IN THE SUPREME COURT OF APPEAL

BLOEMFONTEIN, SOUTH AFRICA

Appeal Case Nos: 754/2018; 1051/2018

High Court Case No: 1416/2015

In the appeal between:

ROSINA MANKONE KOMAPE	1st Appellant
MALOTI JAMES KOMAPE	2nd Appellant
MOKIBELO LYDIA KOMAPE	3rd Appellant
LUCAS KHOMOTSO KOMAPE	4th Appellant

And

MINISTER OF BASIC EDUCATION	1st Respondent
MEMBER OF THE EXECUTIVE COUCIL, LIMPOPO DEPARTMENT OF EDUCATION	2nd Respondent
PRINCIPAL OF MAHLODUMELA LOWER PRIMARY SCHOOL	3rd Respondent
SCHOOL GOVERNING BODY, MAHLODUMELA LOWER PRIMARY SCHOOL	4th Respondent

And

EQUAL EDUCATION	*Amicus Curiae*

FILING NOTICE

DOCUMENT: AMICUS CURIAE HEADS OF ARGUMENT, CERTIFICATE AND LIST OF AUTHORITIES SERVED AND LODGED HEREWITH

DATED AT BLOEMFONTEIN ON THIS 28th DAY OF FEBRUARY 2019

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AMICUS CURIAE'S PRACTICE NOTE

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1. **NAME AND NUMBER OF THE MATTER**

As it appears in the heading above.

2. **NATURE OF THE APPEAL**

2.1. This is an appeal against the judgment and order of his Lordship Justice Muller in the Polokwane High Court on 23 April 2018. The appellants (plaintiffs in the court a quo), all family members of the deceased, sued for damages arising from the death of five-year-old Michael Komape after he fell into a pit toilet at his Limpopo school and drowned.

2.2. The appellants are appealing against the dismissal of several of their claims.

2.3. Equal Education has been admitted as an *amicus curiae* in this Court and will make submissions on the High Court's dismissal of the appellants' claim B, namely, the claim for damages arising from grief, based on the development of the common law, alternatively as constitutional damages.

3. **BASIS FOR JURISDICTION OF THE SUPREME COURT OF APPEAL**

3.1. The appellants were granted leave to appeal in respect of claim B by the High Court on 5 June 2018.

3.2. The Court has jurisdiction to hear the matter under section 168(3) of the Constitution.

4. **CONSTITUTIONAL QUESTION**

In claim B, the appellants seek a development of the common law in accordance with section 39(2) of the Constitution. In the alternative, they seek constitutional damages as a remedy for the violation of their constitutional rights. Both of these alternative formulations of claim B raise constitutional issues.

5. **THE ISSUE/S ON APPEAL**

5.1. In respect of Claim B, the issues are:

5.1.1. Whether the common law should be developed to recognise a claim for grief and, if so, what the quantum of such damages should be.

5.1.2. Alternatively, whether the appellants are entitled to an award of constitutional damages to vindicate their constitutional rights and, if so, what the quantum of such damages should be.

6. **ESTIMATE OF THE DURATION OF THE ARGUMENT**

The amicus curiae will require 30 minutes as per the directive. The main parties have indicated the time estimate in their practice notes.

7. **URGENCY**

None

8. **PORTIONS OF RECORD IN LANGUAGE OTHER THAN ENGLISH**

None

9. **PARTS OF THE RECORD NECESSARY FOR THE DETERMINATION OF THE APPEAL**

9.1. The pleadings (record volume 1 pp 1 to 109)

9.2. The judgment of the High Court (record volume 10 pp 1705 to 1776)

9.3. All other parts of the record referred to in the *amicus curiae*'s heads of argument.

10. **CORE BUNDLE**

As has been lodged by the appellants.

11. **SUMMARY OF THE ARGUMENT**

11.1. The common law should be developed to recognise a claim for grief in this case for three reasons:

11.1.1. The existing common law does not compensate for the severe infringements of the plaintiffs' constitutional rights that occurred when Michael died in the pit toilet at his primary school. It concerns itself with the individual and the medically attested

psychiatric lesions that a traumatic event can cause in a person. It does not concern itself with the further consequences of the trauma of losing a child. It does not focus on the family as a collective and ask what has been taken from it.

11.1.2. The existing common law also does not concern itself with the deceased's rights. It does not provide a remedy for the violation of Michael's constitutional rights to family life, to basic education, to have his best interests protected and, above all else, his dignity. It does not allow the Komapes to vindicate the rights of their lost family member, in recognition of their inextricable link to him.

11.1.3. The need for deterrence is also not adequately addressed by the existing common law. Deterrence is an accepted aim of remedial orders, particularly where the conduct is egregious. This case falls at the extreme end of egregious conduct. It is not just a negligently caused death. It is a case of repeated, and yet unexplained, inaction. It is a case where the defendants' knowledge of the unsafe conditions at Mahlodumela Primary School was clearly established and their reckless disregard for the warnings is undeniable.

11.2. In the alternative, the court should award constitutional damages to the plaintiffs because:

11.2.1. There are numerous jurisdictions that award aggravated and exemplary damages for breaches of constitutional rights. They do so because of the specially egregious circumstances in which a wrong was committed and in order properly to vindicate the Constitution.

11.2.2. This case meets the requirements for an award of constitutional damages because it deals with the preventable death of a five-year old child that was caused by state organs who have persistently failed to take responsibility for their conduct.

Constitutional damages are required not only because of the egregious nature of the state's conduct but also to mark society's outrage at this type of treatment from its public officials.

12. **COMPLIANCE WITH RULES 8(8) AND 8(9)**

The respondents have complied with both Rule 8(8) and Rule 8(9).

13. **RULE 10A(b) CERTIFICATE**

A Rule 10 and 10A(a) is filed herewith.

_____

KATE HOFMEYR

NDUMISO LUTHULI

HASINA CASSIM

AMY ARMSTRONG

Counsel for the *amicus curiae* (Equal Education)

Chambers, Sandton

28 February 2019

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AMICUS CURIAE'S LIST OF AUTHORITIES

SOUTH AFRICAN CASE LAW

1. *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC)
2. *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA)*
3. *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A)*
4. *Boswell v Minister of Police* 1978 (3) SA 268 (E)
5. *Bridgman NO v Witzenberg Municipality and Others* 2017 (3) SA 435 (WCC)
6. *Coughlan NO v Road Accident Fund* 2015 (4) SA 1 (CC)*
7. *Dawood and Another v Minister of Home Affairs and Others* 2000 (2) SA 936 (CC)
8. *Dikoko v Mothatla* 2007 (1) BCLR 1 (CC)
9. *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42 (1 December 2017)
10. *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* 2017 ZACC 47 (29 December 2017)
11. *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC)
12. *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)*
13. *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC)
14. *Governing Body of Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC)
15. *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC)
16. *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)
17. *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC)

18. *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC)
19. *Life Esidimeni Arbitration Award,* available at http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf
20. *Makhanya v University of Zululand* [2009] ZASCA 69
21. *Mbhele v MEC for Health for the Gauteng Province* 2016 JDR 2144 (SCA)*
22. *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC)
23. *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC)
24. *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) and Others* 2005 (3) SA 280 (CC)
25. *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA)
26. *Minister of Safety and Security v Van Der Merwe and Others* 2011 (5) SA 61 (CC)
27. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)
28. *S v Makwanyane and Another* 1995 (3) SA 391 (CC)
29. *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA)
30. *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)
31. *Union Government v Warneke* 1911 AD 657
32. *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C)

FOREIGN CASE LAW

33. *Alcock v Chief Constable of South Yorkshire* [1991] UKHL 5
34. *Conway v Irish National Teachers Organisation* [1991] 2 IR 305*
35. *Dunlea v Attorney General* [2000] 3 NZLR*
36. *Kennedy v Ireland* [1987] IR 587

37. *Liston-Lloyd v The Commissioner of Police [*2015] NZHC 2614

38. *Rookes v Barnard* [1964] A.C. 1129

39. *Vancouver (City) v Ward* [2010] 2 SCR 28*

ACADEMIC WORKS

40. P Boberg, *The Law of Delict,* Vol 1: *Aquilian Liability,* 1984 (Juta & Co, Cape Town)

41. J Burchell, "An Encouraging Prognosis for Claims for Damages for Negligently Inflicted Psychological Harm", 116 *SALJ* 1999

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

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AMICUS CURIAE'S HEADS OF ARGUMENT

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CONCLUSION 36

INTRODUCTION

1 This is a case about an unthinkable horror: the death of a five-year-old boy who drowned in human waste when he fell into a pit toilet at school. The boy was Michael Komape and his death was caused by the reckless acts of the school and the National and Provincial Departments of Education.

2 His death brought untold grief and suffering to his family. Their pain was exacerbated by the manner in which the school and the Departments of Education treated them after Michael's death. They did not accept responsibility for Michael's death. They did not acknowledge the horror of what they had allowed to happen. The family could not process their grief or move on with their lives whilst the Departments and the school continued to remain impervious to their responsibility for this tragedy. So, they sued.

3 They claimed, over and above the usual delictual claim for emotional shock and trauma, a novel head of damage. They sought a remedy for their grief. This is referred to as claim B in the pleadings. Claim B is pleaded in the alternative: either as a claim for development of the common law of delict to encompass damages for grief, or as a claim for constitutional damages for the breach of the respondents' constitutional duties.[1]

4 Equal Education was admitted as an *amicus curiae* in the trial. It presented evidence of its extensive involvement with the Departments, both at national and provincial level, about the deplorable state of school infrastructure prior to Michael's death on 20 January 2014.[2] It was also

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1 Record, vol. 1, pp 23-24, paras 31 and 32

2 The evidence was given by Brad Brockman, the then General Secretary of Equal Education, whose evidence was admitted on affidavit and was marked "exhibit A" in the trial – record vol. 3, pp 529-542.

admitted to present oral and written argument to the Court in relation to claim B. Equal Education has been admitted as an *amicus* again before this Court to advance further arguments in relation to claim B on appeal.[3]

5 The High Court refused to grant the appellants the relief they sought in claim B. It declined to develop the common law to recognise a claim for grief as it feared this would lead to "limitless liability".[4] It also refused to award the Komape family constitutional damages to compensate them for the violation of their constitutional rights to dignity and family life, or for the violation of Michael's rights. The Court declined to do so on the basis that such damages would overcompensate the Komapes and would not serve the interests of society.[5]

6 In these heads of argument, we demonstrate why the High Court was wrong in reaching these conclusions. We show that the High Court's refusal to development the common law or to grant the plaintiffs constitutional damages has denied them an effective remedy. The High Court's judgment also fails to vindicate the Constitution. It must, therefore, be overturned on appeal.

7 The heads of argument are structured in two main sections.

7.1 In the first part, we track the development of the claim for pain and suffering under the common law and show that it has been developed and extended by courts over the last fifty years whenever the facts of a case demanded it. We show that this case demands a further

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3 The parties have consented to Equal Education's participation as an *amicus* before this Court in terms of SCA Rule 16(1), on the basis that it would present the same arguments it advanced before the High Court – see Equal Education's letter to the other parties in terms of SCA Rule 16(1), dated 27 July 2018, para 7.

4 Judgment of Muller J, record p 1726, order in respect of claim B and pp 1714-1718, paras 36-49

5 Judgment of Muller J, record p 1724, para 68. In the end, the High Court would only recognise a very narrow type of compensation for the Komape family, based strictly on emotional shock that amounts to psychological lesion – and only to the extent that the Court found expert witnesses could demonstrate that particular family members suffered such psychiatric injury - Judgment of Muller J, record p 1711-1713, paras 26-33

development in order to provide an effective remedy to the Komape family for the state's callous neglect.

7.2 In the second place, we analyse the law on constitutional damages in South Africa and in foreign jurisdictions. We show that if this Court declines to develop the common law to recognise a claim for grief, it should nevertheless award constitutional damages to the Komape family in order properly to vindicate the Constitution.

THE EXISTING ACTION FOR PAIN AND SUFFERING

8 The action for pain and suffering began as a limited remedy which extended only to physical pain, suffering and disfigurement.[6] It did not fit neatly into either the *actio iniuiarum* or the *lex aquilia*.[7] Despite this, however, it was recognised in our law and expanded over time to provide redress in an increasing number of cases.

9 Until 1973, the action included various types of non-pecuniary loss, like shock and mental suffering, but the harm still had to flow from the plaintiff's own bodily injury. There was no relief for psychological harm by itself, or for grief and distress at the suffering or death of another.[8]

Bester

10 In 1973, in the case of *Bester*,[9] this Court extended the existing law. It recognised a claim for emotional shock or psychological injury where the plaintiff's body was not physically harmed but he was injured psychologically as a result of witnessing his brother's death. Until this point, the common law did not recognise a claim for pain and suffering brought by a person who was not injured in his own body as a result of the negligent conduct of another. This was because the courts feared opening the floodgates to "unlimited liability" where every bystander or distant relative might have a claim.[10] In addition, there were no clear principles in this field from Roman

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

7 *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601(A) at p 606E-H

8 P Boberg, *The Law of Delict*, Vol 1: *Aquilian Liability*, 1984 (Juta&Co, Cape Town) at 516. See also *Union Government v Warneke* 1911 AD 657 at 665-6.

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

10 P Boberg at 174-75.

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".[11]

11 At the time *Bester* was decided, South African law had inherited two "artificial" restrictions from English law:[12] the nervous shock had to result in physical injury; and the plaintiffs had to believe that they were in immediate danger or feared for their own safety.[13] The first restriction was the product of an outdated distinction between mind and body and the Roman law's preoccupation with the physical body. The second restriction was designed to limit the scope of liability.[14]

12 In *Bester*, however, the Appellate Division did away with those two restrictions. It eschewed the notion that self-preservation was the only legitimate instinct that deserved protection and it held that the brain or nervous system was a part of the physical body and therefore psychological harm could be compensated.[15]

13 The Court was, however, cautious to ensure against limitless liability. It held that a range of factors would have to be considered by a court before imposing liability on any particular defendant. These factors included: the foreseeability of such shock-induced injury; the severity or duration of the injury; the relationship between the plaintiff and the injured party; and the plaintiff's proximity to the scene of the accident.[16]

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

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

13 J Burchell, "An Encouraging Prognosis for Claims for Damages for Negligently Inflicted Psychological Harm", 116 *SALJ* 1999, 697 at 698.

14 J Burchell at 698.

15 J Burchell at 698.

16 P Boberg at 176; J Burchell at 268;

14 The flood-gates did not open after *Bester*. There were a handful of reported cases over the next two decades where plaintiffs successfully claimed for psychiatric injury following the negligent conduct of the defendant.

Barnard

15 In 1999, this Court again developed the law further and removed the requirement that the plaintiff must have actually witnessed the accident or had close proximity to the scene. In the case of *Barnard*, a mother claimed damages for "nervous shock and psychic trauma" flowing from being told on the phone that her teenage son had died.[17]

16 At that stage, English law still required plaintiff actually to have witnessed the event of death themselves in order to claim damages. This had been incorporated into our law and was regarded as a limitation to the claim in the hands of those who were only told about the event of death afterwards. These are referred to in the literature as the "hearsay victims".

17 This limitation to the claims of hearsay victims was articulated by the House of Lords in the case of *Alcock*,[18] which dealt with claims brought by the families who lost relatives in the Hillsborough stadium tragedy. The disaster saw almost a hundred people killed when officials let in too many fans to a football match. Many fans were crushed at the front of the spectator pens. The House of Lords took a very restrictive view of emotional shock and held that family members must have actually witnessed the event themselves in order to claim damages.

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

18 *Alcock v Chief Constable of South Yorkshire* [1991] UKHL 5. *Barnard* at 210-12.

18 This Court in *Barnard* found the House of Lords' approach in *Alcock* overly restrictive and not based on any logic. This Court was not persuaded by the policy reasons that motivated the House of Lords to place this limit on liability. It held that hearsay victims could also claim for nervous shock, provided that they had a detectable psychiatric injury. The Court held that the closer the relationship is between the deceased and the plaintiff, the more reasonable the inference that the defendant would have foreseen the nervous shock suffered. The court noted that fears of limitless liability were exaggerated because only a handful of claims for emotional shock had arisen since *Bester*.[19]

19 The Court did, however, place a limitation on the availability of a remedy for those who are told about the negligently caused death of a loved one. It held that only psychological lesions confirmed by expert psychiatric evidence would found a claim for compensation. Although the mother in *Barnard* had also claimed for "emotional grief", the parties accepted that this did not amount to a psychiatric injury and conceded that no damages could be awarded for it.[20]

20 Until 2016, the law had developed from recognising a claim for pain and suffering that had to resulted from a bodily injury to the plaintiff himself, to an action that could be brought by a plaintiff who suffered psychological effects after being told of the negligently caused death of family member. But a line was still maintained between emotional shock or psychological harm, on the one hand, and "mere" grief or sorrow, on the other.

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19 *Barnard* at 215-216.

20 *Barnard* at 205-06. Emphasis added.

Mbhele

21 That line was removed in this Court's decision in *Mbhele*.[21] There, damages for "shock, grief and depression" were awarded to a mother whose child was stillborn after she received negligent treatment from the medical staff at Chris Hani Baragwanath Hospital. The facts of the case were heart-breaking.

22 The mother of an unborn child was transferred from her local clinic to Chris Hani Baragwanath Hospital because her baby was in foetal distress. When she arrived at Chris Hani, she was not treated as an emergency case. After more than an hour, a doctor saw her and ordered a CTG scan which was also delayed for a long time. Despite the fact that the CTG scan showed foetal distress, the nurse who conducted the scan did not report the results to the doctor and so the mother was not attended to promptly. Instead, she was left alone to progress in labour without being monitored. She delivered a stillbirth. After the delivery, she was taken to the labour ward where she was told that her baby had died. She was then taken to a ward with mothers of new-born babies. Each bed in the ward had a cot attached to it. The other mothers had their babies with them feeding them and holding them while the plaintiff had no baby. When she asked to be moved to another ward and for her family to be phoned, she was ignored for about eight hours.[22]

23 The High Court dismissed her claims for emotional shock and constitutional damages for the loss of a right to rear a child. She appealed to this Court. The case was conducted on the basis of an agreed statements of facts. The agreed statement of facts described the impact of the loss on the plaintiff. But there was no expert medical evidence led at the trial and therefore no confirmation

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21 *Mbhele v MEC for Health for the Gauteng Province* 2016 JDR 2144 (SCA)

22 *Mbhele* para 3

that the death of her baby had resulted in any cognisable psychological lesion. This did not deter the Court from awarding damages. It held that "although no medical evidence was presented, there can be no doubt that the appellant experienced severe shock, grief and depression" as set out in the agreed statement of facts.[23] She was awarded damages of R100,000.[24]

24 This Court has therefore already extended the claim for pain and suffering to include "emotional distress"[25] that does not manifest in a diagnosed psychiatric lesion. It did so in a case that cried out for a remedy. No woman should be left unattended at a public hospital while her baby is in foetal distress. No woman should, after delivering a stillbirth, be taken to a labour ward and left there on her own to encounter the sight of mothers with their new born babies while she looks at the empty cot next to her bed.

25 The absence of expert medical evidence did not prevent this Court from granting a remedy for the hospital's flagrant breach of the mother's rights.

26 The Polokwane High Court in this case declined to follow *Mbhele*. The Court held that *Mbhele* did not mention *Bester* and *Barnard* and represented a radical departure from these cases. The Court therefore concluded that it did not overrule those cases and so it was still bound by them.[26] However, this reasoning ignores the principle that cases may be impliedly overruled.[27] That is clearly what occurred in *Mbhele*.

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23 *Mbhele* para 19

24 *Mbhele* para 19

25 *Mbhele* para 11

26 Judgment of Muller J, record p 1715-1716, paras 40 and 41

27 See, for example, *Makhanya v University of Zululand* 2010 (1) SA 62 culminating at para 8.

27 The High Court was also wrong to conclude that the statement of facts in *Mbhele* already established "emotional shock". The statement did not do so. This Court explicitly acknowledged that there was no medical evidence led but that from the facts about Ms Mbhele's suffering and state of mind, it was "clear" that she suffered, not only emotional shock, but grief, and the Court provided a remedy.[28]

28 *Mbhele* follows the trajectory of the case law development of the action for pain and suffering. The case law has one consistent theme: where the facts of a case demand it, the law will provide a remedy. The Komapes' claim in this case presents the next opportunity for development. The facts of this case demand an award of damages over and above emotional shock.

THE DEVELOPMENT OF THE ACTION

29 This Court has previously provided guidance on how to approach a claim for new remedies for constitutional rights violations. It has held that a court must first consider the adequacy of an existing remedy before ordering separate constitutional damages. If existing remedies are deficient, then the next step is to try and remedy this inadequacy through a development of the common law to accommodate a more extensive claim.[29]

30 In the previous section, we set out how the action for pain and suffering has been developed over the last fifty years. We now address why a further development is required in this case. An extension is required here because the facts of the case demand it. The facts show that the

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[28] *Mbhele* para 19

[29] *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA) para 22.

Komapes and Michael suffered extreme violations of their rights that the existing common law does not recognise nor remedy.

The facts

The pain

31 All the appellants gave evidence at the trial. They spoke in emotional terms about the extent of their grief following Michael's death and the impact of his death on the family.

32 Ms Komape found Michael's body when the toilets were searched. She saw his hand stretching out from the toilet. This image was particularly difficult for her to process because it was a sign that he was asking for help, and no-one came.[30] She would see his out-stretched hand during her sleep.[31] After Michael's death, she cried all the time during the night.[32]

33 Ms Komape resisted the notion that Michael's death was an accident. She said if it had been an accident, she would have been able to accept it. But it was not an accident. The toilets were old and rusty.[33] The principal of the school knew this and was responsible for taking care of Michael. They ought to have looked after him. Instead, he died in a toilet surrounded by the waste products of other people.[34] She said that the pain she had experienced was particularly acute because of the manner in which Michael died.[35] Dying by drowning in the waste of others is an unthinkable horror.

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30 Ms Komape's testimony: record vol. 5, p 760

31 Ms Komape's testimony: record vol. 5, p 770

32 Ms Komape's testimony: record vol. 5, p 771

33 Ms Komape's testimony: record vol. 5, p 755

34 Ms Komape's testimony: record vol. 5, p 778

35 Ms Komape's testimony: record vol. 5, p 778-779

34 Mr Komape testified that when Michael's body was finally retrieved from the pit, he could not go close to the body because he would have been sick.[36] He, like Ms Komape, spoke of troubled sleep during which he would see Michael's outstretched hand.[37]

35 He testified that no-one from the school explained to him how Michael had died and he did not know whether there had been any investigation of the death.[38] He explained that it had been very difficult to find closure. He spoke of a sickness in the family following Michael's death.[39]

36 Michael's sister, Lydia Komape, testified that the Department's conduct of the case was an insult to her family.[40] She said that the family did not want to speak about Michael's death because they feared hurting each other.[41] She said that if he had died in another way, they may have been able to talk about it. "But he died in the faeces of other people". "No-one wants to talk about that". "No-one wants to die in that way".[42]

37 Michael's brother, Lucas Komape, also testified. He was in Grade 10 when Michael died. He found it very difficult to concentrate at school after his death. He would think of Michael before he went to sleep because that is when they used to play together.[43] He said the death affected the family badly. They could no longer sit together. Before the death, they used to talk together; after the death, they could not because it had hurt them all so much.[44]

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36 Mr Komape's testimony: record vol. 5, p 831

37 Mr Komape's testimony: record vol. 5, p 831

38 Mr Komape's testimony: record vol. 5, p 832

39 Mr Komape's testimony: record vol. 5, p 833

40 Ms L Komape's testimony: record vol. 5, p 908

41 Ms L Komape's testimony: record vol. 5, pp 912-913

42 Ms L Komape's testimony: record vol. 5, p 913

43 Mr L Komape's testimony: record vol. 5, pp 921-922 and 925

44 Mr L Komape's testimony: record vol. 5, p 925

38 During cross examination, Lucas refused to accept that Michael's death was an accident. He said it was deliberate because when he was at the school in 2006, the toilets were damaged. The school knew the toilets were damaged long before Michael's death and they did nothing. They were required to make the toilets safe and they failed.[45]

The state's conduct

39 The evidence at trial included both the affidavit evidence of Equal Education[46] and the oral testimony of the plaintiffs' witnesses. The evidence established the following about the respondents' conduct:

39.1 For many years before January 2014, the respondents were made aware of the dangerous state of sanitation infrastructure at schools in Limpopo.[47]

39.2 The national and provincial authorities knew that the pit toilets in the majority of the schools in Limpopo were dangerous.[48] In March 2013, the Department had indicated to Section27 that the work on sanitation facilities at the schools identified on the implementation plan would be completed by 30 June 2013.[49] This date came and went, however, without the necessary work being completed. By October 2013, Mahlodumela had been included in at

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45 Mr L Komape's testimony: record vol. 5, pp 929-930

46 Brockman affidavit: record vol. 3, pages 529 to 542

47 Exhibit A; Affidavit of Brockman: record vol. 3, pp 533, 537-538, paras 20, 42; annexure EE11 to Brockman's affidavit: March 2013 comments on the draft Norms and Standards Regulations, record, vol. 3, pp 612 and 616, paras 46 and 60; annexure EE12 to Brockman's affidavit: appendix to the March 2013 comments on the draft Norms and Standards Regulations, record vol. 3, pp 642 and 646; annexure EE17 to Brockman's affidavit: appendix to the October 2013 comments on the draft Norms and Standards Regulations, record, vol. 3, p 698

48 This was traversed in the evidence of Mr Heywood from record, vol. 7, p 1157, with reference to the following documents from the Trial Bundle: record vol. core bundle, pp CB52, CB63, CB68, CB70, CB72; and vol. 2, pp 241, 246, 250, 252

49 Heywood testimony: record, vol. 7, p 1186 referring to the Trial Bundle, record vol. 2, p 265, para 4.5

least one list of schools that would receive sanitation infrastructure support.[50] This work was not, however, undertaken before Michael died on 20 January 2014.

39.3 The national and provincial departments had received repeated request from Mahlodumela school to construct new toilets from 2004 to 2009.[51] These requests were never acknowledged.[52]

39.4 The school knew that the particular toilet into which Michael fell was a temporary structure[53] built by a local villager[54] and never inspected to determine whether it was fit for purpose.[55]

39.5 By January 2014, the temporary toilet structure that had been constructed in 2009 was rusted and decaying.[56] It ought to have been replaced at least two years after it was installed.[57] It was an "accident waiting to happen".[58]

39.6 It would have cost the Department R500 per seat to replace the toilets at Mahlodumela with structurally sound and safe pit latrines.[59]

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50 This appears in the Mvula Trust "Sanitation and Water Backlogs Eradication Programe October 2013" Trial Bundle, record, vol. core bundle, p CB74, at p CB75 top line. According to the programme, "16 enviroloos" were to be constructed.

51 Malothane testimony: record vol. 9, p 1640 where the first letter of 28 June 2004 (record vol. core bundle, p CB44) is discussed, p 1646 where the letter of 27 July 2009 is discussed (record vol. core bundle, p CB47)

52 Malothane testimony: record vol. 9, p 1645

53 Steel (Still) testimony: record vol. 6, p 1106

54 Malothane testimony: record vol. 9, pp 1658 and 1663

55 Malothane testimony: record vol. 9, p1658

56 Malothane testimony: record vol. 9, p 1660

57 Steel (Still) testimony: record vol. 6, p 1127

58 Malothane testimony: record vol. 9, p 1687

59 Steel (Still) testimony: record vol. 6, p 1135

39.7 On the day of Michael's death, Charles Malebane, who had taken photographs shortly after Michael's body was found, was forced to delete the photographs.[60]

39.8 No proper investigation into the circumstances of Michael's death was conducted by the authorities.[61]

39.9 The respondents' witnesses were consulted for the first time a few days before they were called to testify.[62]

39.10 At no point prior to October 2017, did any of the respondents accept responsibility for Michael's death.

39.11 None of the respondents has apologised to the Komapes for their role in the death of their beloved son.[63]

39.12 Mr Heywood, who gave evidence for the plaintiffs, described the respondents' culpability on the basis of foreseeability. He said that collapsing and filthy toilets are "predictable", "monitorable" and "foreseeable". They should have been acted upon by the Department. According to Mr Heywood, "you can plan for toilets".[64] That planning was fatally lacking in this case.

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60 Mr Malebane's testimony: record vol. 5, pp 861-868

61 Mr Komape's testimony: record vol. 5, p 833; Heywood testimony: record vol. 7, p 1245

62 Rasekgala testimony: record vol. 6, p1701

63 Mr Komape's testimony: record vol. 6, p 836

64 Heywood testimony: record vol 7, p 1287

The impact on rights

40 The respondents had a duty to protect Michael. He was a child in their care. But, for years, the National Department failed to commit to a minimum standard for infrastructure provision at public schools. During those same years, the Provincial Department ignored the repeated requests from Mahlodumela school for safe toilets. And the school itself, knowing that the toilets were rusted and decaying, allowed young learners to use the toilets without any adult supervision.

41 The respondents' callous neglect resulted in infringements of both the family's and Michael's rights:[65]

41.1 The Komape family's rights to family life[66] and dignity[67] have been violated by the state's thoughtless conduct; and

41.2 Michael's rights to life,[68] dignity, basic education,[69] and to have his best interests taken into account[70] were all violated when the state failed to take the few meagre steps required to make the toilets at Mahlodumela school safe.

42 The state's culpability did not, however, end with Michael's death. After his death, the state failed to take responsibility for its gross dereliction of duty and it fought this litigation irresponsibly and unreasonably.

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65 This is also addressed in the appellants' heads of argument paras 68.1-68.6

66 *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42 (1 December 2017) para 49

67 *Dawood and Another v Minister of Home Affairs and Others* 2000 (2) SA 936 (CC) para 36

68 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 166

69 *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) para 37

70 *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) para 17

43 The state's conduct after Michael's death is relevant to the damages that the state should be ordered to pay. In *Bridgman NO*, the Western Cape High Court admonished a municipality who was sued for damages arising from the rape of a mentally-disabled woman that occurred on premises they were required to keep safe. The municipality had long been aware from the evidence that it was accountable for this tragic event but nevertheless persisted in denying liability until the trial. The court found that the state's attitude had placed a burden on the claimant to prove her trauma. The municipality knew from the medical evidence that requiring her to testify in court would traumatise her further but it pressed on.

44 The court held that an organ of state must be accountable and responsive and must take responsibility for its omissions.[71] It found the municipality's stance unacceptable.

> "*The approach of the Municipality added insult to her injury and it further violated her dignity. A remedy for injury should be given when words or conduct involve degradation or an element of insult. This translates into damages*."[72]

45 Many of the foreign jurisdictions that we discuss in the second part of these heads of argument also recognise that the state's conduct after a wrongful act, and its approach to litigation arising from it, are relevant to an assessment of the damages that may be awarded against the state.[73]

46 Under our constitutional scheme, the state is also bound by the principle of ubuntu to treat people with dignity, respect and humaneness.

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71 *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) para 70

72 *Bridgman NO v Witzenberg Municipality and Others* 2017 (3) SA 435 (WCC) at para 221.

73 See, for example, *Merson v Cartwright* [2005] UKPC 38 and *Conway v Irish National Teachers Organisation* [1991] 2 IR 305.

47 Ubuntu is closely connected with dignity and is a theme running through our constitutional values. It requires a "deep respect for the humanity of another".[74] "The concept carries in it the ideas of humaneness, social justice and fairness."[75] Our law recognises that the state has an obligation to act consistently with the value of ubuntu in order to forge the society that the Constitution envisages.[76]

48 No part of the respondents' conduct in this case is consistent with treating either Michael or his family with respect. The state's conduct is the antithesis of ubuntu. It has been dismissive and callous.[77] In fact, despite ultimately admitting it had no defence to the merits of the claim against them, the respondents fought the family's claim from July 2015 until October 2017, when, in the month before the trial, they conceded liability for the wrong done to Michael and the Komape family. This was a grossly long period to delay justice to the Komape family.

49 The injustice has not ceased. In this Court, the respondents argue that the Komapes cannot claim any relief from the state for the violation of Michael's right to education, dignity, and to act in his best interest because, "the person to whom the aforementioned rights accrued passed away."[78]

50 The respondents apparently take the view that because their egregious conduct resulted in Michael's death, and he is no longer here to vindicate his rights, the state need not provide any remedy for those rights violations. Even a declarator, they maintain, would be pointless, because

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74 *Dikoko v Mothatla* 2007 (1) BCLR 1 (CC) para 68

75 *Makwanyane* para 237

76 In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) the Constitutional Court para 37 explained how ubuntu is given effect to by eviction legislation. This obligation of ubuntu was applied to the state as landowner.

77 See the appellants' heads of argument, paras 49-50

78 Respondents' heads of argument, para 126

the rights they were obliged to promote, fulfil and protect, are already stated in the Constitution – so there is no need to repeat them.[79]

51 That is not conduct consistent with respect for the Komapes' or Michael's rights. Just because the state's failure in this case was so great that it led to the death of the person it was supposed to protect, does not immunize it from accountability.

52 Failing to hold the state accountable for this conduct would undermine the constitutional value of ubuntu. As the appellants point out in their heads, ubuntu emphasises the communal nature of society; group solidarity and collective unity.[80] Ubuntu recognises that we are who we are through other people[81] – our lives are given meaning, we reach our full potential, because and through our relationships and connections to other people.[82]

53 When a child dies as a result of the state's gross breaches of fundamental constitutional duties, there must be redress. If a child dies despite frequent warnings to the state that its inaction was placing children's lives in danger – that child's family must, if ubuntu is to mean anything, be able to vindicate those rights on his behalf. The Komape family's sense of identity and wellbeing were inextricably linked to Michael. In a very real sense, their wellbeing, dignity and psychological integrity were profoundly impacted by his suffering. The Court must fashion a remedy that recognises this. It should take its lead from the inclusive approach that Justice Moseneke adopted

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79 Respondents' heads of argument, para 120

80 Appellants' heads of argument, para 71

81 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 53

82 Langa CJ in *Pillay* (para 53) cites Kwame Gyekye who says that "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons."

in the *Life Esidimeni* arbitration. There, Justice Moseneke recognised that the rights of those who had died could be vindicated by their families.[83]

54 Section 38 of the Constitution provides that where a right in the Bill of Rights has been infringed, the court may grant appropriate relief. In *Fose*, the Constitutional Court held that appropriate relief means effective relief. It emphasised that the courts "have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[84]

55 Since *Fose*, the Constitutional Court has consistently emphasised that, where a litigant established that an infringement of an entrenched right has occurred, he or she should, as far as possible, be given effective relief so that the right in question is properly vindicated.[85]

56 An appropriate remedy is also a "specially fitted or suitable" remedy to the particular facts and circumstances of the rights' violation. The remedy must vindicate the Constitution and act as a deterrent against further violations of rights. Kriegler J in *Fose* found that—

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83 *Life Esidimeni Arbitration Award,* available at http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf

The arbitration award makes this connection between the harm to the health care users themselves but also their families. The Tribunal recognised that the violation of *their* rights, even though they had died as a result, could be vindicated by their families (para 178). Justice Moseneke also found that the families having to find their loved ones' bodies in terrible conditions "was a hurtful affront to their human worth and to the value of Ubuntu that teaches us caring, communal sharing and human solidarity" (para 187). Justice Moseneke also connected this to the right to family life. He explained that the family unit is an important source of security, support and companionship, and any action that violates the integrity of the family unit therefore violates the right to dignity, freedom and sometimes parental and family care as well (para 195)

84 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69.

85 *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC) at para 40.

"In pursuing this enquiry, one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate."[86]

57 Accountability is also an important factor in determining which remedy to grant against the state for violating rights or breaching its constitutional duties.[87]

58 Section 38 must be read together with section 172(1)(b) of the Constitution.[88] This section provides that when a court is deciding a constitutional matter within its power, a court may make any order that is just and equitable. The courts have held that this is an expansive remedy that can be used even if there has been no declaration of invalidity[89] or to grant relief beyond that which was claimed in the notice of motion.[90] This means that the bounds of the remedy a court can impose are restricted only by what is "just and equitable".[91]

"That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case the court should be wary

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86 *Fose* at para 97. While this was a concurring judgment in *Fose,* the Constitutional Court has since approved this passage in *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) at para 83.

87 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paras 85-86.

88 *Mhlope* at para 83. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) and Others* 2005 (3) SA 280 (CC) at para 74.

89 *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 97. This was adopted by Mogoeng CJ in *Minister of Safety and Security v Van Der Merwe and Others* 2011 (5) SA 61 (CC) at para 59.

90 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* 2017 ZACC 47 (29 December 2017) para 211

91 *Mhlope* at para 83.

not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it, as it is empowered to."[92]

The vindication

59 It is the violation of these rights that requires vindication. The existing common law does not compensate for these infringements. It concerns itself with the individual and the medically attested psychiatric lesions that a traumatic event can cause in a person. It is bedded in a person's corpus.[93] It does not concern itself with the further consequences of the trauma of losing a child. It does not focus on the family as a collective and ask what has been taken from it. It does not consider whether the family members have been treated with the dignity and respect that ubuntu demands. It does not consider the enduring sorrow and heartache that accompanies a horrific tragedy that was preventable if only the Education Department had responded to the school's request and spent R2000 on safe toilet seats at Mahlodumela.

60 The existing common law also does not concern itself with the deceased's rights. It does not provide a remedy for the violation of Michael's constitutional rights to family life, to basic education, to have his best interests protected and, above all else, his dignity. It does not allow the Komapes to vindicate the rights of their lost family member, in recognition of their inextricable link to him.

61 The need for deterrence is also not adequately addressed by the existing common law. Deterrence is an accepted aim of remedial orders, particularly where the conduct is egregious.[94] This case falls at the extreme end of egregious conduct. It is not just a negligently caused death. It is a case

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92 *Mhlope* at para 83.

93 *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) para 67

94 *Fose* para 96 per Kriegler J

of repeated, and yet unexplained, inaction. It is a case where the defendants' knowledge of the unsafe conditions at Mahlodumela was clearly established and their reckless disregard for the warnings is undeniable.

The arguments against development

62 The catalogue of the case law set out above displays two policy considerations that have cautioned courts to place limits on the delictual damages that may be recovered by a plaintiff. The first relates to a fear of creating limitless liability for defendants. The second concerns a risk of double compensation. We address each of these below.

Limitless liability

63 This Court already recognised in *Barnard* that the concern of limitless liability was probably overstated given the limited number of claims since the Appellate Division developed the law in 1973 in *Bester*.

64 Furthermore, this particular case is unique.

64.1 It involves state conduct. That is a distinguishing factor for two reasons. The first is that the state bears responsibility for a number of rights under the Constitution that private parties do not, such as the right to basic education. Only the state has positive obligations to provide basic education.[95] The second distinguishing factor is that the Constitution sets heightened

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95 *Governing Body of Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC) paras 57 to 58

standards for the exercise of public power by the state and its officials.[96] The state must be accountable and responsive and take responsibility for its omissions.[97]

64.2 It involves a level of recklessness that approximates intentional conduct. The law has never been concerned with limiting liability where the defendant's conduct is intentional. It has held that a person who intentionally shocks another cannot complain if the law holds him responsible, and the scope of his liability is coterminous with the ambit of his intentions.[98] The facts here establish that the Departments knew of the dangerous state of the toilets at Mahlodumela and did nothing. The school knew that the toilets were rusted and decaying and failed to fix them. Its conduct was unconscionable[99] and the loss it caused must be compensated.

64.3 Doing justice to the Komape family requires more than a general damages award for their psychological lesions. Not all cases of the death of a loved one will bear the gruesome features of this case. Here, the victim died in unthinkable circumstances, circumstances that could have been avoided if a mere R2000 had been paid to remedy the situation. Here, the respondents knew for years before the event that the toilets in Limpopo schools were unsafe. Here the respondents refused to be accountable and to accept responsibility for the family's loss in any meaningful way.

64.4 The Polokwane High Court found that the state's conduct after Michael's death in, amongst other things, failing to take responsibility for his death, was merely a "moral question" and

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96 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 44

97 *Bridgman NO,* para 221

98 *Boswell v Minister of Police* 1978 (3) SA 268 (E)

99 *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC) para 57

not legally relevant to determining whether to award damages to the Komape family.[100] This is incorrect in law. The state is not an ordinary litigant. It has heightened duties, when it litigates, to consider the impact of its litigation decisions on the constitutional rights of its opponents.[101] In this case, the state's conduct after Michael's death has perpetuated the violation of rights. Not all cases will have this element because, at some point, the state will realise that it owes its people more than this.

Double compensation

65 The respondents accuse the Komapes of trying to have "a second bite at the cherry" when they were fully compensated for their loss through the cumulative damages award of R270 000 for "emotional shock".[102]

66 The state is wrong that a claim for grief would amount to double compensation.

67 The principle against double compensation was described in *Zysset*. The High Court explained that the object in awarding general damages for pain and suffering is to compensate the plaintiff for his loss. Therefore, if the plaintiff by reason of his injuries receives a benefit from some third party, to which he would otherwise not have been entitled, then the loss is reduced by that benefit, and the damages must therefore also be reduced. Failure to make this deduction would amount to double compensation.[103]

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100 Judgment of Muller J, record p 1710, para 23

101 *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) para 79

102 Respondents' heads of argument, para 98

103 *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) 278 A – B

68 The Constitutional Court has found, however, that where different benefits to a claimant are of a different nature, serve a different purpose, and therefore compensate a different loss, then they do not amount to double compensation.[104]

69 An award of damages for grief in this case would also not amount to double compensation. The damages for grief (pursued in claim B) serve a different purpose to the damages for emotional shock (pursued in claim A). As we have highlighted above, damages for emotional shock compensate the plaintiff for the medically detectable psychological consequences of the death of a loved one. Its Roman-Dutch origins in our law tie it to an enduring preoccupation with injury to the body, albeit one particular part of the body – the mind.

70 An award for damages for grief is not concerned with the body. It focusses on the other effects of the death of a loved one. Its compass is broader. It considers all the rights of the plaintiff and the victim and assesses the full extent of their loss, including the infringements of their rights to family life and dignity.

71 There is accordingly no risk of double compensation in this case because the purpose of the remedy for grief is to compensate for a range of rights that are not considered relevant to the assessment of an award of damages for psychological lesions.

72 The Polokwane High Court refused to develop the common law for reasons that do not withstand scrutiny. This should be rectified on appeal so that the Komape family may receive an effective remedy.

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104 *Coughlan NO v Road Accident Fund* 2015 (4) SA 1 (CC) para 51

CONSTITUTIONAL DAMAGES

73 *Mboweni* requires this Court first to consider the existing common law and test its adequacy before recognizing a claim for constitutional damages. We have set out above why the existing common law is inadequate and should be developed to include a claim for grief in this case. If, however, the Court declines to develop the common law, it will then need to consider whether to grant constitutional damages.

74 The Polokwane High Court held that it was common cause that the respondents failed to perform certain obligations towards learners in schools in Limpopo and Michael in particular;[105] that the conditions in Limpopo schools violated various rights of learners and of Michael;[106] and that it was obliged to grant appropriate relief in the circumstances.[107] However, the Court nevertheless concluded that a claim for constitutional damages would overcompensate the Komapes and would not serve the interests of society.[108]

75 The Court was wrong on both counts.

75.1 Constitutional damages would not overcompensate the appellants. They would compensate the Komapes for losses that are distinct from a medically diagnosable psychological lesion. They compensate for the range of constitutional rights violated in this case and they recognise that the burden of Komapes' loss must be placed firmly at the feet of those whose reckless conduct was the cause their child's death.

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105 Judgment of Muller J, record pp 1719-1720, para 55

106 Judgment of Muller J, record pp 1720-1722, paras 59-63

107 Judgment of Muller J, record pp 1720, para 56

108 Judgment of Muller J, record pp 1724, para 68

75.2 Constitutional damages do serve an important social function. They mark the court's, and hence society's, disapproval of an egregious breach of rights. They make an example of the defendants' conduct and show that it will not be tolerated from state respondents who are required to respect, protect, promote and fulfil the constitutional rights children in their care.

The cases

South Africa

76 The Constitutional Court in *Fose* explained that courts have an obligation to provide an effective remedy whenever there has been an infringement of a constitutional right. A distinction was drawn in *Fose* between "aggravated" and "exemplary" damages. Aggravated damages fall under the compensatory principle, and are awarded where the injury to the plaintiff has been aggravated by the way in which the defendant has behaved. The object of exemplary damages is different; it is to deter and punish.[109] However, the Court recognised that it is "not always easy to draw the line between an award of aggravated but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the injuria have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word".[110]

77 This case requires a remedy that not only compensates the Komapes for the physical and patrimonial consequences of their loss but also recognises that a range of other rights and values have been infringed. It requires a remedy that marks society's outrage at the state's conduct. It requires a remedy that effectively holds the state accountable for its failure and that recognises

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109 *Fose* para 42

110 *Fose* para 62

the state had constitutional obligations towards Michael and his family that were shamefully ignored.

78 When the Constitutional Court considered constitutional damages in *Fose*, it noted that section 24(1) of the Canadian Charter – which provides for a remedy that is "appropriate and just in the circumstances" for the infringement of Charter rights – was in effect the same as section 38 of the South African Constitution.[111] At that stage, however, the Canadian Supreme Court had not yet awarded constitutional damages. It did so, thirteen years later in *Vancouver v Ward*.[112]

Canada

79 The Court in *Ward* even quoted *Fose* with approval and endorsed our Constitutional Court's approach to the vindication of constitutional rights with damages. This approach recognises that there is additional harm done to society when the state violates constitutionally protected rights. This is because "they impair public confidence and diminish public faith in the efficacy of the [constitutional] protection".[113]

80 The requirements for an award for constitutional damages are set out in *Ward*: a constitutional right has been breached; damages are just and appropriate in the circumstances in that they fulfil the functions of compensation, vindication of rights, deterrence of future breaches; and the absence of countervailing factors like alternative remedies or interference with good governance.[114]

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111 *Fose* at para 82.

112 *Vancouver (City) v Ward* [2010] 2 SCR 28

113 *Ward* at para 28, discussing *Fose* at para 81.

114 Plaintiff's heads of argument at para 319, citing *Ward* at para 4.

81 In *Ward,* the Canadian Supreme Court held that, where constitutional rights are violated, there is loss in addition to physical, psychological and pecuniary loss. This is the "harm to the claimant's intangible interests" of having their constitutional rights violated. The Court explained that "often the harm to intangible interests effected by a breach of rights will merge with psychological harm. But a resilient claimant whose interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury."[115]

New Zealand

82 The New Zealand Courts also recognise that constitutional damages play the important and distinct role of vindicating the constitutional rights of the claimant. In *Dunlea v Attorney General*, the Court of Appeal held that—

> *"compensation for a breach of the Bill of Rights therefore embraces the extra dimension of vindicating the claimant's right, a right which has been vested with an intrinsic value, and it is that intrinsic value to the claimant for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted. Thus, the right has a real value to the recidivist offender as well as to a model citizen."*[116]

The Court explained further:

> *"Not only must the plaintiffs be compensated for their loss, including the distress and humiliation which they suffered, but the plaintiffs' rights must be vindicated by recognizing their worth to them. . . . . Unless awards are realistic, the value which the community has chosen to place on the observance of those rights must be depreciated. What value is the*

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115 At para 24 and 27

116 *Dunlea v Attorney General* [2000] 3 NZLR at para 67.

right to be free of an unreasonable search or not to be unlawfully detained if the court's remedies for breaches of those rights are seen to be miserly? Parliament's will is not then implemented and the community's expectations are not then met."[117]

83 The High Court of New Zealand in *Liston-Lloyd* explained that vindication has public and private law components. These damages recognise that breaches of constitutional rights harm not only the particular victim of the breach but the public generally, because it impairs public confidence in the efficacy of constitutional protections. The aim of the damages is to affirm the right and deter further breaches.[118] The Court held that an "individual should be able to feel secure in the knowledge that the state will respect his or her [constitutional] rights, and the state should be required to compensate him or her for injury or loss resulting from the failure to do so."[119]

The Privy Council

84 In *Merson*, the Privy Council held that the fact that a constitutional right is violated "adds another dimension to the wrong".[120] It also held that the manner in which the state defends a claim for constitutional damages is relevant to the measure of damages to be awarded.[121]

Ireland

85 The Irish Courts,[122] relying on the House of Lords decision in *Rookes v Barnard*[123] have recognised that "aggravated" and "exemplary" damages may be awarded against the state where the

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117 *Dunlea* paras 82-83.

118 *Liston-Lloyd v The Commissioner of Police [*2015] NZHC 2614 para 42

119 *Liston-Lloyd* para 44

120 *Merson v Cartwright* [2005] UKPC 38 para 19

121 *Merson v Cartwright* [2005] UKPC 38 para 13

122 *Kennedy v Ireland* [1987] IR 587

123 *Rookes v Barnard* [1964] A.C. 1129

government has been found to have taken "oppressive, arbitrary or unconstitutional action". In particular, the courts have found that in determining the damages to which such a claimant is entitled, the courts must consider not only the infringement of the constitutional right, but also the fact that an infringement is carried out deliberately, consciously and without justification.[124]

86 The Irish Supreme Court has explained that ordinary compensatory damages awarded for constitutional infringements are sums calculated to compensate a wronged plaintiff for physical injury, mental distress, anxiety, or other harmful effects of wrongful acts. [125] Aggravated damages are also compensatory damages but seek to increase the compensation to the claimant because of the manner in which the wrong was committed – involving, for example, oppressiveness, arrogance or outrage. [126] Aggravated damages take into account the conduct of the wrongdoer after the commission of the wrong, such as the refusal to apologise or to ameliorate the harm done; the conduct of the wrongdoer or his representatives in the defence – up to and including the trial action. These compensatory damages must in part be a recognition of the added hurt or insult to the plaintiff who has been wronged and in part a recognition of the cavalier or outrageous conduct of the defendant. [127]

87 The Irish Supreme Court has also sanctioned the award of exemplary damages for constitutional rights' violations. Exemplary damages are awarded to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case.[128] McCarthy J found that there was a duty resting on the courts to award these damages in appropriate cases:

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124 *Kennedy v Ireland* [1987] IR 587 at 594

125 *Conway v Irish National Teachers Organisation* [1991] 2 IR 305 at 316-317.

126 *Conway* at 316-317.

127 *Conway* 317.

128 Conway 317.

"*every member of the judiciary has made a public declaration to uphold the Constitution; it would be a singular failure to do so if the courts did not, in appropriate cases such as this, award such damages as to make an example of those who set at nought the constitutional rights of others*".[129]

Conclusion

88 The foreign cases referred to above recognise the role of both aggravated and exemplary damages for constitutional rights' violations. In *Fose*, the Constitutional Court declined to award exemplary (or punitive) damages. It was persuaded by a body of literature that cautioned against awarding these types of damages.[130] However, it also made it clear that it was not deciding this issue for all cases and for all time. It recognised that there may be other cases where different constitutional rights are violated and where the facts demand a different approach to remedy.[131]

89 This case requires the approach to be re-examined because it deals with the preventable death of a five year old child who was in the state's care. The state's conduct in this case caused severe and persistent violations of the Komapes' rights. It violated Michael's most sacred right to life. The state should bear the burden of that loss. It should be required to pay a measure of damages that signifies that this type of rights' violation is not tolerated in a constitutional state that places value on life, on children and on family. The state has not shown any countervailing factors that would prevent a substantial damages award to mark society's disapproval of its reckless conduct.

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129 *Conway* 326.

130 *Fose* para 70

131 *Fose* para 34

CONCLUSION

90 Michael's tragic death was not an accident. For years, it was a disaster waiting to happen. The issue of inadequate and unsafe infrastructure at public schools, especially those deliberately left behind in the past, is well chronicled and was well known to the defendants.

91 The state cannot let its children die in undignified and abhorrent circumstances when they are charged with protecting and educating them in a safe environment. They must take responsibility for this outrage.

92 It is not enough that they compensate the Komapes for the medical injuries they can demonstrate with doctors and scientific evidence. The harm is far greater than this. It lies in the fact that this family will be haunted by the thought of Michael desperately seeking help in his final moments and that he was abandoned by the adults trusted to look after him. It is in the harm done to our society when elected officials fail to protect our children and then turn their backs when the worst happens.

93 This case demands a remedy that effectively redresses that harm and vindicates the Constitution. The remedy should be to uphold the appeal and grant the appellants' claim B.

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28 February 2019

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IN THE SUPREME COURT OF APPEAL
BLOEMFONTEIN, SOUTH AFRICA

Appeal Case Nos: 754/2018; 1051/2018

High Court Case No: 1416/2015

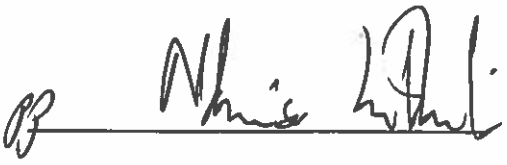
In the appeal between:

ROSINA MANKONE KOMAPE	1st Appellant
MALOTI JAMES KOMAPE	2nd Appellant
MOKIBELO LYDIA KOMAPE	3rd Appellant
LUCAS KHOMOTSO KOMAPE	4th Appellant
And	
MINISTER OF BASIC EDUCATION	1st Respondent
MEMBER OF THE EXECUTIVE COUCIL, LIMPOPO DEPARTMENT OF EDUCATION	2nd Respondent
PRINCIPAL OF MAHLODUMELA LOWER PRIMARY SCHOOL	3rd Respondent
SCHOOL GOVERNING BODY, MAHLODUMELA LOWER PRIMARY SCHOOL	4th Respondent
And	
EQUAL EDUCATION	Second *Amicus Curiae*

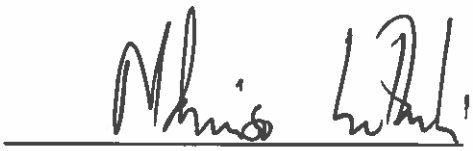
AMICUS CURIAE'S CERTIFICATE IN TERMS OF RULE 10(A)(b)

We, the undersigned, certify that the provisions of Rules 10 and 10A(a) have been complied with.

DATED AT JOHANNESBURG ON THIS 28TH DAY OF FEBRUARY 2019



KATE HOFMEYR



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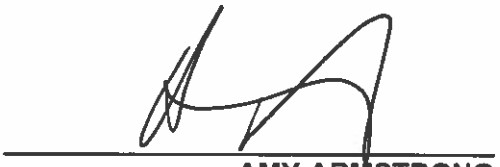

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