Dutch Law of Injuries*, 1899 (Juta & Co, Cape Town) at 3-4; J Neethling, J Potgieter and P Visser, *Neethling's Law of Personality*, 2ed, 2005, (LexisNexis Butterworths, Durban) at 40.

⁹⁸ J Neethling, J Potgieter and P Visser, *Law of Delict*, 5ed, 2006 (LexisNexis Butterworths, Durban) at 15.

⁹⁹ J Neethling et al (*Delict*) at 264.

*evidence is not required to establish. Damages are not recoverable in delict for normal grief and sorrow following a bereavement.*¹⁰⁰

55. The development of the award of damages, with its roots in the Twelve Tables, recognises that compensation sounding in money is a legitimate form of atonement. However, a related development of delictual claims is an overemphasis on damage that results in a diminution of the claimant's patrimony.¹⁰¹ Hence, one can claim compensation for the death of a pet where the claim meets the element of delict. The 'market value' of the animal may be determined. But one cannot do the same for the loss of a family member. If Michael had been a breadwinner, or brought some material gain to his family, they would have received some recognition in law of their loss. Because he was a five-year-old boy at the start of his school career, his life, in terms of our law of delict, has no value.
56. The Constitutional Court has cautioned against 'letting the past bind us' and raises the question 'whose past is it'?¹⁰² While the Court raised the caution in the context of a debate as to whether future medical expenses can be awarded in kind, the caution is salutary. We have inherited a rich tradition of legal principles, but that is only part of our ancestry.
57. In *Carmichele*, the Constitutional Court noted that before the advent of the Interim Constitution, the refashioning of the common law entailed "policy decisions and value judgments" which had to reflect the "wishes, often unspoken, and the perceptions, often but dimly discerned, of the people." The Court held that under section 39(2) of the Constitution, concepts such as "policy decisions and value judgments" reflecting "the wishes . . . and the perceptions . . . of the people" and "society's notions of what justice demands" might well

¹⁰⁰ *Hing and others v Road Accident Fund* 2014 (3) SA 350 (WCC) para 24.

¹⁰¹ *Law of Damages*, Visser and Potgieter (Juta and Co Ltd, 1993) at para 1.6.4.

¹⁰² *Member of the Executive Council for Health and Social Development Gauteng v DZ obo WZ (Member of the Executive Council for Health Eastern Cape and Member of the Executive Council for Health Western Cape as Amici Curiae)* 2018 (1) SA 335 (CC) at para 39.

have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.¹⁰³

58. This exhortation is as true for determining an appropriate remedy as it is for development of the common law. The grief that emerges from the evidence in this case is no ordinary grief. It arises from the death of a five-year old child caused by a negligent breach by state actors of their positive constitutional obligations. The respondents could have and ought to have prevented Michael's death. Instead, they sought to conceal the facts of what happened; they held a callous attitude towards Michael and his family, and their conduct after Michael's death deepened the indignity of the manner in which he died.
59. The courts bear a duty to develop the common law where it does not give full effect to the spirit, purport and objects of the Bill of Rights. The obligation, created by section 39(2) of the Constitution,¹⁰⁴ is not only one to address an inconsistency between a rule of the common law and the constitutional provisions; it includes cases where a rule of the common law falls short of the spirit, purport and objects of the Bill of Rights.¹⁰⁵ In such cases the courts must develop the common law to give full effect to these.
60. The five-step approach to the development of the common law requires a determination of the existing common-law position; its underlying rationale; whether the rule offends section 39(2) of the Constitution or where there are wider considerations that require development in the interests of justice; how development of the common law ought to take place; and the consequence of the proposed change on the relevant area of law.¹⁰⁶ We deal with each of these in turn.

The existing common-law provision and the underlying rationale

¹⁰³ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 56.

¹⁰⁴ Section 39(2) of the Constitution provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

¹⁰⁵ *Thebus and another v S* 2003 (6) SA 505 (CC) para 28. See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 17.

¹⁰⁶ *MEC, Health and Social Development, Gauteng v DZ* above n 102.

61. The passage from *Hing* quoted at paragraph 54 above sets out the existing position clearly: there is no recognized claim for grief at common law. This approach follows comparative decisions,¹⁰⁷ in which the courts held that sorrow cannot found a claim for damages.
62. In *Vernon v Bosley*, the English Court of Appeal recognized a distinction between post-traumatic stress disorder and pathological grief disorder, but held that a plaintiff may only recover damages for the former. The court held that the reason that pathological grief disorder is “uncompensatable loss” is that policy considerations dictate this.¹⁰⁸
63. Although recognizing that grief may manifest in psychiatric lesion exceeding the ordinary sorrow that follows the loss of a loved one, courts in other jurisdictions have consistently rejected the possibility of damages for grief. Their basis for doing so is that a recognition of a claim for grief is not supported by policy.
64. The Western Cape High Court in *Hing* followed these decisions, without considering whether specific policy considerations in the South African context produce the same result. We submit that the opposite is true: that the spirit, purport and objects of our Bill of Rights require the recognition of such a claim in circumstances such as these.

Does the existing common-law position offend section 39(2) of the Constitution?

65. This case involves direct breaches by the defendants of a series of rights in the Bill of Rights. It also involves breaches of section 195 of the Constitution and the value of Ubuntu, which, as we discuss below, underlies the Constitution as a whole and must inform the conduct of all state actors. These violations are apparent from the following distinguishing features of the case:

¹⁰⁷ *White and others v Chief Constable of South Yorkshire and others* [1991] 1 All ER 1 (HL) and *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

¹⁰⁸ *Vernon v Bosley* [1997] 1 All ER 577 at 587a-b.

65.1. Michael died at the age of five, on his fourth day of Grade R and while the teachers and principal of the school were in loco parentis. Despite knowing about the state of the toilets and being directly responsible for Michael's safety, they allowed him to attend the toilet unsupervised.¹⁰⁹

65.2. The national and provincial education departments were similarly aware of the state of the toilets at Mahlodumela.¹¹⁰ Providing safe and adequate toilets to this school, and to other schools in a similar condition, was within their resources.¹¹¹

65.3. As a direct consequence of these failures, Michael attended the toilet unsupervised and the dilapidated toilet could not support his slight weight. He died a cruel and undignified death. His outstretched hand indicated that he sought help to get out of the pit of putrid substances and the results of his post-mortem establish that he was left there for many hours.¹¹²

65.4. Michael's body was left in the pit for at least four hours, with the only explanation being that there would be no purpose in trying to remove him because he had already died.¹¹³ The cruelty and indignity with which Michael was treated persisted after his death.

65.5. Michael's family was also treated with cruelty and indignity and denied the support – both financial and emotional – to which they were entitled, as set out at paragraph 49 above.

66. The respondents admitted that they had a duty of care towards Michael and his family, and that they acted wrongfully and negligently in failing to prevent his death.¹¹⁴ The evidence shows that all of the respondents, the DBE, the provincial education department and the

¹⁰⁹ Pre-trial minute, core bundle, p CB7, paras 26 – 30; core bundle, pp CB 44 – 51.

¹¹⁰ Core bundle, pp CB 44 – 51 and CB 75.

¹¹¹ Transcript, volume 7, p 1329, line 22 to p 1337, line 2.

¹¹² Post-mortem report, core bundle, pp CB 24 – 25.

¹¹³ Transcript, p 139, lines 3 – 9; transcript, p 199, lines 20 – 21.

¹¹⁴ With prejudice settlement offer, core bundle, p CB 22, para 1.

school, were aware of the dangerous circumstances and could have prevented Michael's death. All of them failed to do so.

67. The family is entitled to damages for emotional shock and trauma evidenced by their immediate reactions to Michael's death. But, in terms of the common law as it stands, they have nothing to compensate them for the loss of their son and brother per se, for their deep and sustained grief and for the way in which they were treated.

68. The respondents' conduct implicates several constitutional rights:

68.1. The right to dignity of both Michael and the appellants:¹¹⁵ the State bears a specific obligation to uphold this right,¹¹⁶ which includes the right to adequate toilet conditions.¹¹⁷ The respondents were directly responsible to make provision for Michael, and other learners similarly placed, to respond to their biological needs with dignity. Michael died in unimaginable circumstances, and his body was left to rot in the pit of waste for hours after his death. The respondents concealed the facts of his whereabouts and how he had died and forced Mr Malebana to delete photographic evidence of this. The respondents did not adequately acknowledge the family's loss, only accepting responsibility weeks before the trial and three and a half years after Michael's death.¹¹⁸ We submit that their conduct, to use the words of Moseneke J, amounted to "*an antithesis of empathy and caring*".¹¹⁹

68.2. The right to family life: although not explicitly referred to in the Bill of Rights, the Constitutional Court has acknowledged that one's dignity is infringed when the right

¹¹⁵ Section 10 of the Constitution.

¹¹⁶ *S v Williams* 1995 (3) SA 632 (CC) para 58.

¹¹⁷ *Beja v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC) para 30.

¹¹⁸ See also the discussion of the right to dignity in the arbitration award of Moseneke J in *Families of Mental Health Care Users Affected by the Gauteng Mental Health Marathon Project v National Minister of Health and others* (19 March 2018) available at <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf>.

¹¹⁹ *Id* para 189.

to family life is not protected; it is what makes us human.¹²⁰ The right may also be gleaned from the right of every child to family care or to parental care or to alternative care when removed from the family environment.¹²¹ Moreover, article 18 of the African Charter on Human and People's Rights, which is binding on South Africa,¹²² provides specific protection to the family unit. Similar protection is provided for in the International Covenant on Civil and Political Rights¹²³ and the International Covenant on Economic, Social, and Cultural Rights.¹²⁴ The Convention on the Rights of the Child¹²⁵ also provides express protection to the family unit and contains several provisions aimed at maintaining its integrity. Our Constitutional Court has held that *"human beings are social beings whose humanity is expressed through their relationship with others."*¹²⁶ It follows that the right to family life is violated when families are separated,¹²⁷ and where "intimacy and love" are replaced by a "chasm".¹²⁸ In addition to Michael's death leaving the family "incomplete",¹²⁹ the members of the family were irritable and isolated and their relationships with each other deteriorated.¹³⁰

68.3. The right to equality:¹³¹ one of the features of apartheid is the role of education in perpetuating inequality on the grounds of, among others, race, class and social origin.¹³² It is no coincidence that the appellants are poor, black and live in a rural area. They lie on the margins of society. The duty on the respondents was to take positive steps to promote the appellants' – and all those similarly placed – enjoyment

¹²⁰ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 37; *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 49.

¹²¹ Section 28(1)(b) of the Constitution.

¹²² South Africa signed and ratified this Charter on 9 July 1996.

¹²³ Article 23. South Africa signed this Covenant in 1994 and ratified it in 1998.

¹²⁴ Article 10(1). South Africa signed this Covenant in 1994 and ratified it in 2015.

¹²⁵ South Africa signed this Convention in 1993 and ratified it in 1995.

¹²⁶ *Dawood* above n 120 para 30. See also the *Life Esidimeni* arbitration award above n 118 para 195.

¹²⁷ *Dawood* above n 120 para 51.

¹²⁸ *Dladla* above n 120 para 49.

¹²⁹ Transcript, volume 5, p 773, line 10.

¹³⁰ See for example, transcript, volume 5, p 904 lines 6 – 8, p 971 lines 19 – 20, p 972, lines 2 – 7.

¹³¹ Section 9 of the Constitution.

¹³² See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 45.

of all of the rights in the Bill of Rights.¹³³ Instead, they neglected the appellants and the services that they relied on, including the school infrastructure in their village. This perpetuates the discrimination on the grounds of race, class and social origin, which discrimination was the initial cause of the appellants' marginalisation.

- 68.4. The right to life:¹³⁴ this constitutionally-entrenched right gives rise to both positive and negative obligations. The state is obliged in terms of this provision to take positive steps to ensure adequate safety and security and to protect those whose lives are at risk.¹³⁵ Having known about the unsafe sanitation at the school and having admitted that this was an accident that could have befallen anyone,¹³⁶ the respondents directly breached their obligations arising from this right.
- 68.5. The right to basic education:¹³⁷ this includes the right to safe and adequate school infrastructure.¹³⁸ The obligation on the state is not subject to progressive realization as is the case with other socio-economic rights; the state bears a direct obligation to provide safe and adequate school infrastructure immediately.¹³⁹ The respondents were aware of the state of the toilets at the school as early as 2004,¹⁴⁰ and did nothing to provide safe and adequate infrastructure, resulting in Michael's death almost ten years later.
- 68.6. Children's rights: section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. There can be no question that a failure to provide safe and adequate school toilets, and the failure to

¹³³ Section 9(2) of the Constitution.

¹³⁴ Section 11 of the Constitution.

¹³⁵ See *Carmichele v Minister of Safety and Security* above n 103; *Rail Commuters Action Group v Transnet t/a Metrorail* above n 24.

¹³⁶ See transcript, volume 5, p 931, lines 13 – 18.

¹³⁷ Section 29(1)(a) of the Constitution.

¹³⁸ *Equal Education and another v Minister of Basic Education and others (Basic Education for All, amicus curiae)* 2018 (9) BCLR 1130 (ECB).

¹³⁹ See *Governing Body of the Juma Musjid Primary School and others v Essay NO and others* 2011 (8) BCLR 761 (CC) para 37; see also *Equal Education* above n 138 para 180.

¹⁴⁰ See core bundle, pp CB 44 – 51.

ensure the safety of children through other means in the absence of such toilets, must be in breach of this obligation.

69. The court a quo confirmed that the respondents had violated these rights, and the respondents have not placed this finding in dispute. We submit that over and above these violations the respondents also breached two fundamental sets of constitutional values that should underlie all of their conduct.
70. The first is to be found in section 195 of the Constitution, which values are reflected in the founding provisions of the Constitution.¹⁴¹ The evidence before the court a quo established a violation of several of these values: the respondents failed to meet their sanitation targets,¹⁴² they underspent hundreds of millions of rands on their budgets allocated to school infrastructure,¹⁴³ and large portions of money were lost to unauthorized expenditure.¹⁴⁴ The respondents failed to use their resources efficiently, economically and effectively,¹⁴⁵ in addition to breaching the values of transparency¹⁴⁶ and accountability.¹⁴⁷
71. In addition to violating the express provisions in the Constitution, the respondents also undermined the constitutional value of Ubuntu. This value is *"intrinsic to and constitutive of our constitutional culture."*¹⁴⁸ Ubuntu *"emphasises the communal nature of society and 'carries within it the ideas of humaneness, social justice and fairness'"*¹⁴⁹ and envelops *'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'*^{150, 151}

¹⁴¹ See in particular section 1(d) of the Constitution which sets out the founding values of accountability, responsiveness and openness.

¹⁴² See for example transcript, volume 7, p 1319 line 18 to p 1320, line 5.

¹⁴³ Transcript, volume 7, p 1321, lines 10 – 15; p 1327, lines 18 – 19; volume 8, p 1364, lines 17 – 20.

¹⁴⁴ Transcript, volume 7, pp 1323 – 1324; p 1330, lines 6 – 7; volume 8, p 678.

¹⁴⁵ In breach of section 195(1)(b) of the Constitution.

¹⁴⁶ Section 195(1)(g) of the Constitution.

¹⁴⁷ Section 195(1)(f) of the Constitution.

¹⁴⁸ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 113.

¹⁴⁹ *S v Makwanyane and another* 1995 (3) SA 391 (CC) para 237.

¹⁵⁰ *Id* para 308.

¹⁵¹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 71.

72. Our courts have emphasised the role of Ubuntu in the development of the common law. Its absence from the principles of the delict relevant to this case – and particularly the absence of a remedy for inhumane conduct devoid of respect and compassion – highlights a chasm between the values promoted in our law of delict and those promoted in terms of our Constitution.
73. In addition to our law of delict failing to recognise a claim for loss where the loss arose from severe breaches of constitutional obligations, its failure to provide a remedy for direct breaches of Ubuntu necessitates development of these principles in line with section 39(2) of the Constitution.

How the common law should be developed and consequences of its development

74. Our submissions in favour of development of the common law turn on two distinct features of this case: the first is that the loss that gave rise to the appellants' grief was a direct result of the respondents' failure to meet multiple constitutional obligations to which they were directly bound.¹⁵² The second is that the appellants' grief, because of the unique circumstances of this case, extended far beyond the ordinary grieving process and compounded their emotional shock.
75. We submit that this Court should develop the common law to recognize that a loss of life – occurring as a direct result of the state's breach of its constitutional obligations – means more than a loss of property or material support. Without this development, state respondents would meet no consequence for the severe and serial breaches of their constitutional duties. Such development would bring the common law in line with the Constitution by recognizing the life of a child as one that holds value.
76. The court a quo declined to develop the common law on the basis that such development would *"no doubt lead to bogus and an unwarranted proliferation of claims for psychiatric injuries and pave the way for limitless claims for every conceivable cause of grief whether*

¹⁵² See section 8(1) of the Constitution.

*insignificant without expert psychiatric evidence.*¹⁵³ We submit that the finding is incorrect, for the following reasons:

76.1. Any claim for damages will always be reliant on proof of harm arising out of grief which is distinct from ordinary grief. We addressed in our submissions above how this proof may take the form of expert psychiatric evidence, but need not necessarily do so. We do not ask the Court to depart from this principle; damages for grief should only be awarded where the existence of grief is established on the evidence.

76.2. It is clear that the development of the common law that what the appellants seek does not extend to every conceivable cause of grief, but only to cases where the state's direct breach of its constitutional duties led to the loss of life in the most undignified of circumstances.

77. In sum, the common law should be developed to recognize grief in circumstance where (a) there is proof of harm arising from extraordinary grief and (b) the harm is caused by the direct failure by the state to comply with its constitutional obligations. In this way, development of the common law would vindicate constitutional rights and give meaning to the principles of Ubuntu.

THE ALTERNATIVE CLAIM FOR CONSTITUTIONAL DAMAGES

78. Should the Court decline to develop the common law in line with section 39(2) of the Constitution, we submit that the appellants should be awarded constitutional damages to vindicate their rights. We submit that the circumstances of this case warrant the direct assertion and vindication of constitutional rights.¹⁵⁴

¹⁵³ Judgment of the court a quo, volume 10, p 1715, para 39.

¹⁵⁴ See *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 27.

79. The court a quo recognised that it was common cause that "the defendants failed to perform certain obligations towards learners from schools in rural Limpopo including Michael, in particular, which in his case, resulted in his death."¹⁵⁵ The court further acknowledged that parents of learners attending public schools have a substantial interest in the safety of their children attending school and being placed in the care of teachers who are "*charged with upholding the rights of children protected by the Constitution.*"¹⁵⁶
80. The court therefore recognized that the respondents' conduct had violated rights on three levels: the rights of Michael Komape, the rights of his family and the rights of other children attending public schools in Limpopo.
81. The court further acknowledged that where a right has been breached it is enjoined to grant an appropriate remedy.¹⁵⁷ It follows that the court ought to have granted relief to vindicate the rights at all three levels on which they were violated. Having declined to develop the common law to recognize a claim for grief in the circumstances, the court was asked to award constitutional damages as just and equitable relief to compensate the appellants for the violation of their rights.
82. The court refused to grant constitutional damages for the following reasons:
- 82.1. The claim for constitutional damages was "*nothing short of a claim for punitive damages.*"¹⁵⁸ Awarding constitutional damages in the circumstances would, in its view, result in over-compensation of the appellants and would not serve the interests of society.¹⁵⁹

¹⁵⁵ Judgment of the court a quo, volume 10, 1720, para 55.

¹⁵⁶ Judgment of the court a quo, volume 10, p 1722, para 65.

¹⁵⁷ Judgment of the court a quo, volume 10, p 1720, para 56. The court relied on the decision of this Court in *Modderfontein Squatters Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA) para 18.

¹⁵⁸ Judgment of the court a quo, volume 10, p 1723, para 67.

¹⁵⁹ Judgment of the court a quo, volume 10, p 1724, para 68.

82.2. An appropriate remedy would be one directed at the enforcement, protection and prevention of future rights violations, for the benefit of all learners attending public schools in Limpopo.¹⁶⁰

83. Having denied the appellants of constitutional damages as just and equitable relief for the violations of their constitutional rights, the court a quo deprived them of their right to a remedy¹⁶¹ as conferred on them by the doctrine of the rule of law¹⁶² and the right of access to courts.¹⁶³

An award of constitutional damages would not amount to over-compensation

84. The claims for the development of the common law, alternatively constitutional damages, are based in the egregious violations of the applicants' rights as discussed above. In that way, these claims are distinct from claim A, which is based in compensation for the emotional shock that the appellants sustained, and claims C, D and E, which arise from future medical expenses, funeral costs and loss of earnings respectively.

85. In other words, it is only claim B that seeks to vindicate the appellants' constitutional rights, through the development of the common law to recognize a claim for grief or directly through the award of constitutional damages. If this Court does not develop the common law as set out above, the only option for the vindication of the appellants' constitutional rights is through constitutional damages. There can therefore be no threat of over-compensation.

The interests of society

¹⁶⁰ Judgment of the court a quo, volume 10, p 1723, paras 67 – 68.

¹⁶¹ See *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amici curiae)* 2005 (3) SA 3 (CC) para 51.

¹⁶² Section 1(c) of the Constitution.

¹⁶³ Section 34 of the Constitution.

86. There are two ways in which the court a quo's denial of constitutional damages based on the interests of society was misplaced:

86.1. First, the claim for constitutional damages is one that seeks to vindicate the rights of the appellants, who are the parties before court. What the court a quo should have considered is whether an award for constitutional damages would be effective in upholding the appellants' rights. While the court granted a structural order to vindicate the rights of other learners attending public schools in Limpopo, this has no effect on the harm sustained by the appellants and therefore leaves them without a remedy for the violation of their rights.

86.2. Second, there is an inherent public interest in the vindication of constitutional rights. In other words, just because a remedy does not provide a direct material benefit to the broader public, it does not follow that granting the remedy would undermine the interests of the broader public. If a remedy gives meaning and effect to the Constitution, then it promotes the interests of the broader public.

Constitutional damages would vindicate the appellants' rights

87. This Court has previously awarded constitutional damages where appropriate to vindicate constitutional rights.

88. In *Modderklip*,¹⁶⁴ the Constitutional Court confirmed an award by this Court of constitutional damages for what amounted in fact to the expropriation of a farm without compensation. The Court held that the state, having failed to find alternative accommodation for approximately 40 000 people unlawfully occupying a private farm, was in breach of its obligations arising from sections 25 and 26 of the Constitution. In addition to awarding constitutional damages

¹⁶⁴ *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amici curiae)* above n 161. This Court's decision is referred to at n 157 above..

to the owner of the private property, the Court granted an order allowing the occupiers to remain on the property until alternative land was made available to them. This order was effective in vindicating both sets of rights and placed the parties in the position they would have been had the state met its obligations.

89. In *Kate*, this Court was faced with an unreasonable delay on the part of the Eastern Cape Department of Welfare in considering and granting an application for a social grant. This was not an isolated case: the Court found that the evidence showed a “*conspicuous and endemic failure*”¹⁶⁵ on the part of the state to meet its obligations arising from the right to social security, with “*no end in sight*”.¹⁶⁶ The court awarded constitutional damages in the amount of the interest that the claimant would have earned had her social grant been considered and paid on time. Although Mrs Kate was not entitled to interest for this period because the debt had not yet accrued, the SCA awarded constitutional damages. It did so partly on the basis of the systemic and sustained failure of the provincial government to deliver social grants. In doing so held that “*the endemic breach of the rights that are now in issue justifies – indeed, it calls out for – the clear assertion of their independent existence.*”¹⁶⁷
90. We submit that this case similarly calls for a clear assertion of constitutional rights: the undisputed evidence before the Court establishes that the state of sanitation across schools is deplorable. The respondents knew about this for many years, and despite having the resources available, they have failed to take steps to ensure learners’ safety. This failure was the direct cause of Michael’s death. It has also caused other deaths and injuries at public schools. Against this background, the respondents have committed to starting to address unsafe school sanitation only in 2026.¹⁶⁸ In short, it is too late for the respondents to take action to save Michael’s life, but there is also “no end in sight” to the sanitation crisis in Limpopo schools, and the endemic breach of rights by the respondents necessitates a clear assertion of these rights through an award of constitutional damages.

¹⁶⁵ *Kate* above n 154 para 3.

¹⁶⁶ *Id* para 5.

¹⁶⁷ *Id* para 27.

¹⁶⁸ Defendants’ report on compliance with paragraph 2 of court order of 23 April 2018, supplementary record vol 1, p 1839, para 9.3.

THE IMPORTANCE OF THE DECLARATOR

91. The court a quo found, based on undisputed evidence, that the respondents had breached their constitutional obligations arising from the rights to equality, dignity, life, safe environment and basic education, as well as their obligation to hold paramount the best interests of children.¹⁶⁹
92. Despite this finding, the court refused to grant declaratory relief, on the basis that a declaratory order is a discretionary remedy, and that it “*would serve no immediate purpose.*”¹⁷⁰

The Court is bound to make a declaratory order

93. In holding that declaratory relief lies in the discretion of the Court, Muller J relied on the Constitutional Court's decision in *JT Publishing*.¹⁷¹ In that case, the Court was faced with a constitutional challenge, based on the provisions of the Interim Constitution,¹⁷² to the statutory censorship of pornography. The applicants brought the challenge to protect their trading, pre-empting any future prosecution in terms of the impugned provisions.
94. The Court's comments about declaratory orders came in the context of a discussion as to whether to consider the question of constitutional validity at all, given the undesirability of courts deciding purely abstract questions.¹⁷³
95. The question posed in this case is different: it is not one as to whether the court a quo should have entertained the claim that the respondents acted in breach of their constitutional

¹⁶⁹ Judgment of the court a quo, volume 10, p 1722, para 63.

¹⁷⁰ Judgment of the court a quo, volume 10, p 1724, para 69.

¹⁷¹ *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC) at para 15.

¹⁷² Constitution of the Republic of South Africa Act 200 of 1993.

¹⁷³ *JT Publishing* above n 171 para 15, footnotes omitted.

obligations; rather, it is about whether, having found that they had indeed breached their obligations, a declaratory order to this effect is competent.

96. This is addressed squarely in section 172(1)(a) of the Constitution, which provides that when deciding a constitutional matter within its power, a court “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.” (Our emphasis)

97. The Constitutional Court has confirmed the existence of this duty:

*Where state policy is declared as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that it has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.*¹⁷⁴ (Our emphasis)

98. The Court went on to hold that if a court finds that a policy is inconsistent with the Constitution it is “*obliged in terms of section 172(1)(a) to make a declaration to that effect.*”¹⁷⁵ This approach has been adopted in several subsequent decisions.¹⁷⁶

99. Having found that the respondents had acted in breach of sections 9, 10, 11, 24, 28 and 29 of the Constitution, the court a quo was compelled to grant a declaratory order to that effect and erred in declining to do so.

The declaratory order will serve an important purpose

¹⁷⁴ *Minister of Health and others v Treatment Action Campaign and others* (No 2) 2002 (5) SA 721 (CC) para 99.

¹⁷⁵ *Id* para 101.

¹⁷⁶ See, for example, *National Director of Public Prosecutions v Mohamed NO and others* 2003 (1) SACR 561 (CC) para 56.

100. In addition to declaratory relief being obligatory, the facts before the court a quo also established that a declaratory order would be just and equitable in the circumstances.

101. In *Rail Commuters*, O'Regan J described declaratory relief as *"a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values."*¹⁷⁷

102. The undisputed evidence before the court a quo demonstrated a deep and long-standing failure by the respondents to take seriously their constitutional duties. The Court held that despite *"distressing, dangerous and poor sanitary conditions at a large number of rural schools"*, *"not worthy for use as toilets by humans"*, and *"safe and affordable products on the market for use by children"*, the respondents had failed to use allocated funds to remedy the situation. The court concluded that *"It is clear that due to a lack of political will no effort was made to better the situation at schools of which the second defendant was well aware of."*¹⁷⁸

103. The new evidence placed before this Court demonstrates that, even after the judgment of the court a quo, the situation persists:¹⁷⁹

103.1. The document filed by the respondents purporting to be a detailed programme for the eradication of unsafe toilets in Limpopo schools is based on unreliable and inaccurate data;

103.2. It does not include criteria for the determination of safety, to enable the identification of schools with sanitation needs;

¹⁷⁷ *Rail Commuters Action Group c Transnet Ltd t/a Metrorail* above n 24 para 107.

¹⁷⁸ Judgment of the court a quo, volume 10, p 1720, para 59.

¹⁷⁹ Plaintiffs' affidavit in response to report filed on 31 August 2018, supplementary record vol 1, pp 1945 – 1980.

103.3. The respondents' intention is to commence with the provision of safe sanitation in Limpopo schools in the 2026/27 financial year, with no plan for immediate mitigation of imminent risk, even on an interim basis;

103.4. The respondents' assertions of budget constraints, which they assert is the reason that they cannot provide safe sanitation before 2026, reflect a misunderstanding of the respondents' legal obligations and are without merit.

104. The new evidence placed before this Court further highlights that the "accident waiting to happen" described to the court a quo tragically came to fruition.

105. The declaratory order the appellants seek would have the effect of holding the respondents accountable for their conduct and would assist in preventing or remedying further conduct in the future. This is particularly important given that the respondents' failures include the failure to uphold the best interests of the children in their care. A clear statement of their obligations, and the manner in which they breached these obligations, will play a role in preventing a recurrence of this terrible tragedy.

COSTS

106. In the event that the appellants are substantially successful in these appeals, we submit that the costs should follow the result. In this regard we alert the Court to the fact that two of the appellants' three counsel have acted pro bono, and ought therefore not to be included in the costs order.

107. In the event that the appellants are not successful, we submit that, in line with the Constitutional Court's decision in *Biowatch*,¹⁸⁰ no adverse costs order should be made against them. The case involves an undisputed breach of constitutional and statutory

¹⁸⁰ *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

obligations, with tragic consequences. The appellants have brought this case to seek compensation for their loss, and to secure a remedy to ensure that the tragedy that befell them does not recur. Litigants should not be discouraged from bringing litigation in the public interest by the fear of adverse costs orders.

VINCENT MALEKA SC

ADILA HASSIM

NIKKI STEIN

Counsel for the appellants

Chambers, Sandton

29 January 2019

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NUMBERS: 754/2018; 1051/2018

COURT A QUO CASE NUMBER: 1416/2015

In the matter between:

ROSINA MANKONE KOMAPE

First Appellant

MALOTI JAMES KOMAPE

Second Appellant

MOKIBELO LYDIA KOMAPE

Third Appellant

LUCAS KHOMOTSO KOMAPE

Fourth Appellant

and

MINISTER OF BASIC EDUCATION

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
LIMPOPO DEPARTMENT OF EDUCATION**

Second Respondent

**PRINCIPAL OF MAHLODUMELA LOWER
PRIMARY SCHOOL**

Third Respondent

**SCHOOL GOVERNING BODY
MAHLODUMELA LOWER PRIMARY SCHOOL**

Fourth Respondent

and

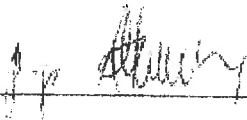
EQUAL EDUCATION

Amicus Curiae

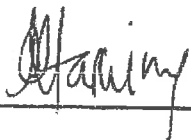
APPELLANTS' CERTIFICATE IN TERMS OF RULE 10 A (b)

We, the undersigned, confirm that to the best of our knowledge the provisions of Rule 10 and 10 A have been complied with.

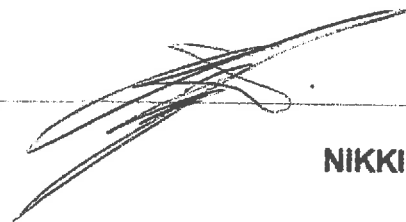
DATED AT JOHANNESBURG ON THIS 28th DAY OF JANUARY 2019.



VINCENT MALEKA SC



ADILA HASSIM



NIKKI STEIN

COUNSEL FOR THE APPELLANTS

THULAMELA CHAMBERS

FREDMAN DRIVE

1A PROTEA PL

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ANNEXURE A: APPELLANTS' CHRONOLOGY

DATE	EVENT	REFERENCE
28 June 2004	Principal of Mahlodumela submits application for new toilets to LDE.	Core bundle, p CB44
8 June 2005	Principal of Mahlodumela submits application for new toilets to LDE.	Core bundle, p CB45
11 September 2007	Siyamthanda Mtunu dies after the walls of his school toilet in the Eastern Cape collapse and crush him	Supplementary record, vol 1, p 1954
22 February 2008	Principal of Mahlodumela requests LDE to build new toilets for learners	Core bundle, p CB46
27 July 2009	SMT and SGB Secretary request service of an excavator to dig pits so that they can install the temporary steel toilets purchased for learners	Core bundle, p CB47
15 April 2011	School requisitions R400 to fix learners' toilets	Core bundle, p CB51
5 December 2011	LDE is placed under administration in terms of section 100(1)(b) of the Constitution	Particulars of claim, para 9, appeal record, p 9; plea, para 8, appeal record, p 90
1 April 2012 – 31 March 2013	LDE Annual Report compiled: <ul style="list-style-type: none"> • 0 out of 66 sanitation projects completed • LDE underspent budget by R960 million, including R378 intended for infrastructure development • R2 billion accumulated balance of unauthorised expenditure 	Core bundle, p CB77 Core bundle, p CB80, p CB82

DATE	EVENT	REFERENCE
		Core bundle, p CB84
27 September 2012	SECTION27 writes to the DBE and the LDE, as well as other government departments, to request a meeting about school sanitation in Limpopo	Appeal record, vol 2, pp 212 – 216
22 October 2012	LDE writes to Director-General in DBE re request for support for amendment of school infrastructure plans to cater for critical sanitation needs in Limpopo schools	Core bundle, pp CB52 – CB73
26 October 2012	SECTION27 writes follow up letter to DBE and LDE requesting a meeting.	Appeal record, vol 2, pp 218 – 220
26 November 2012	SECTION27 meets with DBE and LDE officials to discuss school sanitation in Limpopo. DBE undertakes to devise urgent plan of action to address sanitation needs of 111 priority schools in Limpopo and to furnish a plan by no later than 31 January 2013. DBE undertakes to drain full pits as an interim measure pending construction of new sanitation facilities.	Appeal record, vol 2, pp 223 – 224
24 January 2013	LDE appoints Mvula Trust to attend to 103 additional school sanitation projects.	Appeal record, vol 3, pp 473 – 483
8 February 2013	SECTION27 writes to DBE and LDE to request an indication as to when the sanitation plan will be provided and provides details of four additional schools requiring further intervention.	Appeal record, vol 2, pp 225 – 228
21 February 2013	SECTION27 writes follow up letter to DBE and LDE	Appeal record, vol 2, pp 229 – 233
28 February 2013	SECTION27 follows up telephonically with DBE and is advised that the plan will be forwarded by 8 March 2013.	Appeal record, vol 2, p 236

DATE	EVENT	REFERENCE
March 2013	Lister Magongwa dies after the walls of his school toilet in Limpopo collapse and crush him	Supplementary record, vol 1, p 1954
4 March 2013	DBE furnishes SECTION27 with water and sanitation programme implementation schedule for Limpopo.	Appeal record, vol 2, pp 238 – 240
8 March 2013	DBE furnishes SECTION27 with consolidated list of 215 water and sanitation projects in Limpopo.	Appeal record, vol 2, pp 241 – 263
18 March 2013	SECTION27 writes to DBE and LDE requesting a list of the criteria used in identifying the priority schools to be included on the sanitation plan and details of budget for sanitation projects.	Appeal record, vol 2, pp 264 – 266
1 April 2013 – 31 March 2014	LDE Annual Report compiled: <ul style="list-style-type: none"> • LDE underspent budget by R560 million, including R378 million intended for infrastructure development • Balance of R168 million in fruitless and wasteful expenditure 	Core bundle, pp CB89 – CB91
25 April 2013	SECTION27 writes an urgent letter to the Parliamentary Portfolio committee on Basic Education requesting an urgent hearing to address the Limpopo Education Crisis, including school sanitation	Appeal record, vol 2, pp 269 – 273
2 May 2013	DBE provides an updated sanitation plan to SECTION27, including 414 priority schools.	Appeal record, vol 2, pp 274 – 291
14 May 2013	SECTION27 writes to the DBE and LDE informing them of progress on sanitation projects and requesting list of criteria for inclusion on sanitation plans and details of budget for sanitation projects. The letter includes names of two additional schools in urgent need.	Appeal record, vol 2, pp 292 – 296
4 June 2013	SECTION27 writes to the DBE and LDE informing them of progress on sanitation	Appeal record, vol 2, pp 299 – 303

DATE	EVENT	REFERENCE
	projects and requesting list of criteria for inclusion on sanitation plans and details of budget for sanitation projects	
25 June 2013	SECTION27 writes to the DBE and LDE informing them of progress on sanitation projects and requesting list of criteria for inclusion on sanitation plans and details of budget for sanitation projects. The letter includes names of two additional schools in urgent need.	Appeal record, vol 2, pp 304 – 307
22 August 2013	SECTION27 writes to the DBE and LDE informing them of progress on sanitation projects and requesting list of criteria for inclusion on sanitation plans. The letter includes names of five additional schools in urgent need.	Appeal record, vol 2, pp 308 – 312
6 September 2013	SECTION27 releases report on Basic Education in Limpopo	Appeal record, vol 2, pp 367 – 402
18 September 2013	SECTION27 meets with LDE and DBE intervention team to discuss report of 6 September 2013. Head of the intervention team estimates 1 000 schools in need of new sanitation facilities and states that he is not aware of the criteria used to identify schools in need of new toilets.	Core bundle, pp CB27 – CB31
October 2013	Mahlodumela Primary School scheduled to receive 16 “enviroloos” and upgraded water system through Mvula Trust Sanitation and Water Backlogs Eradication Programme	Core bundle, p CB75
29 November 2013	Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure promulgated. Pit toilets are to be eradicated by 28 November 2016.	Appeal record, vol 3, p 542, para 63
20 January 2014	Michael Komape dies	Appeal record, vol 1, p 12, para 17; p 93, para 16.1
22 January 2014	Post mortem report completed, concluding possibility of death due to drowning	Core bundle, pp CB24 – CB26

DATE	EVENT	REFERENCE
29 January 2014	SECTION27 meets with Deputy Minister of Basic Education who undertakes to accelerate and intensify efforts to provide sanitation facilities to schools in Limpopo.	Appeal record, vol 2, pp 321 – 328
10 February 2014	SECTION27 requests an update on the provision of safe and adequate sanitation facilities at nine client schools	Appeal record, vol 2, pp 329 – 332
3 March 2014	SECTION27 sends follow-up letter to Deputy Minister of Basic Education to request progress report on nine schools	Appeal record, vol 2, pp 334 – 335
14 March 2014	Deputy Minister of Basic Education provides progress report on construction of toilets at nine schools	Appeal record, vol 2, pp 336 – 337
1 April 2014 – 31 March 2015	LDE Annual Report compiled: <ul style="list-style-type: none"> • R651 million in accumulated unauthorised expenditure • Accumulated balance of R3.2 billion in irregular expenditure 	Core bundle, p CB96 Core bundle, p CB98
9 May 2014	Histopathology report completed and Michael Komape's cause of death confirmed as "aspiration of foreign material, which is consistent with drowning"	Appeal record, vol 2, pp 208 – 210
14 May 2014	Meeting between SECTION27 and DBE. DBE confirms that 868 schools in Limpopo are being provided with new sanitation facilities at a total cost of R718 million, with a further 341 schools awaiting budget approval and 160 schools to be fast-tracked.	Appeal record, vol 2, pp 341 – 342
10 June 2014	Plaintiffs attend psychological assessment: <ul style="list-style-type: none"> • First plaintiff diagnosed with PTSD, depressive disorders and bereavement 	

DATE	EVENT	REFERENCE
	<ul style="list-style-type: none"> • Second plaintiff diagnosed with PTSD and bereavement • Third plaintiff diagnosed with PTSD and bereavement • Fourth plaintiff displays symptoms related to PTSD and bereavement • Onica Komape diagnosed with PTSD and bereavement • Maria Komape presents traits of PTSD and bereavement • Moses Komape displays concentration difficulties and memory problems 	<p>Appeal record, vol 1, p 49</p> <p>Appeal record, vol 1, p 38</p> <p>Appeal record, vol 1, p 56</p> <p>Appeal record, vol 1, p 62</p> <p>Appeal record, vol 1, p 69</p> <p>Appeal record, vol 1, p 75</p> <p>Appeal record, vol 1, p 79</p>
1 April 2015 – 31 March 2016	<p>LDE Annual Report compiled:</p> <ul style="list-style-type: none"> • R1.1 billion appropriated for school infrastructure • R24.7 million underspent on school infrastructure • R452 million surrendered back to provincial revenue fund 	<p>Core bundle, p CB104</p> <p>Core bundle, p CB114</p> <p>Core bundle, p CB152</p>
26 June 2015	<p>Plaintiffs issue summons out of the Polokwane High Court</p>	<p>Appeal record, vol 1, pp 105 - 109</p>
31 August 2015	<p>Defendants file plea</p>	<p>Appeal record, vol 1, pp 86 – 103</p>
1 April 2016 – 31 March 2017	<p>LDE Annual Report compiled:</p> <ul style="list-style-type: none"> • R284 million of funds appropriated for infrastructure development unspent 	<p>Core bundle, p CB154</p>

DATE	EVENT	REFERENCE
	<ul style="list-style-type: none"> Department balance of irregular expenditure awaiting condonation grows to R4 billion 	
3 May 2016	Oratilwe Diloane falls into the toilet pit at his school in the North West.	Supplementary record, vol 1, p 1955
28 November 2016	Deadline for eradication of pit toilets in terms of Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure	
19 May 2017	Joint meeting between expert clinical psychologists	Core bundle, pp CB20 – CB21
11 August 2017	Pre-trial conference held	Core bundle, pp CB1 – CB17
3 October 2017	Defendants make “with prejudice” settlement offer of R450 000	Appeal record, vol 1, pp 195 – 197
11 October 2017	Defendants give notice of concession of merits of delictual claims and make a “with prejudice” settlement offer of R450 000	Core bundle, pp CB22 – CB23
2 November 2017	LDE provides update on progress of 96 uncompleted sanitation projects	Appeal record, vol 4, pp 734 – 740
13 November 2017 – 1 December 2017	Trial before the court a quo	
17 November 2017	<p>Court a quo grants order by consent directing the defendants to pay:</p> <ul style="list-style-type: none"> R79 917,85 in partial settlement of claim C; R34 105,80 in full and final settlement of claim D; and R21 349 in full and final settlement of claim E 	Appeal record, vol 1, pp 201.1 – 201.2

DATE	EVENT	REFERENCE
13 March 2018	Lumka Mkethwa drowns in a school toilet in Bizana, Eastern Cape	Supplementary record, vol 1, p 1954
16 March 2018	<p>President Ramaphosa issues directive calling on first respondent to:</p> <ul style="list-style-type: none"> • Conduct an audit to identify unsafe sanitation facilities within one month • Provide a plan for provision of safe and adequate school sanitation • Produce an emergency plan by no later than 16 June 2018 	Supplementary record, vol 1, p 1962
23 April 2018	Court a quo hands down judgment dismissing claim A, claim B, the alternative to claim B and the request for a declaratory order, and granting claim C in relation to Maria Komape and Onica Komape.	Appeal record, vol 10, pp 1705 – 1729
5 June 2018	Application for leave to appeal granted in respect of claim B	Appeal record, vol 10, pp 1756 – 1757
16 June 2018	Deadline for emergency plan for safe sanitation in schools	Supplementary record, vol 1, p 1962
30 July 2018	Due date for defendants' report to court a quo on compliance with structural order	Supplementary record, vol 1, p 1820
19 July 2018	Eastern Cape High Court, Bisho, declares certain provisions of Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure inconsistent with the Constitution and invalid	Supplementary record, vol 1, p 1820
14 August 2018	Launch of SAFE Initiative	Supplementary record, vol 1, p 1963
31 August 2018	Defendants file report on compliance with structural order	Supplementary record, vol 1, p 1820

DATE	EVENT	REFERENCE
5 September 2018	Application for leave to appeal granted in respect of declaratory relief, claim A, alternative to claim B and claim C	Appeal record, vol 10, pp 1778 – 1779
27 September 2018	Plaintiffs file response to report on compliance with structural order	Supplementary record, vol 1, pp 1945 -1980
5 October 2018	Amicus curiae files response to report on compliance with structural order	Supplementary record, vol 3, pp 2285 - 2318
2026 – 2031	Defendants' intended time frames for provision of safe and adequate school sanitation	Supplementary record, vol 1, p1839, p 1843

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and

MINISTER OF BASIC EDUCATION**First Respondent****MEMBER OF THE EXECUTIVE COUNCIL,
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PRIMARY SCHOOL****Third Respondent****SCHOOL GOVERNING BODY
MAHLODUMELA LOWER PRIMARY SCHOOL****Fourth Respondent**

and

EQUAL EDUCATION**Amicus Curiae**

APPELLANTS' LIST OF AUTHORITIES

SOUTH AFRICAN CASES

1. AB v Minister of Social Development 2017(3) SA 570 (CC)
2. Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd 2002 (4) SA 681 (SCA)
3. Allie v Road Accident Fund [2003] 1 All SA 144 (C)
4. August v Electoral Commission 1999 (3) SA 1 (CC)
5. Barnard v Santam Bpk 1999 (1) SA 202 (SCA)
6. Beja v Premier of the Western Cape 2011 (10) BCLR 1077 (WCC)
7. Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A)
8. Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC)
9. Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

10. Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)

11. Dikoko v Mokhatla 2006 (6) SA 235 (CC)

12. Dladla v City of Johannesburg 2018 (2) SA 327 (CC)

13. Equal Education and another v Minister of Basic Education and others (Basic Education for All, amicus curiae) 2018 (9) BCLR 1130 (ECB)

14. Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)

15. Families of Mental Health Care Users Affected by the Gauteng Mental Health Marathon Project v National Minister of Health and others (19 March 2018) available at <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf>.

16. Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

17. Gory v Kolver NO and others 2007 (4) SA 97 (CC)

18. Governing Body of the Juma Musjid Primary School and others v Essay NO and others 2011 (8) BCLR 761 (CC)

19. Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC)
20. Hing and others v Road Accident Fund 2014 (3) SA 350 (WCC)
21. JT Publishing v Minister of Safety and Security 1997 (3) SA 514 (CC)
22. K v Minister of Safety and Security 2005 (6) SA 419 (CC)
23. Kritzinger and another v Road Accident Fund (337/2008) [2009] ZAECPEHC 6 (24 March 2009)
24. KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and others 2013 (4) SA 262 (CC)
25. Maart v Minister of Police [2013] ZAECPEHC 19 (19 April 2013)
26. Majiet v Santam Limited [1997] 4 All SA 555 (C)
27. Mazibuko and others v City of Johannesburg and others 2010 (4) SA 1 (CC)
28. Mbhele v MEC for Health for the Gauteng Province [2016] ZASCA 166 (18 November 2016)
29. MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA)

30. Member of the Executive Council for Health and Social Development Gauteng v DZ obo WZ (Member of the Executive Council for Health Eastern Cape and Member of the Executive Council for Health Western Cape as Amici Curiae) 2018 (1) SA 335 (CC)
31. Minister of Defence and Military Veterans v Motau and others 2014 (5) SA 69 (CC)
32. Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 (5) SA 721 (CC)
33. Minister of the Interior and another v Harris and others 1952 (4) SA 769 (A)
34. Modderfontein Squatters Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae) 2004 (6) SA 40 (SCA)
35. National Director of Public Prosecutions v Mohamed NO and others 2003 (1) SACR 561 (CC)
36. Port Nolloth Municipality v Xhalisa and others; Luwalala and others v Port Nolloth Municipality 1991 (3) SA 98 (C)

37. President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amici curiae) 2005 (5) SA 3 (CC)

38. Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)

39. Road Accident Fund v Ruth FS Draghoender [2006] JOL 18271 (SE)

40. Road Accident Fund v Sauls 2002 (2) SA 55 (SCA)

41. S v Makwanyane and another 1995 (3) SA 391 (CC)

42. S v Williams 1995 (3) SA 632 (CC)

43. Swartbooi v Road Accident Fund 2013 (1) SA 30 (WCC)

44. Thebus and another v S 2003 (6) SA 505 (CC)

45. Walters v Minister of Safety and Security [2012] ZAKZDHC 19(12 April 2012)

FOREIGN CASES

46. Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383

47. *Vernon v Bosley* [1997] 1 All ER 577

48. *White and others v Chief Constable of South Yorkshire and others* [1991] 1 All ER 1 (HL)

LEGISLATION

49. Constitution of the Republic of South Africa Act, 1996

50. Constitution of the Republic of South Africa Act 200 of 1993

51. Superior Courts Act 10 of 2013

INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

52. African Charter on Human and People's Rights

53. International Covenant on Civil and Political Rights

54. International Covenant on Economic, Social, and Cultural Rights

55. The Convention on the Rights of the Child

TEXTBOOKS

56. J Neethling, J Potgieter and P Visser, *Law of Delict*, 5ed, 2006 (LexisNexisButterworths, Durban)
57. J Neethling, J Potgieter and P Visser, *Neethling's Law of Personality*, 2ed, 2005, (LexisNexis Butterworths, Durban)
58. M de Villiers, *The Roman and Roman-Dutch Law of Injuries*, 1899 (Juta&Co, Cape Town)
59. RJ Koch's *Quantum Yearbook 2017*
60. P Visser and J Potgieter, *Law of Damages*, 1993 (Juta&Co Ltd, Cape Town)