IN THE SUPREME COURT OF SOUTH AFRICA

(REPUBLIC OF SOUTH AFRICA)

Case no : 1051/2018 and 754/2018

Court a quo case no: 1416/2015

In the matter between:

ROSINA MANKONE KOMAPE **FIRST APPELANT**

(first plaintiff in the court a quo)

MALOTI JAMES KOMAPE **SECOND APPELLANT**

(second plaintiff in the court a quo)

MOKIBELO LYDIA KOMAPE **THIRD APPELLANT**

(third plaintiff in the court a quo)

LUCAS KHOMOTSO KOMAPE **FOURTH APPELLANT**

(fourth plaintiff in the court a quo)

AND

MINISTER OF BASIC EDUCATION **1ST RESPONDENT**

(first defendant in the court a quo)

MEMBER OF THE EXECUTIVE COUNCIL LIMPOPO DEPARTMENT OF EDUCATION **2ND RESPONDENT**

(second defendant in the court a quo)

PRINCIPAL OF MAHLODUMELA LOWER PRIMARY SCHOOL **3RD RESPONDENT**

(third defendant in the court a quo)

SCHOOL GOVERNING BODY,
MAHLODUMELA LOWER PRIMARY SCHOOL **4TH RESPONDENT**

(fourth defendant in the court a quo)

AND

EQUAL EDUCATION **AMICUS CURIAE**

(Second amicus curiae in the court a quo)

FILING NOTICE

DOCUMENT : HEADS OF ARGUMENTS

DATED AT POLOKWANE ON THIS 20TH DAY OF DECEMBER 2018

State Attorney Polokwane
Attorneys Respondents
36A BODENSTEIN STREET
BLOCK B, SECOND FLOOR
HIGH COURT BUILDING
PRIVATE BAG X 9705
POLOKWANE, 0700

Ref: 387/15/RA

C/O STATE ATTORNEY BLOEMFONTEIN

Fedsure Building , 11th Floor

49 Charlotte Maxeke Street

Bloemfontein Central

Bloenfontein

Tel; 051 400 4300

Fax 051 4004 341

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

SUPREME COURT OF APPEAL , BLOEMFONTEIN

AND TO: SECTION 27

ATTORNEYS FOR THE APLICANTS

C/O WEBBER ATTORNEYS

Webbers Building

Bloemfontein

Tel : 051 430 1340

Fax : 430 8987

REF: S Linderboom

AND TO : EQUAL EDUCATION

Isivina Center

3rd Floor

08 Mzala Street

Khayelitsha

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case Nos: 754/2018

1051/2018

LP Case No:1416/2015

In the matter between:

ROSINA MANKONE KOMAPE **First Appellant**

(First Plaintiff in the *Court a quo*)

MALOTI JAMES KOMAPE **Second Appellant**

(Second Plaintiff in the *Court a quo*)

MOKIBELO LYDIA KOMAPE **Third Appellant**

(Third Plaintiff in the *Court a quo*)

LUCAS KHOMOTSO KOMAPE **Fourth Appellant**

(Fourth Plaintiff in the Court *a quo*)

and

MINISTER OF BASIC EDUCATION **First Respondent**

(First Defendant in the Court *a quo*)

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

(Second Defendant in the Court *a quo*)

PRINCIPAL OF MAHLODUMELA LOWER
PRIMARY SCHOOL **Third Respondent**

(Third Defendant in the Court *a quo*)

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

(Fourth Defendant in the Court *a quo*)

and

EQUAL EDUCATION **Amicus Curiae**

(Second Amicus Curiae in the Court *a quo*)

HEADS OF ARGUMENT ON BEHALF OF THE RESPONDENTS

A. INTRODUCTION

1. This is an appeal against the judgment and the order by Muller J. sitting as a court of first instance in the High Court of Court of South Africa, Limpopo Division, Polokwane granted on 23 April 2018 wherein the appellants' claims, save for a portion of claim C, were dismissed.

2. These appeals come with the leave of both the court a quo in respect of claim B granted on 29 June 2018 and this court granted on 06 September 2018.

B. CATEGORIES OF CLAIMS

3. Their claims were categorized as follows:

3.1 **Claim A**, for trauma and emotional shock;

3.2 **Claim B**, for grief, subject to the court *a quo* developing common law in accordance with section 39 (2) of the Constitution of the Republic of South Africa, 1996 and recognize a cause of action for grief and award damages for grief;

3.3 **Alternative to claim B**, the appellants requested the court a quo to award constitutional damages.

3.4 **Claim C**, for past and future medical expenses;

3.5 **Claim D**, for funeral expenses;

3.6 **Claim E**, for loss of income in respect of the first appellant; and

3.7 A declarator that the respondents have breached their constitutional obligations in respect of the rights contained in sections 9,10,11,24,27,28 and 29 of the Constitution ("the Constitution ").

C. FACTS GIVING RISE TO THE CLAIMS

4. On 20 January 2014, at Chebeng Village, Limpopo Province a 5 year old, Michael Komape, who was a grade R learner at Mahlodumela Lower Primary School ("the school"). Fell into a pit toilet and died.

5. The appellants instituted damages claim against the respondents as a result of Michael's death.

6. The high court, Limpopo Division ("Muller J"), dismissed parts of the appellants claims.

D. ISSUES ON APPEAL

7. As stated above, the court *a quo* granted leave in respect of claim B and this Court granted leave in respect of the declarator, claim A, alternative claim B and a portion of claim C.

8. For ease of reading we maintain the chronology, when setting out the issues, with which the issues were dealt with in the judgment of the court *a quo* and not as and when leave was granted in respect of each claim.

9. Thus, the issues on appeal are whether the court *a quo*:

8.1 erred in dismissing claim A in circumstances where the respondents had conceded liability/ merits in respect of same;

8.2 ought to have, at the very least, awarded the damages as set out in the respondents' heads of argument and advanced in oral argument at the court a quo;

8.3 erred in finding that there was no need to develop the common law to recognize a claim for grief and award damages for same;

8.4 erred in refusing to award a claim for Constitutional damages in circumstances where it refused to develop the common law to recognize grief as cause of action;

8.5 erred in not granting an order for future medical expenses in respect of Moses Komape; and

8.6 erred in not granting a declaratory order.

E. CLAIM A TRAUMA AND EMOTIONAL SHOCK

10. The appellants contend that the court *a quo* erred on the facts and on the law and should have held that the appellants established their case on the evidence because the respondents accepted on the facts and evidence established

that the appellants suffered emotional shock and recognizable damages[1].

11. The court *a quo* could not make a finding contended for by the appellants because it found that Mr Molepo's report, the appellants expert, fell dismally short of the requirements of rule 36 (9)(b) in that it had no specific reference to the appellants' and the minor children's individual diagnosis or reasons thereof[2].

12. The court *a quo* held that emotions such as anxiety, grief and sorrow do not sound in damages as they are not psychiatric injury and in order for a claimant to succeed it must adduce evidence of a psychiatric harm.[3]

13. In finding that the appellants failed to adduce evidence of psychiatric injury, the court *a quo* stated that Mr Molepo testified with reference to facts and circumstances set out in Ms Sodi's

---

[1] Volume 10 page 1769 paragraphs 5 and 5.1
[2] Volume 10 page 1712 paragraph 28 and Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Fur Schädlingsbekämpfung MBH 1976 (3) SA 352 (AD) 370E-372A and Ndlovu v Road Accident Fund 2014 (1) SA 415 (GSJ) para 109 and 117-119.
[3] Volume 10 page 1714 paragraph 36.

report[4] and thus his evidence was insufficient for finding that the appellants suffered grief or "*any other recognizable psychiatric injury*".[5] By this, we submit, the court a quo was making reference to trauma and emotional shock. Direct Authority in South African case law for the proposition that, any causing of mental altering such as experiencing fear or emotional shock which has significant effects on the mental wellbeing of a person is Minister of Justice v Hofmeyer.[6]

14. It is settled law that the courts are not bound by the view of the experts. They make the ultimate decision on issues the experts provide an opinion. [7]

15. Of importance is that the facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning it must be based on correct facts. [8]

---

[4] Volume 10 page 1716 paragraph 42.
[5] Volume 10 page 1717 paragraph 47.
[6] 1993(3) SA 131 (AS145I-J)
[7] Road accident Appeal Tribunal and others v Gouws and Autcher 2018 (3) SA 413 (SCA) para33.
[8] Bee V Road Accident Fund 2018 (4) SA 366(SCA) p 373 para 23.

16. The court *a quo*, further, found that Mr Molepo was unable to make a diagnosis of the appellants and minor children and thus the differential diagnosis he made in his report in the face of clinical findings and the contents of the joint minute was difficult to reconcile, understand and accept.[9]

17. We submit that the findings by the court *a quo* with regard to the evidence of Mr Molepo is correct.

18. The evidence that the appellants needed to establish their claim for emotional shock is set forth in the medico-legal report of Ms Sodi as it contained the relevant information and the diagnosis. However, the court a quo, found that the contents of Ms Sodi's report were not proved by means of Ms Sodi's evidence and thus cannot assist the appellants. The court *a quo's* reasoning

---

[9] Volume 10 page 1717 paragraph 47, section 34 (1)(b):
" In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact provided the person who made the statement is called as a witness in the proceedings..."

in this regard is based on the provisions of section 34 of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965)[10].

19. We respectfully submit that the court *a quo* did not err in making the above findings as it is common cause that Ms Sodi whose report is attached to the particulars of claim did not testify and where the court *a quo* found that the necessary information and diagnosis was in her report and not the report of Mr Molepo. As such, there was no medico-legal evidence upon which the appellants could establish the necessary element of psychiatric injury.

20. The appellants, further, contend that because the respondents conceded liability and the concession was based on the facts the appellants were entitled to compensation. Furthermore, they contend that the concession of liability was both to the obligation, on merits, to compensate and the quantum thereof.[11] As such, the only debate before the court *a quo* in respect of

[10] Volume 10 page 1717 to 1718 paragraph 47.
[11] Volume 10 page 1770 paragraph 5.4.

claim A was the assessment of the quantum of damages and not the merits[12].

21. It is clear from the judgment that the court *a quo* was aware that a concession in respect of the merits of claim A was made.[13] However, the court a quo correctly stated that the quantum in respect of claim A remains in dispute and that the onus to prove remained with the appellants.[14]

22. In proving the quantum of compensation payable as a result of emotional shock alleged to have been suffered, the appellants had an onus to prove that the emotional shock they suffered is a recognizable psychiatric injury. It is for this reason that the court *a quo* held that "*...Policy considerations militate against compensation for emotional suffering short of a recognisable psychiatric illness. Damages cannot be awarded...without the resultant recognizable psychiatric lesion or illness which is a requirement for claim A...to succeed...*"[15]

[12] Volume 10 page 1770 paragraph 5.5
[13] Volume 10 page 1708 paragraph 14.
[14] Volume 10 page 1708 paragraph 16
[15] Volume 10 page 1718 paragraph 49.

23. The appellants further contend that the court *a quo* erred in not granting compensation for claim A because the quantum claimed was not excessive, it was consistent with previous comparable cases and took into account the nature, degree and effect of the trauma, emotional shock and suffering.[16]

24. Further, that at minimum the court should have awarded the compensation in the amount assessed by the respondents.[17]

25. These contentions fail to appreciate the court *a quo's* finding that, before a recognisable psychiatric injury is proved by way of the necessary expert evidence, the court cannot award compensation. This much was made clear by the court *a quo* when it found that the evidence of Mr Molepo was insufficient based on the deficiencies referred to in paragraph 15. Supra and that the relevant medico-legal evidence was not place before court and thus the court was precluded by section 34 of

[16] Volume 10 pages 1770 to 1771 paragraphs 6, 6.1 to 6. 3.
[17] Volume 10 page 1771 paragraph 7.

the Civil Proceedings Evidence Act from placing reliance on evidence that is not properly placed before it.

26. A further ground of appeal is based on the contention that the court *a quo* confused claim A and B, the former based on a cause of action founded upon emotional shock whilst the latter was based on the development of the common law to recognise a cause of action founded on grief and award damages in respect thereof.

27. The appellants contend, further, that the evidence established the requisite emotional shock, so too the report of Ms Sodi as canvassed in the oral testimony of Mr Molepo as well as Mr Molepo's own testimony.[18]

28. We respectfully submit that the appellants' contentions, in this regard, have no merit in that the court a quo appreciated the fact that the two claims, (A and B), were separate and distinct. At least in so far as they were pleaded. However, both required

[18] Volume 10 pages 1771 to 1772 paragraphs 8, 8.1 to 8.3 and 9.

expert evidence[19] to establish the existence of a psychiatric injury.[20]

29. The last ground of appeal, in respect of claim A is premised on the contention that the court a quo failed to apply and follow the authorities of *Mbhele v MEC for Health for Gauteng Province (355/15) [2016] ZASCA 166 (18 November 2016)* that proof of psychiatric lesion or illness by expert evidence was not a precondition for compensation.

30. The appellants' contention completely disregards the court *a quo's* finding that the Mbhele judgement represents a radical departure from ***Bester***[21] and ***Barnard***[22] judgments with regard to the requirement of expert psychiatric evidence to prove a psychiatric injury. Further, that "*no reference is made in Mbhele to either of the two judgments, let alone overrule them. Until such time that they are overruled as being clearly wrong, this Court is obliged to follow them*". In making this finding, the court

[19] Volume 10 page 1718 paragraph 48.
[20] Volume 10 page 1718 paragraph 49.
[21] Bester v Commercial Union Versekeringsmaatskappy van SA Bkp 1973 (1) SA 769 (A).
[22] Barnard v SANTAM Bkp 1999 (1) SA 202 (SCA).

a court *a quo* relied on this Court's judgment of *Patman Explorations (Pty) Ltd v Limpopo Development Tribunal*.[23]

31. The court a quo reasoning cannot be faulted as it clearly applied and followed the principle of stare decisis and until the conflicting judgments of Bester, Barnard and Mbhele are clarified, the court *a quo is* justified not to follow *Mbhele* where the latter two are not overruled nor mentioned in *Mbhele*.

32. We submit with respect that the court *a quo* did not err on its findings that claim A is not supported by evidence and should be dismissed, notwithstanding the concessions made.

33. However, in the event this Court finds that the court *a quo* erred and ought to have awarded damages in respect of claim A, we set out the legal principles applicable to the determination of general damages and reference same in respect of the facts of this case.

[23] Volume 10 page 1716 footnote 24.

34. According to Neethling's Law of Personality [24], 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.[25]

35. Emotional shock is described as sudden, painful emotion or fright resulting from the realisation or perception of an unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief.[26]

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

---

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

[25] 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.

[26] LAWSA 9 second edition, para 2

"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" [27].

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

38. In stating what type of emotional shock gives rise to compensation, LAWSA, refers to the judgment of Barnard v

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

Santam Bkp [28] 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".*

F. APPLICABLE PRINCIPLES FOR THE DETERMINATION OF QUANTUM FOR GENERAL DAMAGES

39. It is trite that the trial court has a discretion to award what it considers to be fair and adequate compensation. [29] The court has to consider the facts of a particular case in the assessment of compensation. [30] The award must be fair to both parties. [31]

---

[28] 1999 (1) SA 202 (SCA) 208J-209A.
[29] Road Accident Fund v Marunga 2003 (5) SA 164 SCA at 169 F:
[30] Minister of Safety and Security v Seymour 2006 (6) SA 320 SCA at 325 B:
[31] Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D) and De Jongh v Du Pisanie N.O 2005 (5) SA 457 (HHA)

40. In this case the trial court dismissed the claim for general damages and in view of the fact that the evidence of Mr Molepo the appellants' expert (clinical psychologist) is before court, the appeal court is placed in a position to make the determination itself.

41. The courts have acknowledged that the assessment of quantum for general damages is fraught with difficulty, as few cases are similar. [32]

G. SUMMATION OF THE CIRCUMSTANCES OF THE APPELLANTS

First appellant (Mrs. Komape)

42. Mr Molepo first consulted with Mrs Komape on 2 October 2015[33] a year and nine months after Michael's death [34].

[32] Protea Assurance Co Ltd V Lamb 1971(1) SA 535H – 536 B
[33] Volume 6 page 951 line 2
[34] Volume 6 page 957 line 20

43. Mr. Molepo mentioned the symptoms of major depressive disorder. [35]She also presented the following symptoms: *"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."* [36]

44. The reason the first appellant 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. [37]

45. Mr Molepo consulted with the first appellant just before the commencement of the trial, on 6 November 2017. At that consultation, he observed her emotional state to be functional.

---

[35] Volume 6 page 970 lines 8 to 11

[36] Volume 6 page 971 lines 1 – 6

[37] Volume 6 page 971 lines 11-14

She was able to communicate more openly and she was relaxed and appeared to be ready to come testify at court. [38]

46. Mr. Molepo testified that in relation to the symptoms that the first appellant went through, those he mentioned earlier in his testimony, he observed her to have made great improvement. He testified further that a lot of those symptoms are not featuring in her reactions and she has almost dealt with her grieving process. [39]

Second appellant (Mr Komape)

47. Mr. Molepo consulted with second appellant on 2 October 2015 and testified that second appellant 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 sleeping difficulties as well as sadness and irritability. [40]

---

[38] Volume 6 page 973 lines 20-22

[39] Volume 6 page 974 lines 11-12

[40] Volume 6 page 976 lines 15-17

48. Mr. Molepo had seven sessions with second appellant and stated that as at their last session. On 6 November 2017, second appellant seemed to be coping much better and positive about life. Mr. Molepo further testified that on 6 November 2017 he did not meet the diagnostic criteria for post-traumatic stress disorder. [41]

49. He further stated that in the timeline between 2 October 2015 and 6 November 2017, second appellant reacted a little more positively than Mrs. Komape did to counselling and showed positive signs of improvement during the 2nd and 3rd sessions. [42] When asked if second appellant is still experiencing grief, he stated that his observation was that he is at peace with the loss of his son. [43]

Third appellant (Lydia Komape)

50. Mr. Molepo testified that third appellant's reaction was similar to her mother, she presented with symptoms such as PTSD. She

[41] Volume 6 page 978 lines 12-13
[42] Volume 6 page 978 lines 17-20
[43] Volume 6 page 978 line 21

also had symptoms that suggested that she was depressed and was going through a bereavement and grieving process. [44] In 2015 she met the diagnostic criteria for PTSD and bereavement.

51. Mr. Molepo had eight sessions with her, and the latest one being on 6 November 2017. He (Mr. Molepo) testified that the third appellant 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.*" [45]

52. She no longer meets the diagnostic criteria for PTSD or bereavement. [46]

53. Currently, she no longer presented symptoms suggesting that she is still experiencing grief. [47]

---

[44] Volume 6 page 981 lines 21-22

[45] Volume 6 page 982 lines 21-22

[46] Volume 6 page 983 line 9

Fourth appellant (Lucas Komape)

54. Mr. Molepo consulted with fourth appellant on 11 December 2015, almost two years after Michael's death. At their first consultation, he 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. [48]

55. Mr. Molepo testified that he 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. [49]

---

[47] Volume 6 page 983 line 20

[48] Volume 6 page 985 lines 20-25

[49] Volume 6 986 lines 15-16

56. Mr. Molepo had five sessions with Lucas and the last session was in April 2017. [50] When they last consulted, he was cooperative and well expressive and appeared to have stabilized much more than when they first met. He was no longer showing signs of PTSD and also he showed no signs of bereavement. [51]

Onica Komape

57. When Mr Malope consulted with Onica in 2015, she did not meet the diagnostic criteria for post traumatic stress disorder, but she has symptoms of bereavement in that she showed irritability.[52]

Maria Komape

58. In December 2015, the sixth appellant showed symptoms of post traumatic stress disorder. [53] However, in 2016 her

[50] Volume 6 page 990 line 3

[51] Volume 6 page 987 lines 7 to 10

[52] Volume 6 page 993 lines 10 and 12

[53] Volume 6 pages 997 lines 18-19

condition improved in that she did not show the symptoms of PTSD. [54]

Moses Komape

59. On 02 October 2015, the first examination by Mr Malope revealed that he had withdrawal symptoms and he was tearful.[55] He was not expressing himself openly and he showed the symptoms of bereavement.[56] Mr Molepo had 8 sessions with the Moses. The last session was on 16 November 2017 and Moses still presented with a lot of sadness and was tearful. Mr Molepo recommended additional 6 to 10 sessions of therapy.[57]

H. COMPARISON WITH PREVIOUS AWARDS

60. It is trite law that previous authorities relating to assessment of general damages serve as useful guide to what other courts

[54] Volume 6 page 999 lines 4-5
[55] Volume 6 page 1000 lines 15-16
[56] Volume 6 page 1000 lines 22 and 23
[57] Volume 6 page 1003 lines 5 and 6

have considered to be appropriate but have no high value than that. [58] It is generally undesirable for the court to adhere slavishly to consumer price index in adjusting earlier awards. [59]

61. 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 2018 value of this amount as Dr Robert Kock's Quantum Year book only refers to the amount granted at the court *a quo*.

62. In Kritzinger and Kritzinger v Road Accident Fund_[60], 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 2018 value amount to R242 000.00.

---

[58] Minister of Safety and Security v Seymour supra at 325B.

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

[60] 2009 QoD 21 (ECD).

63. In Maart v Minister of Police [61], the Plaintiff's son was shot by the police in full view of the Plaintiff and 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 2018 value amount to R264 000.00.

64. In Walters v Minister of Police [62], 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 Plaintiff suffered shock, anxiety, emotional and psychological suffering and feeling guilty and other complications. The court awarded R185 000.00 and the 2018 value is R259 000.00.

65. In Van der Merwe v Minister van Veiligheid en Sekuriteit 2009 (6K2) QoD 1 (NCK) a sixty three year old building contractor who

[61] 2012 (6K3) 2012 QoD 24 (ECP).

[62] 2012 (6K3) QoD 24 (ECP).

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 2018 value amount to R40 000.00.

66. 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 2018 value amount to R165 000.00.

67. 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. Flowing 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 2018 value amount to R93 000.00.

68. 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).

69. In Minister of Police v Dlwathi [63], 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."*

70. In respect of the above remarks, this court 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

[63] (20604/14) [2016] ZASCA6.

conduct to which the police subjected Mr Dlwathi, and remarked as follows:

"*...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.*[64]"

71. 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.* [65]"

72. It is apparent from the authorities referred to supra that the circumstances are distinguishable from the facts *in casu* in that the appellants' circumstances have improved according to Mr Molepo's evidence.

---

[64] Ibid para [9].

[65] Transcript: p 270, lines 19- 24.

73. From the evidence, we contend that save, for first appellant, the members of the appellants family do not suffer 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.

74. It is four years since the incident, none of the appellants and the minor children suffer from severe and chronic psychiatric disorder.

75. In assessment of general damages, this Court has laid down the principle that the primary purpose for an award of general damages is not to enrich the aggrieved party but to offer him or her some much needed *solatium* for his or her injured feelings.[66]

76. We contend an amount of R120 000. for first appellant is fair and reasonable. In respect of second appellant we contend

[66] Minister of Police and Security v Tyulu 2009 (2) SACR 282 (SCA)

that an amount of R80 000.00 is fair and reasonable. In respect of the third and fourth appellants 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 R270 000.00 is fair and reasonable compensation in respect of claim A.

I. CLAIM B WHETHER THE COMMON LAW SHOULD BE DEVELOPED TO RECOGNIZE GRIEF AS A CAUSE OF ACTION AND AWARD DAMAGES IN RESPECT OF SAME

77. The appellants contend that the court a quo erred in failing to develop the common law to recognise a cause of action based on grief.[67] This contention is premised on various grounds which we deal with herein infra.

[67] Volume 10 page 1759 paragraph 1.

78. First, the appellants are of the view that the evidence of Mr Molepo established that they suffered bereavement and mourning and thus proved the existence of grief on their part.[68]

79. The court a quo held that the evidence of Molepo was insufficient to support the finding that the family members suffered grief or any recognisable psychiatric injury or harm.[69]

80. Second, the appellants contend that the common law requirement of the existence of a psychiatric lesion by means of psychiatric report required development in terms of section 39 (2) of the Constitution, when such a claim is instituted against the state for delictual compensation arising out of serious breaches of fundamental rights.[70]

81. The court *a quo* held that there was no reason in law or policy consideration to draw a distinction between grief and any other psychiatric injury or harm and that a claim for grief which caused no psychiatric injuries will lead to bogus and

[68] Volume 10 page 1759 paragraph 1.1
[69] Volume 10 page 1717 paragraph 47
[70] Volume 10 page 17659 to 1760 paragraph 1.2.

unwarranted proliferation of claims and pave the way for limitless claims without expert psychiatric evidence.[71]

82. We submit that the court a quo did not err in refusing to develop the common law as requested. We say so because, grief is defined as an intense sorrow, especially caused by someone's death.[72]

83. Grief is a passing emotion. In fact, grief is a 'process'. This much was stated by the appellant's psychologist when he stated that:

> *"The grieving process is the term, the process through which a person who suffered a loss goes 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*

[71] Vide: volume 10 page 1715 paragraph 39.
[72] Concise Oxford English dictionary.

going through grief or mourning will experience a rank of emotions..."[73]

84. As a passing emotion, appellants cannot and should not be compensated for going through a process that all human beings go through.

85. In support of this contention we are in agreement with the judgment of the Full Court in **Hing and Others v Road Accident Fund**[74]

86. In comparison to English law, the court in Hing referred to **White and Others v Chief Constable of South Yorkshire**

---

[73] Volume 6 page 953 lines 9-16.

[74] 2014 (3) SA 350 (WCC): Wherein the court said the following at paragraph 24:

"*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...*"

and Others [75], where Lord Steyn referred to two groups of persons with bereavement related "mental suffering"[76]

87. With reference to Australian law, the Honourable Mr Justice Binns-Ward made reference to **Mount Isa Mines Ltd v Pusey**:[77]

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

---

[75] [1999] 1 All ER 1 (HL)

[76] "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."

[77] (1970) 125 CLR 383 at 394.

89. The Constitutional Court has established the factors to be considered in arriving at the determination whether the common law should be developed. [78]

90. The appellants do not embark on any of the exercises set out by the Constitutional Court.

J. LEGAL IMPEDIMENT TO DEVELOPMENT OF THE COMMON LAW TO RECOGNIZE GRIEF AS A CAUSE OF ACTION AND AWARD DAMAGES FOR SAME

91. Had the appellants succeeded with their claim A, they would have recovered damages for trauma and emotional shock caused by Michael's death. That compensation is a satisfaction or *solatium.* The cause of action is the *actio iniuriarum.*

[78] Mighty solutions V Engen petroleum 2016 (1) SA 621 (CC) at para [39]B,"(39) before a court proceeds to develop the common law, it must (a) determine exactly what the common-law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of rights and thus requires development. Furthermore, it must be (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law."

92. 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 facts against the same parties. [79] The finding of this Court on this point was confirmed by the Constitutional Court. [80]

93. A further problem to the request for development of the common law to award damages for grief is that, of foreseeability is a requirement for negligence.

94. The appellants must prove that the respondents have foreseen that as a consequence of Michael's death, the family will suffer grief. By extension, the respondents would have a duty of care towards the appellants. This will lead to limitless liability, consequently, rendering the requirement of legal causation irrelevant. [81]

---

[79] Le Roux v Dey 2010 (4) SA 210 SCA at 218D- 219 D

[80] Le Roux v Dey 2011 (3) SA 274 (CC) at 320F.

[81] International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A).

95. In Le Roux v Dey *supra*[82] Brand AJ said the following:

> "*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 Constitution al 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]

96. In light of what Brand AJ stated in Le Roux, we submit that it would be unreasonable to recognise a cause of action based on grief.

[82] 2011 (3) SA 274 at 315 B-C

97. In view of the above established legal principles we contend that the court *a quo* did not err in refusing to develop the common law and that there is no reason for the appeal court to disturb the court *a quo's* conclusion by breaking new ground and developing the common law to make provision for the compensation for grief.

98. This contention is fortified by our proposition that the appellants are already suited and would have been compensated under the claim of trauma and emotional shock (general damages, if they had adduced sufficient evidence) and it is not necessary for them to have a second bite at the cherry on the same facts where a common law remedy already exists.

K. ALTERNATIVE CLAIM B WHETHER CONSTITUTION AL DAMAGES OUGHT TO BE AWARDED

99. In the alternative to development of the common law, the appellants sought an award for constitutional damages. This claim was dismissed.

100. The appellants contend that court *a quo* erred in its treatment of constitutional damages and structural relief as mutually exclusive. They contend that because of the multiple levels on which constitutional rights were violated, the relief should have been granted in respect of each level of the violation. The relief currently granted is only perspective and aimed at preventing future violations and does not vindicate the rights of the appellants[83].

101. Because the respondents had been repeatedly informed (two years before the death of Michael) that sanitation posed danger to the lives of learners, they failed to address the problem despite repeated undertakings and had the necessary financial means and resources but still failed to address the sanitation problems.[84]

[83] Volume 10 page 1773 paragraph 13.
[84] Volume 10 page 1773 to 1774 paragraphs 14, 14.1 to 14.3

102. The court *a quo* did not fail to appreciate the multiple levels of the constitutional rights violations it discusses the various breaches.[85] It was however mindful that "*...the reality is that the compensation claimed, as constitutional damages, is nothing short of a claim for punitive damages*"[86] and that a claim for punitive damages is against public policy and foreign to South African law.[87]

103. The court *a quo* correctly found that the appellants sought constitutional damages as "punitive damages", this much is set out in their particulars of claim that *"[T]he defendants are not exposed to sufficient deterrence not to repeat the aforesaid wrongful conduct, and breach of the aforesaid constitutional duties, unless they are ordered to pay punitive damages..."*[88]

104. To this end, the court *a quo* correctly held the constitutional damages as simply punitive damages and was correct in dismissing such a claim as it is contrary to public policy.

---

[85] Volume 10 pages 1721 to 1723 paragraphs 60 to 63 and 65.
[86] Volume 10 page 1723 paragraph 67.
[87] Volume 10 page 1723 footnote 51 and Jones v Krok 1995 (1) SA 677 (AD) 696C-H.
[88] Volume 1 page 21, particulars of claim, paragraph 27.3.

105. In ***Fose v Minister of Safety and Security***[89] 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.

106. The appellants contend that constitutional damages would be a recognition of the appellants' personal loss and thus vindicate their constitutional rights.[90]

107. We submit with respect that that this contention overlooks the authority that the courts are loath to award constitutional damages in the circumstances where the claimants have a claim for damages in terms of the common law. [91]

108. The appellants further contend that in holding that constitutional damages would amount to overcompensation, the court *a quo* failed to have regard to the different nature and purpose of the

---

[89] 1997 (3) SA 786 (CC)
[90] Volume 10 page 1774 paragraph 14.4.
[91] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

different claims for damages as compensation for the different nature of harm sustained.[92]

109. We respectfully submit that this contention is out of sync with the authorities.

110. The Constitutional Court has already established in principle that a private law remedy is sufficient to vindicate constitutional rights. [93]

111. The appellants also contend that the court *a quo* rejected constitutional damages as a deterrent to future violations and that another death of a learner has since occurred in the Eastern Cape arising out of the first respondent's obligation towards learners.[94]

---

[92] Volume 10 page 1774 paragraph 15.

[93] 2011 (1) SA 400 (CC) at 429H 1. In Law Society of South Africa v Minister of Transport 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 Constitution ally entrenched fundamental right. Thus a claimant seeking 'appropriate relief' to which it is entitled, may properly resort to a common-law remedy in order to vindicate a Constitution al right. It seems obvious that the delictual remedy resorted to must be capable of protecting and enforcing the Constitution al right breached."*

[94] Volume 10 page 1775 paragraph 16.

112. The court *a quo* held that *"...[N]o convincing evidence emerged that punitive damages, will serve to achieve to protect the rights violated or that such an award will act as deterrence to prevent future violations..."* this is a finding of fact unless the appellants can demonstrate that this finding is wrong the court of appeal cannot interfere with such finding.

113. We submit with respect that the appellants have not shown that such a finding is plainly wrong.

114. The court *a quo* carefully analysed and considered the facts before it and came to the conclusion that a structural remedy was the only appropriate remedy that is just and equitable and which will effectively vindicate the constitutional rights,[95] because such an order will benefit all learners where there is a dire need for safe toilets instead of payment of compensation as constitutional damages to the appellants.[96]

[95] Volume 10 page 1724 paragraph 70.
[96] Volume 10 page 1722 paragraph 64.

115. In so far as reference is made to a learner who fell into a pit latrine in Eastern Cape, the circumstances relating to that instance are not before court and neither were they an issue before the court *a quo*.

116. In terms of the applicable legislation South African Schools Act, 84 of 1996, the MEC of the respective provinces are responsible for the management of the schools within their respective provinces. The first respondent cannot be held liable for non-compliance with the norms and standards by the Eastern Cape provincial government.

117. The appellant's have not demonstrated with evidence that any of their constitutional rights have been violated by the respondents' failure to perform their constitutional obligations. Furthermore, that the constitutional damages should be awarded to the family instead of the learners whose rights are being threatened by the absence of proper and safe toilets.

L. FUTURE MEDICAL EXPENSES FOR MOSES KOMAPE

118. If regard is had to the pleadings, Moses' claim for future medical expenses was not pleaded. Consequently, the court *a quo* was correct in dismissing the claim.

M. WHETHER A DECLARATORY ORDER OUGHT TO BE MADE

119. The appellants contend that the court *a quo* erred in dismissing the declaratory order on the basis that it would be of no value to the learners.[97] They say so because the declaratory order is fundamental to clarify the respondents' duties in respect of the learners.

120. We submit that the appellants do not require a declaratory order to clarify such duties, they are clearly set out in the Constitution. Over and above the unambiguous obligations set

[97] Volume 10 page 1768 paragraph 1.

out in the Constitution, the court *a quo* repeated those duties and discussed them in various paragraphs[98] of the judgment.

121. We submit with respect that the finding made in paragraph 63 of the judgment, namely that the constitutional rights in sections 9,10,11,24,28 and 29 have been breached are in respect of the deceased Michael Komape and other learners in Limpopo in so far as the first and second appellants act on their behalf[99] and not in respect of the appellants themselves.

122. In so far as there was a need for an appropriate remedy for such breach, the court *a quo* correctly granted a structural interdict which in its view was an appropriate remedy as an order directed at the enforcement, protection and prevention of future encroachment of the rights.[100] This is so because, the rights of theses learners are not adequately addressed by an

---

[98] Pages 1721 paragraphs 60 (section 9) and 61 (section 10), 1722 paragraph 62 (section 24) and paragraph 63 (sections 28 and 29) as well as a find that all these rights have indeed been breached.

[99] Volume 10 page 1706 paragraph 3 and volume 1, particulars of claim, page 4 paragraph 7.3.

[100] Volume 10 page 1724 paragraph 67

effective common law claim for damages the elements of which include violations of protected constitutional rights.

123. It is apparent from the court *a quo's* reasoning that a declaratory order sought was not an appropriate order in the circumstances, in that, it will not effectively protect and promote the rights of the learners in the Limpopo Province.

124. It is settled law that a declaratory order is discretionary in nature and that the courts in exercising their discretion should do so judicially, upon consideration of the circumstances of the case.

125. We submit with respect that for the appellants to succeed, they must demonstrate that in exercising the discretion the court *a quo* erred in refusing to grant the declaration.

126. We further contend that, is not clear from the facts and evidence led how the respondents' breached the appellants 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.

127. The respondents have not discriminated against the appellants; they have not infringed their dignity or created an environment that is harmful to their persons. The respondents have not infringed their right to health care, food, water and social security.

128. Section 28 is not available to the appellants. In so far as it applies to the minor children, the facts and evidence do not support the case that the respondents have breached the first and second respondent's minor children's rights in terms of section 28 of the Constitution.

129. The respondents did not breach the appellants and minor children's right to education (section 29). All three minor children attend school and thus there cannot be a case of the breach of that right.

130. We submit with respect that there is no breach of the appellants' rights. Consequently, the declaratory order is ill-conceived. It is settled law that courts may fashion new and effective remedy where the Constitutional rights have been breached.[101]

131. The appellants have not demonstrated that the court *a quo* erroneously exercised its excretion by refusing to grant the declaratory order or in granting the structural interdict.

132. The facts do not establish that any of the appellants rights, as mentioned were breached. The Constitutional Court has said that claimants who seek to vindicate a constitutional right by impugning the conduct of the state functionary must identify the functionary and its impugned conduct with reasonable precision.[102]

---

[101] Modderfontein squatters, greater Benoni city council v Modderklip boerdery (pty) Ltd (Agri SA and Legal resources centre, amici curiae), president of the republic of South Africa and others V Modderklip boerdery (Pty) Ltd (Agri SA and Legal resources centre, amici curia. President of the RSA v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40

[102] Von Abo v President of the Republic of South Africa 2009 (5) SA 345 at para [50]

N. APPLICATION TO ADDUCE NEW EVIDENCE

133. With regards to the appellants application to adduce new evidence on appeal, it is our submission that such introduction is not necessary in that the issues involving such evidence is still to be considered the court *a quo*.

134. It has to be borne in mind that the evidence that the applicants(appellants) intend to adduce emanates from the structural interdict order granted by the court *a quo*. As a result, the adequacy or inadequacy of the plan is still to be considered by that court as it is still seized with the matter.

135. Depending on the outcome of the court *a quo's* finding on the plan, this Court may be called upon to make a determination.

O. CONCLUSION

136. We submit with respect that there is no merit to these appeals and as a result they should be dismissed with costs which costs to include costs of two counsels.

MS Phaswane

K Ramaimela

Chambers, Pretoria

COUNSEL FOR THE RESPONDENTS

20 DECEMBER 2018.