

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1416/2015

In the matter between:

ROSINA MANKONE KOMAPE

FIRST APPLICANT

MALOTI JAMES KOMAPE

SECOND APPLICANT

MOKIBELO LYDIA KOMAPE

THIRD APPLICANT

LUCAS KHOMOTSO KOMAPE

FOURTH APPLICANT

AND

MINISTER OF BASIC EDUCATION

1ST RESPONDENT

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

2ND RESPONDENT

**PRINCIPAL OF MAHLODUMELA LOWER
PRIMARY SCHOOL**

3RD RESPONDENT

**SCHOOL GOVERNING BODY,
MAHLODUMELA LOWER PRIMARY SCHOOL**

4TH RESPONDENT

**TEBEILA INSTITUTE OF LEADERSHIP
EDUCATION, GOVERNANCE AND TRAINING**

1ST AMICUS CURIAE

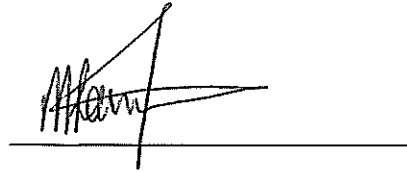
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2ND AMICUS CURIAE

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DOCUMENT : HEADS OF ARGUMENTS

DATED AT POLOKWANE ON THIS 30TH DAY OF JANUARY 2018



State Attorney Polokwane

Attorneys Respondents

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Ref: 387/15/RA

**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
LIMPOPO DIVISION , POLOKWANE**

**AND TO: SECTION 27
ATTORNEYS FOR THE APPLICANTS
C/O MOLEPO & PHALA ATTORNEYS
66 LANDROS MARE STREET
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REF: MS./K.PATERSON**

**AND TO: EQUAL EDUCATION LAW CENTRE
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IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 1416/2015

In the action between:

ROSINA MANKONE KOMAPE

First Applicant

MALOTI JAMES KOMAPE

Second Applicant

MOKIBELO LYDIA KOMAPE

Third Applicant

LUCAS KHOMOTSO KOMAPE

Fourth Applicant

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

**TEBEILA INSTITUTE OF LEADERSHIP
EDUCATION, GOVERNANCE AND TRAINING**

First Amicus

EQUAL EDUCATION

Second Amicus

HEADS OF ARGUMENT ON BEHALF OF THE DEFENDANTS

A. INTRODUCTION:

1. This is a claim for damages and compensation. The Plaintiffs also requested the court to develop the common law to award satisfaction (*solatium*) for grief. In the alternative the court is asked to develop the common law to award constitutional damages.

2. The Plaintiffs' claims are categorized as follows:
 - 2.1 **Claim A**, is for trauma and emotional shock of the Plaintiffs;

 - 2.2 **Claim B**, for grief alleged to have been suffered by the Plaintiffs. Plaintiffs asked the court to develop the common law in accordance with section 39 (2) of the Constitution. Alternative to claim B above, the Plaintiffs request the court to develop the common law to make an award for constitutional damages;

 - 2.3 **Claim C**, for medical expenses;

 - 2.4 **Claim D**, for funeral expenses; and

2.5 **Claim E**, for loss of income in respect of the First Plaintiff.

3. Claims D, E and part of claim C are resolved between the parties. In relation to claim C, the outstanding issues is the damage and the damages in respect of the three minor children (Onica, Maria and Moses).
4. Defendants have conceded merits in respect of Claim A and the outstanding issues are damage, damages and compensation in respect of claim A. Claim B and its alternative are in issue (whether the common law should be developed to compensate Plaintiffs for alleged grief; alternative, whether the common law should be developed to make an award for constitutional damages).

B. BRIEF BACKGROUND:

5. The unfortunate and untimely passing of Michael Komape occurred on 20 January 2014 at Mahlodumela Lower Primary School. Michael passed on when he fell into a pit latrine at the

school. The Defendants' conceded that they had a duty of care and were *in loco parentis* when Michael died. It is on this basis that they conceded liability, such as general damages (claim A) and special damages (claim C, D and E), arising from his death.

C. ISSUES IN DISPUTE:

6. As stated above, out of the five heads of damages claimed by the Plaintiffs only three remain in dispute:

6.1 It is the quantum for general damages (claim A) that each of the Plaintiffs must be awarded as well as the quantum for the minor children;

6.2 The liability and quantum (claim B) that must be awarded for grief (development of the common law), alternative, constitutional damages; and

6.3 Future medical expenses (claim C) only in respect of the minor children.

D. QUANTUM OF GENERAL DAMAGES (TRAUMA ¹ AND EMOTIONAL SHOCK)

7. According to Neethling's Law of Personality ², it is trite that our law recognises a claim for trauma and emotional shock. The claim for trauma and emotional shock is founded on *actio iniuriarum*. The object is to compensate the aggrieved party for the infringement of personality right which include bodily injury. ³
8. Emotional shock is described as sudden, painful emotion or fright resulting from the realisation or perception of an

¹ Trauma is the term used to indicate disorders due to wounds or injuries. See Thomson, W.A.R (1984) *Black's Medical Dictionary*, 34th edn, Adam & Charles Black (Publishers) Ltd, London, p 904.

² Neethling, Potgieter & Visser. (2005) *Neethling's Law of Personality*, 2nd edn, Lexis Nexis, Durban, p91.

³ Direct authority in South African case law for the proposition that any causing of mental suffering- such as experiencing emotional shock- which has a significant effect on the physical-mental well-being of a person, is the Appeal Court decision in *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 145-146.

unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief.

9. To this end, LAWSA makes reference to the case of *Jaensch v Coffey* (1984) 155 CLR 549 567 where emotional shock, is defined as:-

“the sudden sensory perception-that is, by seeing, hearing or touching- of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the Plaintiff’s mind and causes a recognizable psychiatric illness”⁴.

10. LAWSA vol 9: Emotional Shock makes reference to Mullany and Handford’s *Tort Liability for Psychiatric Damage* 26” it states that:-

“mental distress usually consists of the following unpleasant emotions: fear of apprehension; horror; grief;

⁴ *Jaensch v Coffey* (1984) 155 CLR 549 567, as quoted in LAWSA volume 9: Emotional shock par 2

sorrow and loneliness; shame; humiliation and embarrassment; anger; annoyance and vexation; disappointment and frustration; worry and anxiety”.

11. In stating what type of emotional shock gives rise to compensation, LAWSA, refers to the judgment of *Barnard v Santam Bkp*⁵ where Van Heerden DCJ opined that the term “*senuskok*” (“*nervous shock*”) *is not only an obsolete term without any specific psychiatric meaning, but it may also be misleading. The only relevant question should be whether the Plaintiff sustained a recognizable psychological lesion (“psigiese letsel”). The existence of such a lesion should, as a rule, be proved by supporting psychiatric evidence”.*

12. In this case the Defendants have conceded liability in respect of trauma and shock based on the reports of the respective parties’ psychologists that indeed the Plaintiffs suffered “emotional shock”. They were diagnosed with PTSD, major

⁵ 1999 (1) SA 202 (SCA) 208J-209A.

depressive disorder and others were treated for symptoms of PTSD and bereavement.

E. LEGAL PRINCIPLES APPLICABLE FOR DETERMINATION OF QUANTUM FOR GENERAL DAMAGES:

13. The trial court has a discretion to award what he/she considers to be fair and adequate compensation.⁶ The court has to consider the facts of a particular case in the assessment of compensation.⁷ The award must be fair to both parties.⁸

⁶ Road Accident Fund v Marunga 2003 (5) SA 164 SCA at 169 F:

"It is settled law that the trial Judge has a large discretion to award what he in the circumstances considers to be fair and adequate compensation to the injured party for these sequelae of his injuries. Further, this Court will not interfere unless there is a 'substantial variation' or as it is sometimes called a 'striking disparity' between what the trial Court awards and what this Court considers ought to have been awarded."

⁷ Minister of Safety and Security v Seymour 2006 (6) SA 320 SCA at 325 B:

"[17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what others have considered to be appropriate but they have no higher value than that. As pointed out by Potgieter JA in Protea Assurance, after citing earlier decisions of this Court:"

⁸ Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D) and De Jongh v Du Pisanie N.O 2005 (5) SA 457 (HHA):

14. The courts have acknowledged that the assessment of quantum for general damages is fraught with difficulty, as few cases are similar.

F. **SUMMATION OF THE CIRCUMSTANCES OF THE PLAINTIFFS:**

MRS. KOMAPE:

15. Mr Molepe first consulted with Mrs Komape on 2 October 2015⁹ a year and nine months after Michael's death¹⁰. He testified that she among other family members presented the symptoms of bereavement, post-traumatic stress disorder and depressive disorders.
16. Mr. Molepe mentioned the symptoms of major depressive disorder.¹¹ He testified that of the mentioned symptoms Mrs Komape, in October 2015, presented the following symptoms:

"(T)he court must take care to see that its award is fair to both sides – it must give just compensation to the Plaintiff, but it must not pour out largesse from the horn of plenty at the Defendant's expense."

⁹ Transcript: p 283 lines 20- 21.

¹⁰ Transcript: p 284 lines 4- 5.

¹¹ Transcript: p 284 lines 6- 23.

*“sadness and depressed mood; feeling down; feeling loss of interest. Loss of energy. Lacking concentration. Contemplating feelings of guilt and the sadness was also often accompanied by tearfulness, difficulty sleeping.”*¹²

17. Mr. Molepo stated that the reason Mrs Komape may have fainted when she saw Michael’s hand in the toilet, indicated that she experienced shock that she was not able to contain and manage and also that her fainting could have been the process through which it could be easier for her to be able to escape that reality.¹³

18. Mr Molepo consulted with Mrs Komape just before commencement of the trial, on 6 November 2017. At that consultation, he observed her emotional state to be functional. She was able to communicate more openly and she was relaxed and appeared to be ready to come testify at court.¹⁴

19. Mr. Molepo testified that in relation to the symptoms that Mrs. Komape went through, those he mentioned earlier in his

¹² Transcript: p 285 lines 1-5.

¹³ Transcript: p 285 lines 7-14.

¹⁴ Transcript: p 287 lines 17-22

testimony, that he observed her to have made great improvement. He testified that a lot of those symptoms are not featuring in her reactions and she has almost dealt with her grieving process.¹⁵

MR. KOMAPE:

20. Mr. Molepo consulted with Mr. Komape on 2 October 2015 and testified that Mr. Komape was not much expressive, he tried to present a strong and brave face as he felt he needed to be strong for the family but acknowledged that he is struggling to cope and experiences difficulty sleeping as well as sadness and irritability.¹⁶

21. Mr. Molepo had seven sessions with Mr. Komape and stated that as at their last session, on 6 November 2017, he seemed to be coping much better and positive about life. Mr. Molepo further testified that on 6 November 2017 Mr. Komape did not meet the diagnostic criteria for post –traumatic stress disorder.

¹⁵ Transcript: p 288 lines 6- 12.

¹⁶ Transcript: p 290 lines 10- 20.

22. He further stated that in the timeline between 2 October 2015 and 6 November 2017, Mr Komape reacted a little more positively than Mrs. Komape did to counselling and showed positive signs of improvement during the 2nd and 3rd sessions.¹⁷ When asked if Mr. Komape is still experiencing grief, he stated that his observation was that Mr. Komape is now at peace with the loss of his son.¹⁸

LYDIA KOMAPE:

23. Mr. Molepo testified that Lydia Komape's ("Lydia") reaction presented similar to her mother, she presented with symptoms such as PTSD, she also had symptoms that suggested that she was depressed and was going through a bereavement and grieving process.¹⁹ She still met the diagnostic criteria for PTSD and bereavement in 2015.

¹⁷ Transcript: p 292 lines 1- 20.

¹⁸ Transcript: p 293 lines 10-12.

¹⁹ Transcript: p 295 lines 18- 23.

24. Mr. Molepo had eight sessions with her, with the latest one being 6 November 2017. Mr. Molepo's observation of Lydia in relation to how she was in October 2015, was that she has improved quite a lot in terms of how she deals with her loss and *"she does not present the symptoms that she used to present which suggest that she was still going through grieving process or experiencing any form of trauma or depressed mood."*²⁰
25. Mr. Molepo stated that when he last consulted with Lydia, the symptoms were not as extreme as they were during their initial consultations. He testified that she no longer met the diagnostic criteria for PTSD or bereavement.²¹
26. Although Lydia's symptoms were a little bit prolonged and going into 2016 still experiencing the symptoms, she appeared to be getting better during later sessions. Currently, she no longer presented symptoms suggesting that she is still experiencing grief.²²

²⁰ Transcript: p 296 lines 20- 25 and p 297 line 1.

²¹ Transcript: p 297 lines 5- 6 and 8- 9.

²² Transcript: line p 297 lines 12- 20.

LUCAS KOMAPE:

27. Mr. Molepo consulted with Lucas on 11 December 2015, almost two years after Michael's death. At their first consultation, Lucas was not highly expressive and portrayed a picture of somebody who wants to be strong. He did however, acknowledge that he was negatively affected by the loss and was very sad and unable to cope effectively as he should.²³
28. Mr. Molepo testified that Lucas did **not** have all the symptoms that could qualify him to meet the criteria for PTSD, however, some of the symptoms were there and so too were signs of bereavement. Lucas was finding it difficult to adjust to the absence of his brother both emotionally and mentally.²⁴
29. Mr. Molepo had five sessions with Lucas and the last session was on 6 November 2017.²⁵ When they last consulted, Lucas was cooperative and well expressive and appeared to have stabilized much more than when they first met. He was no

²³ Transcript: p 299 lines 19- 25.

²⁴ Transcript: p 300 lines 4- 17.

²⁵ Transcript: p 300 lines 22- 25.

longer showing signs of PTSD and also he showed no signs of bereavement.²⁶

PREVIOUS AUTHORITIES:

30. It is trite law that previous authorities relating to assessment of general damages serve as useful guide to what other courts have considered to be appropriate but have no high value than that.²⁷ It is generally undesirable for the court to adhere slavishly to consumer price index in adjusting earlier awards.²⁸
31. In **Minister of Safety and Security v Seymour**, *supra*, the respondent was arrested and detained. He was diagnosed with moderate to severe symptoms of depression and symptoms of post-traumatic stress disorder. The diagnosis showed that the symptoms will respond to treatment. The respondent was awarded compensation in the amount of R90 000.00. We were unable to obtain the 2017 value of this amount as Dr Robert Kock's Quantum Year book only refers to the amount granted at the court *a quo*.

²⁶ Transcript: p 301 lines 3- 9.

²⁷ Minister of Safety and Security v Seymour *supra* at 325B.

²⁸ A A Onderlinge Assuransie Assosiasie Bpk v Sodoms 1980 (3) SA 134 (A) at 141 G-H.

32. In **Kritzinger and Kritzinger v Road Accident Fund**²⁹, the Plaintiff had to identify the bodies of her two children at the mortuary and the Plaintiff suffered severe emotional shock and PTSD. The parties had accepted the reports of experts with regard to the Plaintiff's medical condition. The court awarded an amount of R150 000.00 in general damages. The 2017 value amount to R230 000.00.
33. In **Maart v Minister of Police**³⁰, the Plaintiff's son was shot by the police in full view of the Plaintiff died instantly on the scene. The medical report clearly showed that the Plaintiff suffered trauma. The Plaintiff suffered severe shock and trauma as a result of having observed her son's shooting. The Plaintiff was further diagnosed with chronic PTSD of a severe form and major depressive disorder. She could not engage in any employment or any substantial gainful activity. The court awarded R200 000.00 for general damages. The damages in 2017 value amount to R251 000.00.
34. In **Walters v Minister of Police**³¹, the Plaintiff's husband was detained by the police for being drunk and disorderly. He committed suicide while in police custody. As a result of her husband's death, the

²⁹ 2009 QoD 21 (ECD).

³⁰ 2012 (6K3) 2012 QoD 24 (ECP).

³¹ 2012 (6K3) QoD 24 (ECP).

Plaintiff suffered shock, anxiety, emotional and psychological suffering and feeling guilty and other complications. The court awarded R185 000.00 and the 2017 value is R245 000.00.

35. In **Van der Merwe v Minister van Veiligheid en Sekuriteit 2010 (6K2) QoD 1 (NCK)** a sixty three year old building contractor who suffered severe post-traumatic stress disorder as a result of two hours and thirty minutes of arrest and detention was awarded R25 000.00 as compensation. The damages in 2017 value amount to R38 000.00.

36. In **Road Accident Fund v Ruth FS Draghoender QoD Vol. V K3-16**, the Plaintiff's son was killed in a motor vehicle collision in front of the family home. The Plaintiff had to identify the son's body from the scene of the accident. She suffered severe emotional shock and trauma. As a consequence of the post-traumatic stress disorder, she was permanently incapable of being employed. The court awarded R80 000.00. The damages in 2017 value amount to R157 000.00.

37. In **Mngomezulu v Minister of Law and Order 2015 (7k3) QoD 1 (KZD)**, Plaintiff was awarded R75 000.00 as compensation for emotional shock and trauma after her daughter was shot and killed by the police. Following from the shooting the Plaintiff was admitted to hospital after being diagnosed with major depressive disorder. She required

counselling as she could not sleep. The damage in 2017 value amount to R89 000.00.

38. In **Mbhele v MEC for Health, Gauteng Province 355/15/2016**

J ZASCA 166 (18 Nov. 2016) the court awarded the Appellant R100 000.00 for severe shock, grief and depression resulting from losing her unborn baby (stillborn).

39. In **Minister of Police v Dlwathi**³², general damages award of R675 000.00 for pain, suffering, disfigurement and loss of amenities of life was found to be excessive and reduced to R200 000.00 on appeal. The court *a quo* in awarding the amount of R675 000.00 had made the following remarks:

“...the court is of the view that the time has come to distinguish those cases, such as this one, where damages incurred arise out of an unwarranted, callous attack and violation that goes beyond the bounds of legitimate law enforcement to clearly signal that such conduct will not be tolerated. The defendant and Plaintiff cannot both be embraced under the same cloak when weighing considerations of what is just and fair regardless of the circumstances of the case.”

³² (20604/14) [2016] ZASCA6.

40. In respect of the above remarks, the supreme court of appeal found that the court *a quo* misdirected itself by introducing a punitive element in the award of general damages so as to deter the kind of unlawful conduct to which the police subjected Mr Dlwathi. The supreme court of appeal remarked that:

*"...it should be borne in mind that general damages are awarded for bodily injury, which includes injury to personality. Its object is to compensate loss, not punish the wrongdoer. If it were otherwise awards would be made even where no loss is suffered. It is apparent that this misdirection resulted in the learned judge making what I regard an excessive award."*³³

41. Mr. Molepo testified that *"with the Komape family that I have seen I have realised that their grieving process took a little longer than I usually take...although most of the symptoms have subsided. They are a little more in control than they were in the first two, three sessions that we had."*³⁴

³³ Ibid para [9].

³⁴ Transcript: p 270, lines 19- 24.

**JOINT MINUTE IN RESPECT OF ROSINA, JAMES, LYDIA
AND LUCAS KOMAPE:**

42. According to the joint minutes ³⁵, *“the Plaintiffs suffered severe trauma due to the manner in which Michael passed away. Although there is considerable improvement in everyone’s functioning, the Plaintiffs’ current presentation of the symptoms is perpetuated by the **prolonged legal process**. Lucas, Lydia and James are functioning optimally. Rosina is functioning moderately...”*

ONICA KOMAPE:

43. Mr. Molepo testified that when he consulted with Onica in December 2015 she did **not** meet the diagnostic criteria for PTSD but had symptoms that were suggestive of PTSD, that she could not have met those that qualify her to be diagnosed

³⁵ Notice bundle: pp 229- 230

as such.³⁶ Mr Molepo testified that, Onica did meet the diagnostic criteria for bereavement.³⁷

44. Mr Molepo had four sessions with Onica. The last session Mr. Molepo had with Onica was on 6 April 2017 and as at that date Onica no longer met the diagnostic criteria for bereavement.³⁸ Although Mr Molepo did not check with Onica what effect the litigation had on her, he stated that “*she did not appear to be too much worried about the litigations and the court cases going on.*”³⁹
45. According to Mr. Molepo, Onica still needs counselling because she requires support so that she continues to make peace with the passing of her brother and to be able to adjust to her optimal level of functioning. He recommends between four and eight sessions⁴⁰. He cannot conclude what will happen if she does not receive the sessions but she might at some stage in her life be drawn back to the experiences of the loss of her

³⁶ Transcript: p 307 lines 9- 14.

³⁷ Transcript: p 307 lines 19- 21.

³⁸ Transcript: p 308 lines 5, 11- 14.

³⁹ Transcript: p 308 lines 24- 25 and p 309 lines 1- 2.

⁴⁰ Transcript: p 309 lines 12- 17.

brother. As such, if the sessions continue as recommended, he hopes that counselling could help her to contain the loss and be able to let go and by the time she is older she can rationalize differently about her loss.⁴¹

46. Having regard to Mr Molepe's testimony we submit that four sessions will be sufficient and the Plaintiffs' contention that the court should award eight sessions has no basis.

MARIA KOMAPE:

47. According to the evidence of Mr Molepe, the symptoms of PTSD were more visible in Maria than they were in Onica⁴² when he first consulted with her on 11 December 2015. Maria is said to also have had symptoms of bereavement.⁴³

48. Mr. Molepe last consulted with Maria on 6 April 2017 and as at that date she no longer showed symptoms of bereavement.⁴⁴

⁴¹ Transcript: p 309 lines 20- 25 and p 310 lines 1- 4.

⁴² Transcript: p 311 lines 17- 20.

⁴³ Transcript: p 312 lines 2- 3.

⁴⁴ Transcript: p 312 lines 12, 18- 20.

Mr Molepo stated that, like her twin sister, Maria did not seem to worry about the litigation process.⁴⁵

49. When they last consulted she was still withdrawn but more at ease and she no longer showed symptoms of bereavement.⁴⁶
50. Despite the noted improvement, Maria still needed counselling to provide ongoing support to continue to contain her emotions. She needs between four and eight sessions.⁴⁷ We contend that the court should award four sessions. The Plaintiffs' contention that the court should award eight sessions has no basis.

MOSES KOMAPE

51. Mr Molepo stated that Moses presented symptoms of bereavement.⁴⁸ The last session Mr Molepo had with Moses was on 6 November 2017 and he stated that Moses appeared

⁴⁵ Transcript: p 313 lines 18- 20.

⁴⁶ Transcript: p 312 lines 14- 20.

⁴⁷ Transcript: p 313 lines 9- 16.

⁴⁸ Transcript: p 313 lines 24-25; p 314 lines 1- 14, 22-25; p 315 lines 1- 9.

to be happy and at ease and was able to communicate much more openly and expressively.⁴⁹

52. Mr. Molepo had eight sessions with Moses, as he had an opportunity to be present when his mother came for counselling. The last being on 6 November 2017, where he seemed happy and was able to communicate openly and expressively. But he still presented with a lot of sadness and tearfulness.⁵⁰

53. According to Mr. Molepo, although Moses seemed happy at their last consultation, he still needs further counselling. He recommends between six and ten sessions.⁵¹ We submit that an award of five sessions is sufficient bearing in mind that progress Moses is said to have made and that of all the children he already had eight, the highest number of sessions.

54. In view of the expert reports in respect to the four Plaintiffs and the report of Mr Molepo in respect of the minor children, the

⁴⁹ Transcript: p 316 lines 13- 17.

⁵⁰ Transcript: p 316 lines 8- 20.

⁵¹ Transcript: p 317 lines 4- 8.

Komape family has not suffered severe trauma and emotional shock, their condition has improved. From the evidence, we contend that save for Mrs Komape the members of the family are not suffering from what could be termed severe and chronic PTSD. Although their recovery took longer than anticipated it cannot be categorised as permanent and thus it does not justify high awards of general damages.

55. Michael passed away on 20 January 2014. It is four years since the incident, none of the Plaintiffs and the minor children are suffering from severe and chronic psychiatric disorder.

56. In assessment of general damages, we remind the court to bear in mind what the Supreme Court of Appeal stated; that the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed *solatium* to his or her injured feelings⁵²

57. We contend an amount of R180 000. for Mrs. Komape is fair and reasonable. In respect of Mr. Komape we contend that an

⁵² Minister of Police and Security v Tyulu 2009 (2) SACR 282 (SCA)

amount of R80 000.00 is fair and reasonable and in respect of Lydia and Lucas an amount of R20 000.00 each is fair and reasonable. In respect of the three minor children we contend that an amount of R10 000.00 each is fair and reasonable. In the premises an amount of R330 000.00 is fair and reasonable compensation in respect of claim A.

G. WHETHER THE COMMON LAW SHOULD BE DEVELOPED TO AWARD DAMAGES FOR GRIEF:

58. The Plaintiffs request the court to develop the general damages common law and award compensation for grief. This request is based on section 39 (2) of the Constitution of the Republic of South Africa, 1996 (" the Constitution"), as it enjoins, the courts when interpreting the legislation, and when developing the common law or customary law to promote the spirit, purport and objects of the Bill of Rights.

59. It is common cause that the common law does not recognise a claim based on grief.⁵³ Grief is defined as an intense sorrow, especially caused by someone's death.⁵⁴
60. Grief is a passing emotion. In fact grief is a 'process'. This much was stated by the Plaintiffs' psychologist when he stated that:

"The grieving process is the term, the process through which a person who suffered a loss go through in order to achieve a form of healing. How I referred to grief is that it is subjective feeling which is precipitated by death of a loved one and it is often used synonymously with mourning. So, grief, morning (sic) and bereavement will most often be used interchangeably. So the person going through grief or mourning will experience a rank of emotions..."⁵⁵

⁵³ Barnard v Santam Bpk 1999 (1) SA 202 (SCA).

⁵⁴ Concise Oxford English dictionary.

⁵⁵ Transcript: p 267 lines 9- 16.

61. It is thus contended that the Plaintiffs cannot be compensated for going through a process that all human beings go through. In support of this contention the court's attention is drawn to the judgment of the Full Court in **Hing and Others v Road Accident Fund**⁵⁶ where the court per Binns-Ward J, after a review of the law dealing with emotional shock stated at paragraph 24 that:

"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 evidence is not required to establish. Damages are not recoverable in delict for normal grief and sorrow following a bereavement; see Barnard supra, at 217B. The position is the same in England and Australia..."

62. In comparison to English law, the learned judge referred to **White and Others v Chief Constable of South Yorkshire and**

⁵⁶ 2014 (3) SA 350 (WCC)

Others⁵⁷, where Lord Steyn referred to two groups of persons with bereavement related “mental suffering”:

“First, there are those who suffered from extreme grief. This category may include cases where the condition of the sufferer is debilitating. Secondly, there are those whose suffering amounts to a recognisable psychiatric illness. Diagnosing a case as falling within the first or second category is often difficult. The symptoms can be substantially similar and equally severe. The difference is a matter of aetiology... Yet the law denies redress in the former case: ...that grief constituting pathological grief disorder is a recognisable psychiatric illness and is recoverable. Only recognisable psychiatric harm ranks for consideration. Where the line is to be drawn is a matter for expert psychiatric evidence. This distinction serves to demonstrate how the law cannot compensate for all emotional suffering even if it is acute and truly debilitating.”

[Own emphasis]

63. With reference to Australian law, the Honourable Mr Justice Binns-Ward made reference to **Mount Isa Mines Ltd v Pusey**:⁵⁸

⁵⁷ [1999] 1 All ER 1 (HL)

⁵⁸ (1970) 125 CLR 383 at 394.

"Sorrow does not sound in damages. A Plaintiff in an action of negligence cannot recover damages for a shock, however grievous, which was no more than an immediate emotional response to a distressing experience, sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had."

[Own emphasis]

64. The Plaintiffs' diagnosis does not indicate intense sorrow. Instead the diagnosis indicated symptoms of grief or bereavement. There is no evidence that the Plaintiffs have chronic or prolonged grief, which required medication or medical treatment.

LEGAL IMPEDIMENT:

65. The Plaintiffs recovered damages for trauma and emotional shock caused by Michael's death. The compensation is a

satisfaction or *solatium*. The cause of action is the *actio iniuriarum*.

66. In this instance the development will lead to a duplication of actions. It is trite that our law does not permit double compensation on the same cause of action against the same parties.⁵⁹ The finding of the Supreme Court of Appeal on this point was confirmed by the Constitutional Court.⁶⁰

67. A further problem to the request for development of the common law to award damages for grief is that of foreseeability which is a requirement for negligence. The Plaintiffs must prove that the Defendants have foreseen that as a consequence of Michael's death, the family will suffer grief. By extension, the Defendants would have a duty of care towards the Plaintiffs. This will lead to limitless liability, consequently, rendering the requirement of legal causation obsolete.⁶¹

68. In **Le Roux v DEY 2011 (3)** supra at 315 B-C Brand AJ said the following:

⁵⁹ Le Roux v DEY 2010 (4) SA 210 SCA at 218D- 219 D

⁶⁰ Le Roux v DEY 2011 (3) SA 274 (CC) at 320F.

⁶¹ International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A).

"In more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether- assuming all other elements of delictual liability to be present- it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct." [Own emphasis]

69. In paragraph 63 supra, we provided a dictionary meaning of grief; "intense sorrow". Mr. Molepo's understanding of grief is correct. He states that grief is a process of bereavement or mourning ⁶². He further stated that the Plaintiffs have symptoms of grief (this is so because he said grief, mourning

⁶² Transcript: p 267 lines 9- 15; p 359 lines 20- 25.

and bereavement will most often be used interchangeably)⁶³
and post-traumatic stress disorder.

70. In view of the above established legal principles we contend that there is no reason that this court breaks new ground and develop the common law to make provision for the compensation for grief.
71. This contention is fortified by our proposition that the Plaintiff in such a case is already suited and will be compensated under the claim of trauma and emotional shock (general damages) and it is not necessary for such Plaintiff to be compensated twice.
72. We therefore contend that there is no basis in law or in fact that the Plaintiffs be compensated for grief under the circumstances of this case. We submit with respect that the claim be dismissed with costs.

⁶³ Transcript: p 267 line 14.

H. **WHETHER THE COURT SHOULD AWARD CONSTITUTIONAL DAMAGES:**

73. The Plaintiffs once more request the court to develop the common law to award constitutional damages as an alternative to the compensation for grief.

74. It is common knowledge that the award for constitutional damages is premised on the court's finding that the rights contained in the Bill of Rights have been infringed. In other words, the court must have found that the Plaintiffs' rights have been breached. The Plaintiffs must plead the rights alleged to have been breached by the conduct of the Defendants. The rights must be vested on the Plaintiffs and not any person. There is no allegation of any breach of the Plaintiffs' rights. There is no evidence of any breach of the Plaintiffs' rights.

75. Certainly the Defendants had a duty of care towards Michael. The teachers have failed that duty of care towards Michael. However, the duty of care cannot be extended to Michael's

family members.⁶⁴ There is no right in the Constitution vested on the Plaintiffs which the Defendants have breached.

76. There is no basis in law to develop the common law to award constitutional damages to the Plaintiffs. There is no violation of any of the Plaintiffs' rights contained in the Constitution, which warrants the development of the common law to award constitutional damages. In **Van Abo v President of the Republic of South Africa**,⁶⁵ Moseneke DCJ as he then was said the following:

"[50] The Constitution carefully apportions powers, duties and obligations to Organs of State and its functionaries. It imposes a duty to all who exercise public power to be responsive and accountable and to act in accordance with the law. This implies that a claimant, who seeks to vindicate a constitutional right by impugning the conduct of a State functionary, must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making order, have to formulate orders with appropriate precision."

[Own emphasis]

⁶⁴ Minister of Police v Mboweni 2014 (6) 256 at 265F-G.

⁶⁵ 2009 (5) SA 345 (CC) at 364.

77. The Plaintiffs do not seek constitutional damages on behalf of the learners in Limpopo Province. In paragraph 7 of the particulars of claim, the Plaintiffs allege that they are bringing this claim in their personal capacities in respect of claims A, B, C, D and E. They proceed to state that they are also bringing the action in their representative capacity in respect of claims A and B, for their minor children.

78. It is trite law that our courts have declined to develop the common law to award constitutional damages in the circumstances where the Plaintiff has a claim for damages in terms of the common law.⁶⁶

79. In **Law Society of South Africa v Minister of Transport**⁶⁷ the court said the following:

“[74] It seems clear that in an appropriate case a private-law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking ‘appropriate relief’ to which it is entitled,

⁶⁶ Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

⁶⁷ 2011 (1) SA 400 (CC) at 429H

may properly resort to a common-law remedy in order to vindicate a constitutional right. It seems obvious that the delictual remedy resorted to must be capable of protecting and enforcing the constitutional right breached.”

80. In **Fose**, *supra*, the court declined to award constitutional damages that includes a punitive element. The court has already found, in *Fose*, that the common law is flexible.

81. In **Minister of Police v Mboweni**, *supra*, the court set out the approach of the development of common law as follows:

“The court should first have considered the adequacy of the existing remedy. If it were inadequate then, it should have considered whether the deficiencies could be remedied by development of the common law to accommodate a claim more extensive than one for pecuniary loss.”

82. The Plaintiffs have not identified the deficiencies of the common law, save to suggest that the awarding of damages will serve as deterrence to Defendants.

83. In Mashongwa v Passenger Rail Agency of South Africa,⁶⁸ the court held that delictual remedy is the only way to enforce the constitutional value of accountability; PRASA had been aware of its public-law duties for many years; and no remedy other than a delictual claim was available to Mashongwa and similarly-placed individuals.

I. DECLARATOR:

84. Again, with reference to the pleadings, with particular reference to paragraph 41.1 of the Plaintiffs' particulars of claim, the constitutional rights that the Defendants were alleged to have breached are as follows:-

84.1 Section 9, Equality;

84.2 Section 10, Human dignity;

84.3 Section 11, Life;

84.4 Section 24, Environment;

84.5 Section 27, Health care, food, water and social security;

84.6 Section 28, Children; and

84.7 Section 29, Education.

⁶⁸ 2016 (3) SA 528 (CC)

85. It is not clear from the facts and evidence led how the Defendants' breached Mr and Mrs Komape and their children's rights to equality, human dignity, life, environment, health care, food, water and social security, children and education. The person to whom the aforementioned rights accrued passed away.
86. The Defendants have not discriminated against the Plaintiffs; they have not infringed their dignity or created an environment that is harmful to their persons. The Defendants have not infringed their right to health care, food, water and social security.
87. Section 28 is not applicable to Mr and Mrs Komape, Lydia and Lucas. In so far as it applies to the minor children, the facts and evidence do not support the case that the Defendants have breached those children's section 28 right. The Defendants did not breach the Plaintiffs and minor children's right to education. All three minor children attend school and thus there cannot be a case of the breach of that right.

88. We contend that there is no breach of the Plaintiffs' rights. Consequently, the declaratory order is ill-conceived.

89. In **Minister of Safety and Security v Slabbert**⁶⁹, the Supreme Court of Appeal stated as follows in respect of pleadings:

"The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a Plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have regards to issues falling outside the pleadings when deciding a case."

90. In their heads of argument the Plaintiffs included section 195, basic values governing public administration and an inferred "the right to family life", which is not 'explicitly' contained in the Bill of Rights.

91. With respect, we submit the inclusion of these two rights, assuming for the moment that there is a right to family life as a

⁶⁹ [2010] 2 All SA 474 (SCA).

self standing right capable of being breached, were an afterthought.

92. The facts do not establish that any of the Plaintiffs' rights, as mentioned were breached.

93. Assuming that the Plaintiffs' constitutional rights were breached as alleged, it does not automatically follow that a court may grant a remedy of constitutional damages. The proper starting point for the enquiry is *"to consider whether the existing remedy by way of damages...[emotional shock, general damages] was an appropriate remedy for which any breach of the...[Plaintiffs'] constitutional rights"*.⁷⁰

94. We submit that there is a remedy in common law, the claim for general damages and that claim serves to protect and enforce constitutionally entrenched fundamental rights. Thus the Plaintiffs' seeking appropriate relief to which relief they are entitled, have properly resorted to the common law remedy in order to vindicate their constitutional rights.

⁷⁰ Minister of Police v Mboweni and Another 2014 (6) SA 256 (SCA) at para 21.

MINOR CHILDREN WHO ATTEND SCHOOLS IN LIMPOPO:

95. It is trite that where a party seeks a declaratory order there must be some tangible and material advantage obtainable from the relief sought, because jurisdiction of the court cannot be exercised to answer abstract, academic or hypothetical questions which have no tangible benefit to the applicant.⁷¹
96. The declaratory order, sought in paragraphs 57.1 to 57.7 have no tangible material benefit for those children.
97. We contend that the Plaintiffs seek advice from the Honourable Court.

J. COSTS:

98. Despite the fact that the merits were partly conceded, especially with regard to claims A, C, D and E, the Plaintiffs

⁷¹ Tri-Cor Industries (Pty) Limited v Chairman of the Mpumalanga Tender Board and Others 1997 (4) All SA 414 (TPD) at 419 F-S

called witnesses to speak about the issues that were no longer in dispute.

99. The following witnesses were not necessary:

99.1 Pathologist (Dr. Matlala);

99.2 McLaren (financials);

99.3 Mr David Steel (David Steel's evidence relating to the toilets was not part of the pleadings.

100. The Plaintiffs intended to vilify the Defendants by leading false evidence about the non-contribution for funeral expenses by the Defendants. It is this type of conduct that necessitated the calling of witnesses to rebut the Plaintiffs' testimony.

101. In an event the court awarding the Plaintiffs compensation which is less than the offer made, the Plaintiffs must pay the costs on party to party scale.

102. However, if the court awards the Plaintiffs compensation which is more than the offer made, it is contended that the Defendants

must pay the costs on party and party scale, alternatively, each party to pay its costs.

103. The general rule is that the costs are in the discretion of the court.

COST OF AMICUS:

104. We submit that even if the Defendants are ordered to pay the costs such costs should exclude the costs of the Second Amicus Curiae.

K. CONCLUSION:

It is submitted with respect that an amount of R330 000.00 be awarded to the Plaintiffs for claim A. The balance of the Plaintiffs' claim be dismissed.

SIGNED AT PRETORIA ON THIS _____ DAY OF JANUARY 2018.

MS Phaswane

K Ramaimela

COUNSEL FOR THE DEFENDANTS

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