IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1416/2015

In the matter between:

ROSINA MANKONE KOMAPE	First Plaintiff
MALOTI JAMES KOMAPE	Second Plaintiff
MOKIBELO LYDIA KOMAPE	Third Plaintiff
LUCAS KHOMOTSO KOMAPE	Fourth Plaintiff

and

MINISTER OF BASIC EDUCATION	First Defendant
MEMBER OF THE EXECUTIVE COUNCIL, LIMPOPO DEPARTMENT OF EDUCATION	Second Defendant
PRINCIPAL OF MAHLODUMELA LOWER PRIMARY SCHOOL	Third Defendant
SCHOOL GOVERNING BODY, MAHLODUMELA LOWER PRIMARY SCHOOL	Fourth Defendant

and

TEBEILA INSTITUTE OF LEADERSHIP EDUCATION, GOVERNANCE AND TRAINING	First *amicus curiae*
EQUAL EDUCATION	Second *amicus curiae*

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A. *Introduction*

1. The visionary dictum of the Constitutional Court rings true for any family's quest for the education of its child -

> "… *So education's formative goodness to the body, intellect and sole has been beyond question from antiquity. And its collective usefulness to the communities has been recognized from prehistoric times to now. The indigenous and ancient African wisdom teaches that 'thuto ke lesedi la sechaba'; 'imfundo yisibani' (education is the light of the nation) and recognizes that education is a collective enterprise by observing that it takes a village to bring up a child".*[1]

2. The constitutional spirit and purport of the dictum assumes a profound dimension in respect of families in the far-flung villages of our country, bereft of modern educational facilities that are the heartland of the basic right to education enshrined in section 29(1)(a) of the Constitution. It is therefore not surprising that great leaders of our constitutional democracy sought to imbue a well-placed hope to villagers across our country by emphasizing the importance of education to all alike when they said -

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1 *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng and Another* 2016 (4) SA 546 (CC), para 1.

> *"Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine, that a child of a farmworker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another. (Nelson Mandela);"*[2]

3. For the Komape family the virtues of education so usefully essayed in the above dictum now ring hollow, and the hope for personal development of their child through education, was destroyed when their son, Michael Komape ("Michael"), died unlawfully as a result of the defendants' negligent conduct on 20 January 2014, and in distressing circumstances we shall describe in due course.

4. The death of Michael Komape cannot be a mere matter of tragic statistics or the ordered way of life. That ought not be the case because it took place at the hands of public officials who were *in loco parentis* in relation to him; and as a result of manifest multiple breaches of constitutional obligations which were foreseeable. Its occurrence may not have fully revealed because of conceived attempts by public officials to conceal evidence of relevance to the tragic loss of life.

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2 *Federation of Governing Bodies* judgment, at 549H-I.

5. The cause of Michael's death, its aftermath and the continuing risk of its repetition, or exposure to other harms to learners who are compelled to suffer poor sanitation at educational facilities under the care and control of the defendants, all of which are borne out by uncontested evidence (we explore more fully below) require a judicial sanction that is exemplary to avoid its repetition. The justification for such exemplary relief, in the context of the painful facts of the present case, represents the only effective remedy that vindicates the plaintiffs' constitutional rights. Ordinary and miniscule forms of compensation bear no proportional relation to the defendants' troubling conduct, and will hardly reflect the constitutional values of accountability, responsiveness,[3] and advancement of equality and human rights and freedoms.[4]

6. Despite an overwhelming public outcry arising from the death of Michael Komape, and his family's lack of financial, emotional and other resources to deal with the immediate and long-term effects of his death, the defendants did not immediately accept responsibility for Michael's death. None of them thought it necessary to conduct investigation into the circumstances of Michael Komape's death in order to assess where the responsibility fell for that death and what compensation was due to the family as a result of that death.

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3 Section 1(d) of the Constitution.

4 Section 1(a) of the Constitution.

7. The uncontested evidence reveals that the Komape family is indigent, and sits at the margins of our society. They lack the financial resources to cope with the burden of the loss of their child. They relied on financial contributions from caring members of the public to bury their child, and to prosecute the present litigation to establish the truth about the cause of their son's death, and the liability of the defendants to compensate them. The defendants opposed the Komape's claims with unmitigated intensity. During cross-examination, the defendants advanced an incomprehensible case, with ferocity. The purpose of that case remains unclear, but manifests a determined effort to resist the plaintiffs' claim at all costs, despite its modest quantum.

8. In the light of the defendants' attitude, we are compelled to set out, in detail, not only the evolution of the Komape's case as expressed in the pleadings, but also the uncontested evidence of their witnesses in the 14 days of trial that followed. We will then analyze the evidence adduced by the defendants, from a belated change of stance, to show that it is irrelevant, at best, but nevertheless fortifies the breaches of constitutional rights asserted by the plaintiffs, at worst.

9. We emphasize that this case is not only about the tragic loss of Michael's life. It is also about the dignity of similarly situated learners, and the defendants' continuing violation of their constitutional right to human dignity, to life, to basic education and to paramountcy of their best interest

because of their continued exposure to sanitation which is unsafe, physically unsound, unmaintained and unhealthy. That degraded and degrading state of sanitation continues to exist, despite the defendants' access to financial and other resources to eliminate it and the risks associated with it.

10. The relief sought by the plaintiffs must therefore be considered in the light of the above considerations. It is in the context of the special facts of this case that the plaintiffs urge the Court to develop common law principles of compensation for the delictual harm arising from the grief caused to them, or by awarding constitutional damages, as is pleaded and supported by evidence led on their behalf.

B. ***The context in which this case occurs***

11. The plaintiffs are four of the eight members of the Komape family.[5] The family resides in a village called Chebeng, on the outskirts of Polokwane. [6] None of the family members is employed.[7] The parents are therefore dependent on state support in order to maintain a household and to live in

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5 The first and second plaintiffs bring this action in their personal capacity, as well as on behalf of their minor children Onica Komape, Maria Komape and Moses Komape. They also bring this action in the interest of all other learners in Limpopo as well as in the public interest. See pleadings bundle: p 4, para 7.

6 Transcript: p 3, line 3; p 58, line 10.

7 Transcript: p 137, line 22; pp 232 – 233. The only family member who was working at the time of Michael's death was Mrs Komape. She worked as a domestic worker. She lost her job because of the amount of leave she took from work to grieve for Michael (Transcript, p 75, lines 1 – 12).

a dignified manner in society. As the Supreme Court of Appeal has held, "To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation it reduces a human in his or her dignity."[8] State support extends to their exclusive reliance on the state education system for their children's schooling needs, which exists also as a matter of right: Section 29(1) of the Constitution states that *"Everyone has the right … to a basic education"*.

12. In sending Michael to school, his family sought naturally to improve their position in society. [9] This accords with an understanding of the purpose and value of education. Most notably, the Constitutional Court has emphasised the significance of the right as a tool for transformation, and as a means to realise other rights and human aspirations:

> *"The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate*

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8 *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) at para 33.

9 Transcript: p 171, line 25; p 172, line 1.

facilities and the discrepancy in the level of basic education for the majority of learners.

Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right." [10]

13. The notes of the United Nations Committee on Economic, Social and Cultural Rights (General Comment No 13), similarly explain that *"[e]ducation is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."*

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10 *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) paras 42 – 43. See also: *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC)* where the Constitutional Court held that "*education is the engine of any society*" (para 2); *SECTION27 v Minister of Education* 2013 (2) SA 40 (GNP) where the High Court held that "*In the South African context … Education takes on an even greater significance. It becomes at the macro level an indispensible tool in the transformational imperatives that the Constitution contemplates and at the micro level it is almost a sine qua non to the self determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of society*" (para 5).

14. This right to basic education necessarily includes safe and adequate school infrastructure, including sanitation, to provide a conducive learning environment.

15. This case also occurs in circumstances where the education authorities were fully aware about the appalling toilet conditions in Limpopo schools, over a year before Michael drowned in his school's toilet. It became aware of sanitation conditions through engagements with SECTION27, [11] but also through internal investigations and channels. In fact, Mr Mark Heywood gave evidence of a letter dated 22 October 2012 from the provincial department to the then director general of the national department, Mr. Bobby Soobrayan, reporting "critical sanitation challenges and storm damaged schools in Limpopo".[12] Moreover, the defendants did not deny or dispute that there is a long-standing crisis in Limpopo schools, which threatens the safety of the learners attending these schools.

16. The courts have previously looked poorly on litigants who are responsible for conditions relating to health, safety or well-being, are further aware of those conditions being intolerable and who do not act reasonably to

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11 Transcript: p 472, lines 1 – 4; p 482 – 483; p 489, lines 21 – 25; p 494, lines 5 – 14; p 596, lines 23 – 25; p 497, lines 1 – 6; pp 508 – 509; p 512, lines 12 – 17; p 516, lines 8 – 10; pp 519 – 520; p 527, lines 15 – 20; p 533, lines 17 – 25.

12 Transcript: p 471, lines 6 – 12.

alleviate such conditions. This has included holding that there is a duty to reduce the risk of harm through positive conduct. [13]

17. In this case, Mr Heywood gave evidence that state officials employed no logical method to address the problem and to put in place a comprehensive programme to provide safe and adequate sanitation facilities to learners, adopting instead an *ad hoc* and arbitrary approach:

> *"[T]here seemed to be no rhyme or reason sometimes as to what school got onto a list and what school did not get onto a list. We were told for a long time that audits were being conducted and that once the audit was concluded it would be possible to draw up a proper list. We did in meetings question how schools got on or did not get on and in fact I would have to look through the papers overnight. But, we recorded in one letter that one of the responses that we got was that sometimes whether a school got on was something that was quite arbitrary."*[14]

18. In fact, well into the planning process, SECTION27 was "*still discovering schools that were not on the plan.*"[15] Mahlodumela Full Service School ("Mahlodumela"), which Michael attended, was not on the plan, but was

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13 *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 (5) SA 94 (CC), see especially para 45; *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) at para 59.

14 Transcript: p 496, lines 8 – 17.

15 Transcript: p 514, lines 9 – 10.

also not discovered by SECTION27 before Michael's death. During his cross-examination of Mr Heywood, the defendants' representative implied that the burden of discovering schools needing attention lay with SECTION27, and that the education authorities were not taking positive steps to identify these schools. [16]

19. This leads us to the third contextual feature of this case: The state was, or ought reasonably to have been, aware that Mahlodumela was a school in dire need of sanitation upgrades. Undisputed evidence has shown that the school, through its principal and other school governing body members, made repeated requests to the provincial education department for new toilets or for assistance in building new toilets between 2005 and 2009. [17]

C. *Background facts*

20. Five-year-old Michael Komape was in grade R at Mahlodumela.[18] He had been at the school for just three days at the time of his death.[19]

21. It is common cause that on 20 January 2014 at or around 10h00, Michael went to use the toilet at Mahlodumela during break-time[20], without adult

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16 Transcript: p 601, lines 2 – 9.

17 Transcript: pp 414 – 419; 955 – 966; 967 – 971.

18 Pleadings bundle: Pre-trial Minute, pp 123, para 28.

19 Transcript: p 983, lines 5-8.

20 Transcript: p 988, lines 7-12.

supervision[21]. The toilet was a pit toilet constructed from corrugated iron and a concrete base. [22]

22. Michael did not return to his classroom when the break ended at 11h00.[23]

23. The principal, Mrs Malothane, who was also Michael's class teacher[24], phoned James Komape, Michael's father to find out if Michael was at home. Mr Komape did not know as he was not at home. He tried to phone his wife but could not get through to her.[25]

24. Rosina Komape, Michael's mother, was at home when she was phoned by Mrs Malothane, who told her that Michael was not at school.[26] This was around 12h30.[27]

25. Mrs Malothane told Mrs Komape that they would look for Michael and call her when they found him. Mrs Komape decided to go to the school.[28] The

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21 Pleadings bundle: Pre-trial Minute, pp 123, paras 29-30.

22 Pleadings bundle: Pre-trial Minute, pp 123, paras 32-33.

23 Transcript: p 988, lines 24-25; p 989, lines 1-3.

24 Transcript: p 938, lines 6-9.

25 Transcript: p 137, lines 1-9

26 Transcript: p 59, lines 17-19.

27 Transcript: p 59, lines 23-25.

28 Transcript: p 60, lines 2-5.

staff told her that they had searched everywhere for Michael, even at the toilets.[29]

26. Mrs Komape went to the toilet area herself anyway. She could see water inside the pit toilet but she did not go closer as she was afraid of the long grass.[30]

27. The principal seemed to think that Michael could have gone to his old crèche. Mrs Komape disputed this but she was taken in one of the teacher's cars to Michael's old crèche to look for him.[31]

28. At Michael's old crèche, Mrs Komape came across little Tshegofatso ("Tshego") who was Michael's friend and also his classmate.[32] Tshego was the one who told her that her son had fallen into the toilet at school.[33]

29. Mrs Komape returned to the school where she discovered Michael's body in one of the pit toilets. One of his hands was raised out of the water. Mrs Komape fainted upon seeing her son's body. [34]

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29 Transcript: p 61, lines 17-20.

30 Transcript: p 64, lines 16-22.

31 Transcript: p 65, lines 1-8.

32 Transcript: p 65, lines 11-16.

33 Transcript: p 66, lines 7-9.

34 Transcript: p 66, lines 16-22.

30. Mrs Komape asked the teachers to help her pull Michael out of the toilet. She desperately believed that Michael could be rescued and taken to a hospital and that he would still be alive.[35] The principal however told Mrs Komape that they had called someone to take Michael's body out of the pit latrine.[36]

31. Soon thereafter, Mr Komape arrived at the school. He was accompanied by his friend Charles Malebana.[37] Mr Komape saw Michael's body inside the toilet which was filled with lots of water.[38]

32. Mr Komape also wanted to take his son out of the toilet but the principal told him that Michael had fallen into the toilet a long time ago and had passed away. She told him that they had to wait for "the first aid" to remove Michael's body.[39]

33. Mr Komape sat next to Michael's body waiting for them to arrive. Mr Malebana was with him. Mr Komape asked Mr Malebana to take

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35 Transcript: p 68, lines 20-25; p 69, line 1.

36 Transcript: p 68, lines 12-15.

37 Transcript: p 70, lines 22-25; p 71, lines 1-6.

38 Transcript: p 137, lines 24-25; p 138, lines 1-14.

39 Transcript: p 139, lines 3-20.

photographs of all the toilets because he saw that they "were not good for our children."[40]

34. Mr Malebana took photographs of the toilets with his cellphone camera while Michael's body was still in the pit. [41] He did so at the request of Mr Komape, to preserve evidence of Michael's death and the circumstances of its discovery.[42] The principal and the circuit manager, who was by then present at the scene, told Mr Malebana to delete the photographs from his cellphone because they did not want news of the incident to spread.[43] He refused and the circuit manager deleted the photographs.[44] Mr Malebana took more photographs of the toilets but after Michael's body had been removed.[45]

35. In the meantime, Michael's older sister Lydia, arrived at the school. She had been in Polokwane when her mother phoned her. Her younger brother Lucas was at home when she arrived. He told her that Michael had died. [46]

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40 Transcript: p 141, lines 18-23.

41 Transcript: p 175, lines 4-11.

42 Transcript: p 176, line 11 to page p 176, line 21; and pp 185 to 186, lines 17 to 2.

43 Transcript: p 144, lines 3-11.

44 Transcript: p 177, lines 2-18.

45 Transcript: p 178, lines 1-14.

46 Transcript: p 213, lines 7-9; p 214, lines 1-22.

36. Michael's body was removed from the pit toilet around 4pm[47] and covered in cloths that were on the floor next to the toilet.[48] Lydia Komape uncovered her brother's body and looked at him because she could not accept or believe that it was Michael.[49]

37. Michael's body was taken away for a post-mortem.[50] Dr Matlala, a forensic pathologist, carried out the post-mortem. The contents of his report (at pages 19-23 of the trial bundle) are common cause.[51]

38. The post-mortem report revealed that Michael's body was covered with maggots, and Michael's feet were wrinkled, because he had been submerged in the pit toilet for some time.[52] It also showed that Michael's stomach was distended probably because he had been gasping for air."[53]

39. Dr Matlala concluded that Michael had died due to the aspiration of foreign material which is consistent with drowning. His post-mortem

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47 Transcript: p 140, lines 16-18.

48 Transcript: p 144, lines 15-19.

49 Transcript: p 216, lines 6-22.

50 Transcript: p 145, lines 4-7.

51 Transcript: p 188, lines 6-12.

52 Transcript: p 194, lines 3-15; p 198, lines 23 – 25; p 199, lines 1 – 5.

53 Transcript: p 197, lines 23-25; p 198, lines 1-3.

conclusion that Michael's death was not from natural causes remains undisputed.[54]

40. Despite that undisputed conclusion about the cause of Michael's death, no inquest was instituted to establish responsibility for his death, despite the overwhelming public outcry. No criminal charges have been laid against anyone in connection with Michael's death.[55] These are manifest failures of responsibility that are at odds with the constitutional values of a caring public administration that are enshrined in section 195 of the Constitution.

41. Michael Komape's family did not have money to pay for his funeral.[56] His father expected the school principal and the SGB to come to his home and discuss the matter. But when he realised that they were not coming, he asked for donations to help him bury Michael.[57]

42. Rosina Komape lost her job as a domestic worker because she could not cope with the trauma of Michael's death.[58] She had been the breadwinner of the family.[59]

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54 Transcript: p 206, lines 4-16.

55 Transcript: p 208, lines 4-8; p 146, lines 22-25; p 147, lines 1-7.

56 Transcript: p 145, lines 20-24.

57 Transcript: p 145, lines 24-25; p 146, lines 1-8.

58 Transcript: p 75, lines 10-16; p 76, lines 1-6.

43. The Komape family did not receive any trauma counselling soon after Michael's death. The clinical expectation is that affected persons should receive an initial debriefing session within 72 hours of a traumatic incident.[60] A clinical psychologist, Mrs Sodi, conducted an assessment of each family member on 10 June 2014, almost five months after Michael's death. Her report, which is common cause,[61] reveals that the Komape's were suffering from Post-Traumatic Stress Disorder ("PTSD"), Bereavement and Depression.[62]

44. The family's first psychotherapy sessions began on 2 October 2015 with clinical psychologist, Stephen Molepo,[63] one year and nine months after Michael's death. All the family members still had symptoms of PTSD and Bereavement. Mrs Komape and Lydia Komape, particularly, were in a bad psychological state.[64]

45. Mr Molepo found that the family's grieving process was taking longer than normal and could have been complicated by the education department's

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59 Transcript: p 135, lines 21-22.

60 Transcript: p 271, lines 1-7.

61 Transcript: p 280, lines 9-11.

62 Pleadings bundle: p 32.

63 Transcript: p 265, lines 21-22.

64 Transcript: p 283, lines 22-25; p 284, lines 1-3; p 295, lines 16-24.

failure to reach out to them since Michael's death.[65] SECTION27, the Komape's attorneys, paid for the family to receive counselling.[66]

46. None of the defendants have to date explained to the Komape family how Michael ended up drowning in a pit toilet at his school.[67] The Komape family has not received an apology from any of the defendants for Michael's death, or for their conduct following his death.[68]

D. ***The issues in dispute***

47. The plaintiffs instituted a claim for damages relating to Michael's death in the school pit toilet. A few weeks before the trial was to begin, on 3 October 2017, the defendants made an offer of settlement that was described as insulting and rejected by the Komape family.[69]

48. On the first day of the trial and in his opening address, the defendants' counsel conceded liability in respect of claims A, C, D and E.[70] The issues in dispute were confined to claim B and whether the common law should be

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65 Transcript: p 272, lines 2-19.

66 Transcript: p 150, lines 19-25.

67 Transcript: p 146, lines 20-21.

68 Transcript: p 79, lines 18-24; p 150, lines 7-8.

69 Transcript: p 133, lines 11-21.

70 Transcript: p 44, lines 5-9; p 45, lines 17-25.

developed,[71] and the determination of the quantum in respect of claims A and C. The defendants' counsel stated that the defendants accepted the quantum of claims D and E.[72]

49. Later in the trial and in respect of claim C, the defendants consented to an order in respect of the plaintiffs but disputed the claim in respect of the minor children, Onica, Maria and Moses Komape.[73]

50. Therefore, the following issues fall to be determined by this Honourable Court:

50.1. Claim A – the amount of damages for the emotional trauma and shock experienced by the plaintiffs and the minor children;[74]

50.2. Claim B – damages for grief as a result of the death and the circumstances of the death of Michael, amounting to R2 000 000.00, alternatively, and on the same basis, constitutional damages in the amount of R2 000 000.00;[75]

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71 Transcript: p 46, lines 6-12; p 49, lines 1-8.

72 Transcript: pp 46; lines 19-25; p 47, lines 1-10; p 48, lines 23-25.

73 Transcript: p 330, lines 16-20; p 331, lines 7-10.

74 Pleadings bundle: p 22, paras 29-30.

75 Pleadings bundle: pp 23-24, paras 31-32.

50.3. Claim C – The future medical expenses in respect of psychological counselling sessions for the minor children, Onica, Maria and Moses Komape.[76] The particulars of claim do not include a claim for Moses Komape. However, the undisputed expert evidence of Mr Molepo laid the basis for including Moses, who undeniably is still traumatized by the death of his little brother. We will deal with Mr Molepo's evidence below.

E. *The constitutional rights and obligations at play*

51. We submit that the defendants' failures to perform the functions and responsibilities articulated in the particulars of claim (which failures the defendants have admitted)[77] caused them further to violate several fundamental rights of both the late Michael Komape and the plaintiffs and their minor children, on the one hand, and also those of the learners in Limpopo schools, on the other hand who are continually exposed to unsafe, unhealthy and dangerous sanitary conditions. The rights affected cannot, in in the context of this case, sufficiently and effectively be vindicated by existing private law remedy for pain and suffering.

52. The defendants acted in breach of the rights to life, dignity, equality, and basic education. They also violated the integrity of the Komape family, and

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76 Pleadings bundle: pp 24-25, paras 33-34.

77 Pleadings bundle: pp 125 – 125.

failed to prioritise the best interests of the child as required by section 28 of the Constitution. These constitutional rights have been drawn from international instruments, including the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the African Charter on Human and People's Rights ("African Charter") and the Convention on the Rights of the Child ("CRC"). South Africa has ratified all of these instruments and thus bears obligations in terms of international law as well.

53. For purposes of the damages claim (prayers 2 and 3),[78] the violations of the plaintiffs' rights are relevant. For purposes of the declarator (prayer 1),[79] the violations of Michael's and similarly situated learners' rights are relevant.

Right to dignity

54. The right to dignity inheres in every person, and there is a particular obligation on the State to uphold this right.[80] Courts have held that overcrowded, decrepit or otherwise poor toilet conditions constitute a violation of the right to dignity.[81] It follows that the use of a toilet which is,

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78 Pleadings bundle: p 26, paras 41.2 and 41.3.

79 Pleadings bundle: p 26, para 41.1.

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

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

by all accounts, squalid and unsafe,[82] and results in death, is an infringement of the victim's right to dignity. The violation is exacerbated when a body is left to degrade in a toilet pit after the death.

55. We submit further that the family of the victim, in this case, the plaintiffs, also experience harm to their dignity. For example, Lydia testified that "*[i]f he died in another way we would have talked about it. But the fact that he died in the toilet where there are faeces of other people which was there long time ago, that one we would not have talked about it. nobody wants to talk about the things that are in the toilet because, they are disgusting."* [83] She continued:

> *"A person who died in the toilet is not a person who died somewhere else. We do not know the faeces that killed him who they belonged to. So nobody wants to die in that way. Nobody would want any family member to touch or kiss or hold faeces because they are disgusting."* [84]

56. In this case, this right to dignity has been violated on the part of both the late Michael, and the plaintiffs on the following primary grounds:

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82 Mrs Komape testified that the block of toilets was "rotten" (Transcript: p 61, line 24, see also p 134, lines 19 – 21) and that you could "see the inside" (Transcript: p 64, line 15). They were additionally surrounded by waist-high bush (Transcript: p 72, lines 1 – 19). See also expert evidence which was undisputed at pp 420 – 427.

83 Transcript: p 227.

84 Transcript: p 228.

56.1. The protracted delay in removing Michael's body from the pit into which he fell and drowned. It is common cause that Michael's body was not retrieved when it was found, but that it took *"some time"*, [85] at least five hours on the evidence. In fact, Mrs Komape testified that when she first saw Michael's hand *"I thought that we can be able to rescue him and we can take him to the hospital and he can still be alive."* [86]

56.2. The circumstances of Michael's death and the manner in which his body was treated were particularly cruel, inhuman and degrading. Michael's body was left in a pool of human waste to attract maggots and insects long after his death.

56.3. Mr Komape (together with his friend, Mr Malebana) were treated unfairly in the aftermath of Michael's death, in that Mr Malebana was forced to delete photographs of the scene on the (false) basis that they were acting illegally. He took these photographs as requested by Mr Komape.[87]

56.4. The uncertainty and associated anxiety of trying to determine Michael's whereabouts. Mrs Komape testified that she went from

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85 Transcript: p 70, line 8; p 190, lines 22 – 23. Mr Komape also testified that the school principal told him that *"it has been long that Michael passed away. He fell in the toilet a long time"* (Transcript: p 139, lines 14 – 16).

86 Transcript: p 68, line 24.

87 Transcript: p 175, line 19 ff.

home, to the school in the rain and carrying her baby. After arriving at the school, she accompanied teachers to Michael's old crèche where she learned from one of the children that Michael had fallen into the school toilet. [88]

56.5. The evidence of Mrs Malothane that they went to the crèche because two previous searches for Michael proved fruitless,[89] is highly improbable and should be rejected. This is even more so in the light of Mrs Malothane's admission that the search included a search in the toilets themselves. Remarkably, the defendants did not provide any acceptable explanation why the first search did not reveal that Michael had drowned in the toilet.

57. The manner in which each of the plaintiffs learnt of Michael's death:

57.1. Mrs Komape was the first family member to see Michael's body:

> *"Tshego pointed at the toilet and said Michael fell in here… When I looked inside the toilet I saw the hand of Michael in the toilet. I said my child died while he was looking for help. Then my child died while he was looking for someone to rescue him, because he raised his hand and he thought*

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88 Transcript: p 66.

89 Transcript: p 989, line 14 to p 990, line 23.

> *that if he raised his hand someone will come and see him and took him out and pull him with the hand and from there I fainted."* [90]

58. Mr Komape learned about Michael's death by overhearing it over the telephone and proceeded to run from a neighbouring village where he was at the time of the death to Mahlodumela. [91] He spent the rest of the afternoon next to the pit in which his son's body was, waiting for it to be retrieved. [92]

59. Lydia learned over the telephone that something bad had happened in Chebeng and rushed home in a taxi from town. She then learned from her younger brother, Lucas, about Michael's death and went to the school where she found his corpse. [93]

60. Lucas learned about Michael's death from a relative while on his way home from school. When he tried to get to the toilet where Michael had died, the police prevented him from doing so as they *"did not want the news to spread"*. Lucas returned home alone, and to an empty house. [94]

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90 Transcript: p 66, lines 16 – 22.

91 Transcript: p 137, lines 17 – 19.

92 Transcript: p 140, lines 19 – 21.

93 Transcript: pp 214 – 216.

94 Transcript: pp 236 – 238.

61. The inherently outrageous and execrable manner of his death, and the disfigurement which it caused, including maggots on the body, bloody froth coming out of the mouth, swelling of the brain and head, excessively swollen lungs, a distended or inflated stomach containing air and a foul-smelling greenish fluid, wrinkled feet and nibbled skin on the palm of Michael's hand. [95] As Mrs Komape explained, "*If Michael died because of illness I would be able to say that he was ill or if it was an accident I would be able to say that it was an accident but the situation like this it is very painful.*" [96]

62. The flippant gestures towards the plaintiffs' loss, instead of patient and attentive concern. As Mrs Komape articulated during cross examination, "*I was looking at the fact that because the child died in their care they will do everything.*" [97] Mr Komape testified, *"[t]he death of Michael is still painful to me because the government did not attend anything to it.*" [98]

63. The visit by the school principal, Mrs Malothane, came many days after Michael's death, and she did not ask Mrs Komape how she was doing. [99] Mrs Malothane subsequently chose not to interact with the Komape

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95 Transcript: pp 194 – 205.

96 Transcript: p 93, lines 14 – 17.

97 Transcript: p 105, lines 24 – 25.

98 Transcript: p 148, lines 15 – 16.

99 Transcript: pp 73 – 74.

family, going so far as to allow Michael's name and image to be used without his parents' permission. [100]

64. The plaintiffs never received any visit or apology from the education authorities. [101]

65. The department arranged, at arms' length, [102] for the plaintiffs to receive food and vouchers worth R7,000, [103] and an insufficient number of chairs and tables for the funeral, [104] but did not personally visit the Komape's. [105]

66. The defendants only offered a form of compensation in acknowledgment of their liability three and a half years after Michael's death and close to the date of the trial. As Lydia explained, "*If the department came after a week of Michael's burial we could have accepted the offer that they are*

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100 Transcript: pp 996 – 997.

101 Transcript: p 79, lines 22 – 24; p 99; p 146; p 150, lines 3 – 8; p 246, lines 16 – 19.

102 Transcript: pp 151 – 153. The plaintiffs did not even know exactly from whom the few minor donations came, or associated donations with the service providers (Transcript: p 121, lines 13 – 16; p 160, lines 23 – 25; pp 161 – 162; p 223, lines 8 – 10).

103 Transcript: p 103, lines 16 – 17; p 103, lines 20 – 24.

104 Transcript: p 120, lines 20 – 21. It was further clarified that the funeral support was generally insufficient for the number of mourners and visitors who came to the family's home and to Michael's funeral (Transcript pp 127 – 130).

105 Transcript: pp 73 – 74.

giving to us. Not the insult that they gave after four years passed away, passed." [106]

67. Finally, the defendants did not arrange counselling for the family,[107] and persist in their denial that the minor children require further counseling.

68. These grounds on which the right was violated go beyond the ordinary pain and suffering experienced in the course of a death, even in the course of a death of a child in other circumstances.

69. Furthermore, the absence of an explanation from the defendants' officials about the cause of Michael's death, the lack of investigation into the causes of that death, the lack of apology in the immediate aftermath of Michael's death, and upon the defendants' belated admission of negligence, intensify the violation of the right to dignity of the Komape family.

70. In the present case, the defendants' violation of dignity extends to learners who are exposed to intolerable and risk-laden sanitary conditions that still persists in several schools in Limpopo Province. We refer to the following uncontested evidence which shows how the right to dignity of these learners is engaged and violated in this case:

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106 Transcript: p 222, lines 7 – 10. See also the testimony of Lucas under cross examination: "They should have come after the funeral. Maybe five days after the funeral. Now they see that there is a court date they come with the offer. Maybe if they came that time we would have accepted the offer" (p 255, lines 4 – 8).

107 Transcript: p 102, lines 6 – 8; p 131, lines 21 – 22; pp 232 – 233; p 258, lines 17 – 23.

70.1. Mr David Allen Still referenced research material of his own and colleagues into sanitary conditions in Limpopo prepared at the instance of world agencies such as the World Bank.[108] His research model, including data collection though direct observations, interfaces with learners, principals and cleaners was explained to the Court, and not disputed by the defendants.[109] His conclusions can therefore safely and reliably be accepted by the Court.

70.2. He concluded that toilets and sanitary facilities built for learners are "*dangerous*" of "*very poor hygiene*" and not supervised by the school staff.[110]

70.3. He also noted that toilets are poorly designed, poorly maintained and unsafe.[111]

70.4. He then concluded that the "*smelly, dark, scary, filthy conditions in the toilet undermine learner's dignity and psychological well being*".[112] This conclusion must be viewed from his common-sense perspective that sanitation is a "*vital human need*".[113] We

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108 Transcript: p 376, line 18 to p 378, line 16; page 388, lines 6 to 16.

109 Transcript: p 390, lines 2 to 21.

110 Transcript: p 389, lines 3 to 11; page 391, line 6 to page 392, line 3.

111 Transcript: p 389, lines 12 to 19.

112 Transcript: p 394, lines 18 to 25.

113 Transcript: p 389, lines 20 to 21.

therefore submit that learners at school cannot avoid the need to respond to that vital human need, when the call of nature requires them to do so.

70.5. Of significance is that Mr Still identified the danger of drowning in a pit toilet as a substantial risk identified by learners when they use unsafe toilets. He noted that the diameter of the toilet seats installed in the toilet was unsafe, particularly for Grade R learners.[114]

70.6. Mr Still also directed attention to the fear expressed by learners who are scared to go to the toilet because there is a devilish creature there known as "*Pinki Pinki*".[115]

70.7. Mr Still was not alone in his description of the decrepit and dilapidated sanitary conditions of schools in Limpopo province. Mr Heywood canvassed recent conditions of several affected toilets in Limpopo,[116] and also with reference to photographs recently taken from affected schools and included in the trial

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114 Transcript: p 409, line 19 to p 410, line 8.

115 Transcript: p 402, line 6 to 21; page 404, lines 12

116 Transcript: p 553, line 19 to p 555, line 2; p 556, lines 17 to 24; and p 558, lines 3 to 9.

bundle.[117] The photographs were authenticated by Mr Solanga Solly Milambo.[118]

70.8. None of the defendants' witnesses disputed the above evidence of the plaintiffs. Mr Freddy Linanye Mabidi called on behalf of the defendants indirectly confirmed that there were as a fact schools in Limpopo which still require sanitation infrastructure.

71. In the light of the above evidence we submit that the continuing violation of the learners' rights to human dignity has been manifestly and demonstrably proven. It is a widespread and wholesale violation whose scale and significance requires a remedy that is transformative and exemplary.

Right to equality

72. The South African schooling system is a *locus* of inequality in our society. This much has been recognised by the Constitutional Court:

"Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The

117 Trial bundle: vol 3, pp 865 to 894.

118 Transcript: p 691, line 17 to p 692, line 12.

> *cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us... "It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education."* [119]

73. Section 9(3) of the Constitution prohibits unfair discrimination, as does the CRC in respect of children in particular.[120] It means that school infrastructure, including sanitation services, many not unfairly

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119 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) paras 45 – 46.

120 Article 2 of the CRC.

discriminate between people on listed grounds. Race and social origin are both listed grounds.[121]

74. In this case evidence establishes the tardy pace of rural school sanitation development in Limpopo, and the resultant inequality in sanitation services.[122] Mr Heywood explored at length the engagement that SECTION 27 has had with the National and Limpopo Provincial Departments of Education on a year to year basis since 2012, after the latter was put under section 100 intervention in terms of the Constitution. We do not reappraise his evidence in detail. We merely highlight the following:

74.1. The first and second defendants were aware of the dire and dangerous conditions of Mahlodumela toilets. Their attention was directed to those conditions since 28 June 2004 when the principal, Mrs Malothane, made application to the Provincial Department to build new toilets given the "*serious hazard*" of the existing toilets to those who were using them at the time.[123]

74.2. Her application went unanswered by the Department.[124] She then submitted a second application a year later in 2005.[125] That

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121 Sections 9(3) and 9(4) of the Constitution.

122 Transcript: p 496; p 566, lines 14 – 22; p 376, lines 24 – 25; p 377, lines 1 – 3.

123 Transcript: p 954, lines 1 to 24.

124 Transcript: p 956, lines 11 to 24.

125 Transcript: p 955, lines 11 to p 956, line 5.

application received no attention from the Department, let alone an acknowledgement of receipt.[126]

74.3. Given the seriousness of the situation, Mrs Malothane addressed a third application to the Department for assistance to build the learners' toilets. She did so on 11 February 2008.[127] In the now familiar, unresponsive conduct, that application was also unanswered and not acknowledged by the Department.[128]

74.4. As and when she submitted a series of the above requests, it was beyond contention that the existing toilets at Mahlodumela were damaged and not fit for sanitary purposes.[129]

75. The lack of response by the Department to the repeated requests for assistance (in the face of manifestly dangerous sanitary conditions at Mahlodumela) was unexplained and remains unexplained in these proceedings. It represents a crass breach of the right to equality and equal treatment of the learners at Mahlodumela. It also impaired and failed to promote the best interests of learners at that school.

76. The breaches nevertheless continued because the School Governing Body of Mahlodumela ("the SGB") resorted to its modest financial resources to

126 Transcript: p 956, lines 7 to 18.
127 Transcript: p 957, lines 13 to 24.
128 Transcript: p 957, line 12 to page 958, line 6.
129 Transcript: p 958, lines 8 to 15.

deal with that risk by upgrading toilets, as a temporary measure.[130] We emphasize that the toilets so constructed by the SGB were "*temporary toilets*". They were constructed by "*an ordinary person from the village*" without any inspection as to their soundness and structural quality.[131]

77. In due course the temporary toilets became permanent. Their structural soundness was exposed to the elements and had become seriously compromised by the time Michael fell into one of those toilets. Community members who arrived at the scene of Michael's death were incensed and destroyed the toilets because they did not want their children to use them.[132]

78. We submit that the submissions above re-enforce and accentuate the defendants' breach of the right to equality and equal treatment asserted by the plaintiffs, because the defendants caused the learners to use toilets which were not fit for purpose and which no one ought to use. The violation and its effects has a dimension of geographical and social distinction that are strongly racialised. [133] This too adds to the necessity to remedy the defendants' violation by means of the special remedy we contend for.

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130 Transcript: p 962, lines 11 to 19.
131 Transcript: p 971, lines 5 to 23.
132 Transcript: p 987, line 8 to p 988, line 6.
133 Geographical location is, in any event, comparable to the listed grounds, and is therefore treated as such (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC)).

79. We submit that the fact that Michael was an African learner living in a village in Limpopo and that he died in a school toilet is not a coincidence. It is precisely because Michael was an African learner at a rural public school that he died and that he died in the manner in which he did. It is difficult to argue that this could have happened to a learner of another race or in an urban school. It follows then, that this type of pain, suffering and grief (associated with Michael's death by drowning in a pit toilet) could not have befallen anyone other than a rural African family.

80. The uncontested evidence of Mr Still confirms that this is a rural problem, and he confirms the extremely decrepit, dangerous and unhygienic conditions that African learners are required to suffer. [134] Reading from a report, Mr Still testified:

> *"Smelly, dark, scary, filthy conditions in the toilets undermine learner's dignity and psychological well being. The overwhelming characterisation of toilets by learners as smelly – 71%. Dirty – 63%. Broken – 36% and dangerous – 31% paint a picture of the degrading experience many learners endure when they use the toilets. 18% found this unbearable and did not use the toilets. Fear of snakes, insects and monsters in the toilet were mentioned. The discomfort described by learners was exacerbated by toilets often*

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134 Transcript: p 389.

being far from the main school buildings and poorly monitored by staff." [135]

81. Mr Still's research is confirmed by photographic evidence before the Court of similar conditions at rural schools in Limpopo. [136]

Right to family life

82. Although the Constitution does not explicitly refer to a right to family life, it has been held to form part of the right to dignity, to the extent that one's dignity is infringed when family life is not protected. [137] It is also mentioned in terms of its importance to children in section 28(1)(b) of the Constitution which provides that, *"Every child has the right to… family care or to parental care or to alternative care when removed from the family environment."* In this way, the right to family life is distinct from European law, which associates the right to family life with privacy rights. Family life is, in any case, a self-standing right worthy of protection under Article 18 of the African Charter, which provides:

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135 Transcript: p 394, lines 23 – 25; p 395, lines 1 – 8. See also pp 408 – 409.

136 Transcript: pp 428 – 436.

137 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 37.

> *"(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.*
>
> *(2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community."*

83. The right is also made explicit in the ICCPR which provides that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State", and is strongly articulated in the ICESCR:

> *"The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."*[138]

84. It is not in dispute that the Komapes' family life was irreparably damaged by Michael's death, by the manner in which it occurred, and by the way in which they were left to cope after his death. They were a family of nine

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138 Article 10(1) of the ICESCR.

(until Michael's death), and lived together under one roof.[139] As Mrs Komape testified, "*in my family now we are no longer the same because we are feeling the pain.*" [140] Lydia also explained: "*It was not nice at home. We were always sad. We could not talk to each other and we forgot things and we were avoiding each other.*" [141] As we stated above, Mrs Komape, who did not receive any counselling, and who was the family breadwinner, soon lost her job because her grieving prevented her from returning to work.

85. The family's experience was confirmed Mr Molepo:

> *"[T]hey reported, Ms. Komape especially, that she is often isolating herself from the rest of the family. Mostly preferring to stay alone. Out of the disturbance of the rest of the other people and she indicated that she usually reacted with irritability most of the time and she felt that she would need to talk less with them during that period."* [142]

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139 Transcript: p 56, line 2; p 58, lines 8 – 22.

140 Transcript: p 110, lines 2 – 4.

141 Transcript: p 218, lines 6 – 8. See also p 285, lines 19 – 20; p 286, lines 2 – 7

142 Transcript: p 286, lines 1 – 7.

86. Mr Molepo also testified to a breakdown in the relationship between the parents in the Komape family. [143]

87. We submit that the unsettling of the family was exacerbated by the nature of Michael's death coupled with the lack of meaningful and adequate support (material and non-material) in the wake of his death. This is in accordance with constitutional jurisprudence which has held that the right to family life is violated when families are separated,[144] and where *"intimacy and love"* are replaced by a *"chasm"*. [145]

Right to life

88. We submit that Michael's right to life was violated through the defendants' failure to protect it. This is a violation of constitutional rights, and the CRC. [146]

89. The right to life imposes, like all rights in the Bill of Rights, positive obligations on the State. [147] In the past, the right to life has been found to have been violated by the failure by authorities in the police ministry to take preventative operational measure to protect individuals whose lives

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143 Transcript: p 285, line 19.

144 *Dawood* (above n137); *Dladla v City of Johannesburg* [2014] ZAGPJHC 211, at paras 35 – 40.

145 *Dladla v City of Johannesburg* 2017 ZACC 42, para 49.

146 Section 11 of the Constitution and Article 6 of the CRC.

147 Section 7(2) of the Constitution.

are at risk, [148] or the failure by rail authorities to take reasonable measures to protect the safety and security of rail users. [149]

90. Following this jurisprudence, we would argue that Michael's right to life was violated through the failure by the education authorities to take reasonable measures to identify and eradicate unsafe and inadequate pit toilets in Limpopo before a death occurred, particularly in the light of the uncontested evidence that they knew about the state of the toilets. Indeed, the defendants' counsel conceded that it was an accident that could befall anyone, and that Michael was unfortunate that he was the one who used the toilet on that day.[150]

Right to basic education

91. Both Michael and other Mahlodumela learners' right to a basic education as entrenched in section 29(1)(a) of the Constitution, were violated as a result of having to use dangerous toilets when at school.

92. The right to basic education incorporates infrastructure as one of its components:

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148 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

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

150 Transcript: p 245, lines 13 – 18.

> *"The state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: - schools, classrooms, teachers, teaching materials and appropriate facilities for learners."*[151]

93. In addition, the infrastructure should be safe.[152] The defendants have accepted this through the publication of National Norms and Standards for School Infrastructure. The right to basic education is therefore violated when safe infrastructure is not provided.

94. They have also accepted it in ratifying the ICESCR, which contains the right to basic education. In a general comment to ICESCR, the Committee on Economic, Social and Cultural Rights stated that:

> *"functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they*

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151 *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) at para 20.

152 *Section 27 v Minister of Education* [2012] 3 All SA 579 (GNP), which concerned textbooks, the court stated that there are *"compelling arguments"* that the right to a basic education *"must and should, in order to be meaningful, include such issues as infrastructure"* (at para 22).

operate; for example, all institutions and programmes are likely to require … sanitation facilities for both sexes..." [153]

Children's rights and interests

95. It cannot be over-emphasised that the spectre of Michael's death affects every aspect of this case. The fact that this case concerns children and arises from the death of a child triggers the operation of section 28 of the Constitution.

96. Section 28(2) of the Constitution provides that "*A child's best interests are of paramount importance in every matter concerning the child.*" It is now well established that this provision fulfils two separate roles. The first is as a guiding principle in each case that deals with a particular child. The second is as a standard against which to test provisions or conduct which affect children in general. [154]

97. Sachs J outlined the wide ambit of section 28 in *S v M*: [155]

"*The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so*

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153 General Comment 13 at para 6.

154 *Teddy Bear Clinic for Abused Children & Another v Minister of Justice & Constitutional Development & Another* 2014 (2) SA 168 (CC) at para 69.

155 *S v M* 2008 (3) SA 232 (CC) at para 15.

must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights."

98. He added that:

"*Section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice."*[156]

99. It is therefore against the backdrop of an understanding of what is or would be best for children that these rights must be interpreted.

99.1. It cannot be in the best interests of any child that school toilets are allowed to lie in squalid conditions and that they are expected to use them. The impact of the state of these toilets is demonstrated

156 At para 16.

in the most macabre sense through Michael's death, but is also addressed in a more day-to-day sense through Mr Still's evidence, referred to above.

99.2. It also cannot be in any child's best interests that a school fails in its duty of care towards its learners. The evidence shows that the staff of Mahlodumela failed to act expeditiously and diligently in that they failed to notice immediately that Michael was missing from class, and they failed to conduct a thorough and effective search for Michael in time for him to still be saved.

Section 195

100. Section 195 sets out the (democratic) principles which govern public administration. These include the principles of openness, responsiveness and accountability. The founding values of our Constitution also include these democratic principles.[157] In the course of failing to fulfil the above-cited obligations, the defendants also failed to meet the standard set in section 195 of the Constitution. Put differently, having acted in the manner in which it did prior to, during and after Michael's death, the State failed to promote an *"efficient, economic and effective use of resources"*, was not

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157 Section 1(d) of the Constitution.

accountable, and did not foster transparency by providing *"timely, accessible and accurate information"*. [158]

101. Evidence has established that in the years leading up to Michael's death:

101.1. Sanitation targets were not achieved due to delays in procurement processes. Mr Mclaren testified that the provincial department's target for the 2012/13 financial year was to provide 66 schools with toilets. The provincial department failed to provide a single school with sanitation in that financial year.[159] This in turn resulted in underspending. [160]

101.2. The provincial department underspent hundreds of millions of Rands. For example, in the 2012/2013 financial year (the year before Michael's death) it underspent an amount of R960 million. A significant portion of this (the underspending which was not condoned) was therefore surrendered to the National Treasury to be allocated elsewhere. The pattern of underspending continues.[161]

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158 Section 195(b), (f) and (g) of the Constitution.

159 Transcript: p 633 lines 18 to p 634 line 5.

160 Transcript: p 634, lines 3 – 5; pp 677 – 678.

161 Transcript: p 635, lines 10 – 15; p 641, lines 18 – 19; p 677, lines 17 – 20.

101.3. The provincial department accumulated billions of Rands in unauthorised expenditure. [162] Again, in the financial year preceding Michael's death, R99 million was unauthorised expenditure from a budget of R2.3 billion.

101.4. By the 2012/2013 financial year, the provincial department had underspent R960 million of its budget, and had accrued R2 billion of unauthorised expenditure.[163]

102. The evidence reflects, we submit, a recurring failure by the Provincial Department to meet the standards set in section 195 of the Constitution.

Conclusion

103. From the above there can be no doubt that a number of inter-linking constitutional rights – including those of Michael, his family and learners throughout Limpopo – were egregiously violated by the defendants and continue to be so violated.

104. We emphasise that the violation is imputable to both the national and provincial departments by virtue of the fact that, since 5 December 2011, the Provincial Department was under the administration of the National

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162 Transcript: pp 637 – 638; 644, lines 6 – 7; p 678.

163 Transcript: p 639, lines 21 – 25; p 640, lines 1 – 2.

Department in terms of section 100(1)(b) of the Constitution. As a result of the administration, the National Department assumed not only the Provincial Department's powers, but also its obligations. [164]

105. In the light of the above contention we submit that there is a well-founded basis for a remedy in a form of constitutional damages, as an effective means to vindicate the rights that are engaged and avoid the repetition of their violation.

106. The remedy is justifiable for the following reasons:

106.1. The violations are of a continuing nature, because there is undisputed evidence of schools which still do not have adequate sanitation.

106.2. The impact of the violations is that learners are afraid of using inadequate sanitation because they fear that they might drown.

106.3. The defendants, especially the Limpopo Department of Education, have the necessary and sufficient financial resources to eliminate poor sanitary conditions and remove risks associated therewith. Mr McLaren's evidence of unspent funds, allocated specifically to

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164 *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) at para 8.

the Department for upgrades to sanitation, in five consecutive financial years is undisputed. In fact, Mr Mabidi who was called by the defendants confirmed that evidence.

106.4. It follows therefore that this is not a case of the State's positive or negative breach of fundamental constitutional rights due to lack of financial resources. Had the defendants faithfully discharged their obligations, they would have progressively realized the rights of the learners. Instead, they failed and still continue in their failure to fulfill those rights.

107. We elaborate upon the need for this remedy in section **I** of these submissions.

F. *The defendants' approach to this litigation*

108. The evidence of the plaintiffs, as set out below, demonstrates a callous and uncaring approach by the defendants to their tragic loss, which compounded the emotional shock and grief that the plaintiffs experienced. The defendants' very characterization of Michael's death as an "accident"[165] and "an unfortunate incident"[166] is an attempt to evade responsibility for his safety away by those who were *in loco parentis* and

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165 Pleadings bundle: p 97, para 20.4.

166 Transcript: p 438, line 22.

had a duty of care towards Michael. In creating the conditions that led to Michael's death, and in the way that they treated the Komape family, the defendants have continued to marginalise the family, and to hamper their full enjoyment of their constitutional rights.

109. This attitude has unfortunately continued to play out in the manner in which the defendants conducted themselves in this litigation. We deal with this briefly in these heads of argument because it is relevant to the plaintiffs' ongoing psychological trauma. It is also indicative of the defendants' likely disregard of the rights of the poor going forward, and thus goes to the declaratory relief and constitutional damages the plaintiffs seek.

The defendants failed to disclose the nature of their defence

110. The plaintiffs issued summons on 26 June 2015.[167] In their plea,[168] the defendants baldly denied the allegations relied on by the plaintiffs, but did not disclose the true nature of their defence.

111. The pre-trial conference was held on 11 August 2017.[169] The minutes of this pre-trial conference record the defendants' denial of the dilapidated

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167 Notice bundle: volume 1, pp 1 – 5.

168 Pleadings bundle: pp 87 – 104.

169 Pleadings bundle: pp 117 – 133.

state of the toilets at Mahlodumela, and their wrongful and negligent conduct in their failure to ensure that learners attending the school were protected from the harm that the toilets presented.

112. Over and above these denials, however, there was no indication from the defendants as to what their defence would be. Moreover, although the defendants indicated their intention on the first day of the trial not to call any witnesses, and later stated that they would be calling three and then four witnesses, the identities of these witnesses and the aspects of the defence with which each witness would deal only became clear at the close of the plaintiffs' case, and upon the calling of each of the defendants' witnesses. They ultimately called five witnesses.

113. The nature of the defence did not become any clearer in the course of cross-examination. During their cross-examination of the plaintiffs and other witnesses, the defendants sought to place certain issues in dispute, but in doing so they did not put any specific propositions to the plaintiffs. The plaintiffs' representatives recorded this objection,[170] arguing specifically that they did not understand the nature of the defence that was being put to their witnesses during cross-examination. Unfortunately, the nature of the defence remains unclear to the plaintiffs, even at this late stage in the proceedings.

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170 Transcript: p 584, lines 3 – 18.

114. It is trite that, in defending a claim, a defendant states his or her defence with sufficient precision to enable the plaintiff to know what case it has to meet.[171] The defendants' bald denials and generalized disputes failed to place the plaintiffs in a position that they understood and could respond to the defence. Their conduct in this regard was unfair and in breach of the rules of this Court.

115. Moreover, the witnesses called by the defendants gave evidence that was not put to the plaintiffs during cross-examination.[172] This is patently at odds with trial procedure and undermines these proceedings in their entirety. The only conclusion that can be drawn is that the evidence of the plaintiffs remains undisputed.

The defendants' attempted escape from accountability

116. The defendants and their representatives have conducted this case as if it were an ordinary dispute between private parties. They have adopted a line and style of litigation that disregards the circumstances of this case: the death of a minor child in the most egregious conditions in the context where they had direct obligations to ensure his safety. The state has clear obligations in relation to minor children, as set out in detail above.

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171 See *Neugebauer & Co Ltd v Bodiker & Co (SA)* 1925 AD 316 at 321, followed in *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542.

172 See, for example, transcript: p 769, line 13 ff.

117. In their evidence, the plaintiffs implicated a number of individuals not only of wrongdoing,[173] but also of possible criminal conduct such as defeating the ends of justice. Their evidence is undisputed.[174]

118. Indeed, apart from Mrs Malothane, the defendants did not call as witnesses any of the individuals implicated by the plaintiffs, either to dispute the allegations or to account for their conduct. We submit that the inference to be drawn from this is that the defendants do not consider themselves duty-bound to provide an explanation to the plaintiffs or to the Court.

119. In addition to the breaches of their specific obligations, the defendants' conduct in these proceedings is in breach of sections 1(d) and 195 of the Constitution.

The offers of settlement

120. The defendants made an offer of settlement on 3 October 2017.[175]

121. Following a rejection of the offer by the plaintiffs, the defendants filed a further notice in terms of Rule 34, repeating the same offer that had

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173 This is common cause as reflected in the defendants' concession of liability for the delictual claims.

174 Transcript: p 182 line 11 to p 186 line 5.

175 Notice bundle: volume 2, pp 242 – 244.

already been rejected by the plaintiffs.[176] This offer, again filed with the Court on 11 October 2017, stated as follows:

> *"Defendants concede merits in relation to the delictual claim and make an offer in full and final settlement of the delictual claim in the amount of R450 000 (Four Hundred and Fifty Thousand Rand).*
>
> *Defendants tender Plaintiffs' costs of litigation on party and party scale up until the last day within which the Plaintiffs are expected to react to this offer."*

122. The plaintiffs were understandably confused by this offer of settlement, and particularly the defendants' concession of the "merits in relation to the delictual claim." Given that the plaintiffs' cause of action is based in delict, it was not clear to them whether the defendants' concession related only to certain aspects of the claim, or to the claim in its entirely.

123. It was only on the first day of the trial, 13 November 2017, that the defendants' representative clarified their position: their concession

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176 Notice bundle: volume 2, pp 245 – 249.

related to liability but not quantum in respect of claim A, and both liability and quantum in respect of claims C, D and E.[177]

124. As we address below, the defendants sought to depart from these concessions almost as soon as they had made them.

Attempts to depart from concessions made

125. In their cross-examination of the plaintiffs, the defendants attempted to reopen issues that they had already conceded. This is evident throughout the transcript of the proceedings. The following examples bear mentioning:

125.1. In their cross-examination of Mr Komape, the defendants' counsel introduced propositions regarding alleged contributions by the defendants to funeral expenses, including catering for the funeral. Indeed, their representative directly challenged the fact of the claim for funeral expenses[178] and raised the issue of these contributions during his cross-examination of each of the

177 Transcript: p 44, lines 5 – 9.

178 Transcript: p 155, lines 9 – 22.

plaintiffs,[179] despite having conceded liability for funeral expenses.

125.2. In a similar vein, the defendants' representative put to all four plaintiffs during cross-examination an allegation that the defendants had already paid for the services of an undertaker.[180] The defendants' representatives put this allegation to the plaintiffs despite their concession of liability for these expenses. Moreover, the witness whose evidence they put to the plaintiffs was never called.

125.3. They adopted the same approach in relation to claim C: having accepted that they are liable for the costs of the plaintiffs' counselling that they received and continue to receive independently of the defendants, they then put to each of the plaintiffs the proposition that they had already offered counseling to them.[181]

126. A large portion of the evidence led by the defendants also related to matters that had already been conceded. The defendants called five

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179 Transcript: p 105, lines 14 ff; p 222, line 22 ff; p 247, lines 1 ff.

180 Transcript: p 120, lines 11 – 13; p 161, lines 2 – 4; p 223, lines 14 – 16; p 247, lines 1 – 19.

181 Transcript: p 102, lines 22 – 25; p 164, lines 13 – 17; p 226, lines 4 – 13; p 253, lines 22 – 25.

witnesses in total, three of whom testified entirely to matters that had already been settled in terms of the consent order of 17 November 2017:

126.1. Ms Reina Molapo testified on 23 November 2017.[182] Her evidence related to the counseling services that the defendants had allegedly offered to the plaintiffs following Michael's death. We understand this evidence to relate to claim C, which was settled on 17 November 2017.[183] Indeed, Ms Molapo was only requested to give her oral evidence in the week of 20 November, after claim C had been settled.[184] Moreover, the only aspect of this claim that falls outside of the consent order is counseling for the minor children in the Komape family. Ms Molapo confirmed that she never had any contact with these children.[185]

126.2. Ms Zanele Mosisibi Hlongwane testified on the same date.[186] She, too, spoke to the counseling allegedly offered to the plaintiffs after Michael's death. Like Ms Molapo, Ms Hlongwane testified after the parties had settled claim C. She also provided no counselling to the minor children, and could therefore not give evidence as to

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182 Transcript: p 755, line 16 ff.

183 Transcript: p 370, line 15 ff. The order appears at p 372.

184 Transcript: p 767 line 22 to p 768 line 11.

185 Transcript: p 801, lines 6 – 19.

186 Transcript: p 802, line 12 ff.

their counseling needs going forward.[187] Indeed, Ms Hlongwane did not recall the names of the minor children.[188]

126.3. Ms Mmakoma Rasekgala, who testified on 28 November 2017, gave evidence on the food donated by the defendants to the Komape family.[189] In addition to this evidence being common cause, the first and second plaintiffs having admitted to these donations during cross-examination,[190] the defendants had already undertaken to pay the funeral expenses claimed by the plaintiffs as recorded in the consent order of 17 November 2017. The purpose of this witness' testimony is therefore unclear.

127. It is not clear on what basis the defendants called these witnesses. The only inference that can be drawn is that they were called to testify in an attempt to depart from previous concessions that the defendants had made. Not only is this unprocedural, it is also a waste of the Court's time and resources and should not be tolerated. We argue or submit that their evidence is wholly irrelevant and no weight should be attached to it.

<u>Frivolous disputes raised by the defendants</u>

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187 Transcript: p 814, lines 14 – 18.

188 Transcript: p 816, line 15.

189 Transcript: p 1009, line 20 ff.

190 Transcript: p 105, lines 2 – 12; p 155, lines 1 – 4.

128. In addition to their attempts to reopen issues that had already been conceded, the defendants raised frivolous disputes in respect of certain aspects of the plaintiffs' case. The result of this was that the plaintiffs were required to call witnesses whose evidence was simply not disputed.

129. For example, during his testimony, Mr Heywood referred to a series of photographs taken in September 2017.[191] These photographs,[192] taken by Mr Solanga Milambo, were referred to by the plaintiffs' representatives to illustrate that the sanitation crisis in Limpopo schools is ongoing. In other words, Michael's death was not an isolated incident; unless the defendants take immediate steps to provide safe sanitation to schools across the province, it is likely that this tragedy will recur in future.

130. The defendants' representatives dealt with only one aspect of these photographs in their cross-examination of Mr Heywood: that he did not take the photographs himself.[193] Following argument to the Court that the photographs would carry less weight because the person who took them did not testify as to their authenticity,[194] the plaintiffs' counsel called Mr Milambo, who took the photographs, to do exactly that.[195] Despite questioning the authenticity of the photographs during their cross-

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191 Transcript: p 467, line 21 ff.

192 Trial bundle: vol 3, pp 865 – 894.

193 Transcript: p 615, lines 24 – 25.

194 Transcript: p 617, lines 20 – 24.

195 Transcript: p 691, line 1 ff.

examination of Mr Heywood,[196] the defendants' counsel chose not to cross-examine Mr Milambo.[197]

131. Why they insisted on the use of time and resources to call Mr Milambo as a witness, therefore, is not apparent.

Conclusion

132. The State is not an ordinary litigant. Particularly in litigation to enforce constitutional rights, the State bears a special obligation not to inhibit access to the necessary judicial processes to enforce these rights. It should approach litigation with this in mind.

133. In *Njongi*,[198] the Constitutional Court was faced with a special plea of prescription against a claim for reinstatement and back pay of a social grant. Mrs Njongi's grant had been terminated without explanation, and she claimed the reinstatement of her grant as well as back pay plus interest. The State's defence to her claim was that she had brought it out of time.

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196 Transcript: p 618, line 6 ff.

197 Transcript: p 692, lines 16 – 17.

198 *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC).

134. In a unanimous judgment, Yacoob J examined the factors relevant to the determination of whether the State should be entitled to rely on the defence of prescription. He held that a decision whether to invoke this defence must be "informed by the values of the Constitution". He continued that it is "the duty of the State to facilitate rather than obstruct access to social security".[199]

135. Although he did not have to decide whether to set aside the State's decision to invoke prescription, Yacoob J did comment that *"both the decision to oppose and the way in which the case was conducted present unconscionable conduct on the part of the Provincial Government."*[200]

136. Although the current case arises from different circumstances, there are several parallels with the facts in *Njongi*. In this case, the defendants have admitted that they have constitutional obligations to provide safe and adequate sanitation facilities to learners and to protect them from harm. They admit that they were negligent. They have conceded liability for damages arising from the breach of their obligations.

137. And yet, they have adopted an obstructive approach to this litigation that has had the effect of frustrating the plaintiffs' ability to have their rights enforced in court.

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199 Id at para 79.

200 Id at para 85.

138. In the ordinary course of events the courts would generally mark their displeasure arising from this kind of conduct through an appropriate costs order. In this case there is more that we ask the court to do. What we seek to do is to avoid the repetition of this style of litigation, and to avoid a repetition of the serious breach of constitutional obligations.

139. In particular, we seek the Court's affirmation of the undisputed evidence through a declaration and a directive to the National Director of Public Prosecutions for the investigation into the individuals who may be liable for criminal prosecution arising from Michael's death.

G. *Damages for emotional shock*

140. The first issue to be determined by this Honourable Court is the claim for damages for emotional shock – Claim A.

141. The plaintiffs and the minor children have claimed that they suffered emotional trauma and shock as a result of Michael's death.[201] The plaintiffs are claiming the following damages: R250 000 each for the first

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201 Pleadings bundle: pp 20-21, para 26; p 22, para 29.

and second plaintiffs, R100 000 each for the third and fourth plaintiffs and R80 000 for each of the three minor children.[202]

142. It is settled law that in order to claim damages for emotional shock, a plaintiff first has to show that the psychological or psychiatric injury that he/she has suffered was due to the negligent act of the defendant.[203]

143. The defendants have conceded the merits relating to Claim A. Negligence has, therefore, been admitted. The only dispute between the parties relates to the quantum of damages for emotional shock.[204]

144. Before we deal with the plaintiffs' evidence in support of the quantum of damages claimed for emotional shock, we will outline the legal principles applicable when making such a determination.

The applicable legal principles

145. *Bester*[205] was the landmark judgment of the Appellate Division which paved the way for claims for emotional shock to be actionable under our

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202 Pleadings bundle: p 22, paras 29.1-29.5.

203 *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A). English translation of the case: [1972] ZAENGTR 1 (20 November 1972) at 779.

204 Transcript: p 13, lines 21 – 25; p 14, lines 1 – 5; p 44, lines 5 – 9; p 45, lines 17 – 25; p 48, lines 11 –16.

law. Botha JA held that there should be significant shock of a long duration which has a substantial effect on the health of the person.[206]

146. *Barnard v Santam*[207] was only the second case concerning nervous or emotional shock that the SCA had to decide. The court stated that it was "*neither necessary nor desirable*" to formulate general rules setting out the circumstances in which damages could be recovered for the negligent infliction of nervous shock in our law.[208]

147. In *Sauls*, the SCA confirmed that the question was one of legal policy, reasonableness, fairness and justice.[209]

148. In the most recent judgment dealing with emotional shock, in Mbhele, the SCA held that:

> "*Courts acting in arbitrio iudicis and generally tending towards conservatism have regard to considerations such as awards in comparable cases, inflationary changes in the value of money, and*

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205 Note 3 above. The case concerned two brothers, aged 11 and 6, who were crossing a road when the younger brother was hit by a car and later died from his injuries. The older brother suffered shock as he witnessed the incident and was himself in danger.

206 *Bester* at 779G.

207 *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA). See: English translation of the case: [1998] ZAENGTR 1 (25 September 1998). The appellant suffered shock and psychic trauma upon learning that her 13 year old son had been killed in a bus accident. The appellant also wanted the court to consider whether she could claim damages for her grief over her son's death.

208 Id at para 6.

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

> *problems arising from collateral benefits. Importantly, in making an award, a court is not bound by one or other method of calculating general damages. It has a wide discretion.*[210] *As this court frequently pointed out, each case must be determined on its own unique facts."*[211] (footnotes omitted and own emphasis)

149. We submit that this Honourable Court should be guided by the dictum in *Swaartbooi* that "*the extent and duration of the psychological consequences induced by emotional shock are the main factors which weighed heavily with the courts when assessing an amount for general damages*."[212]

150. Further while reference to prior awards is a useful aid to assist a Court in determining general damages, in the final analysis each case must be determined on its own merits.[213]

151. Indeed, as Nugent JA cautioned in *Seymour*:

> *"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of*

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210 See also: *Allie v Road Accident Fund* [2003] 1 All SA 144 (C) where the court held at para 37 that "the court has a wide discretion. Comparative awards in other cases might be a useful guide. They may be instructive but not decisive." Also: *Maart v Minister of Police* [2013] ZAECPEHC 19 (9 April 2013) at para 30.

211 *Mbhele v MEC for Health for the Gauteng Province* [2016] ZASCA 166 (18 November 2016) at para 13.

212 *Swaartbooi v Road Accident Fund* 2013 (1) SA 30 (WCC) at para 20.

213 *R and Others v Minister of Police* [2016] ZAGPPHC 264 (21 April 2016) at para 14.

a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."[214]

152. Having highlighted the need to proceed with caution, we refer the Court to a number of awards made in previous cases for emotional shock, with the values inflation-adjusted.

153. *Majiet v Santam Limited*[215] - the plaintiff, a mother of a nine-year-old boy was awarded R35 000 for emotional shock as a result of her coming upon the body of her son lying in the road shortly after he had been struck and killed by a motor vehicle. The damages adjusted to 2017 value amount to R109 000.[216]

154. *Allie v Road Accident Fund*[217] – the plaintiff was awarded R80 000 for emotional shock after seeing his wife flung through the windscreen of the vehicle and her subsequent death after a police officer refused to summon an ambulance. The 2017 adjusted amount is R182 000.

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214 *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA) at para 17.

215 [1997] 4 All SA 555 (C).

216 Using the calculations as per R J Koch's "*Quantum Yearbook 2017*".

217 [2003] 1 All SA 144 (C).

155. *Kritzinger & another v Road Accident Fund* [218] - the plaintiff was informed of a collision and discovered that his two daughters had been killed when he arrived at the scene. He suffered from chronic bereavement, post-traumatic stress disorder and a major depressive disorder. He was awarded R150 000 in March 2009. The 2017 value amounts to R230 000.

156. *Maart v Minister of Police*[219] - the plaintiff suffered emotional shock and trauma after her minor son was killed in her presence by police officers whom she had summoned. The court found that:

> *"It is however apparent in this matter that the injury here suffered has had and continues to have a profound effect upon the plaintiff. The pervasive effect of the psychological trauma and its ongoing severely debilitating effect on the plaintiff are undoubtedly related to the particular circumstances giving rise to her loss. These are factors which bear upon the quantum of an appropriate award of general damages. Having regard to all of these circumstances I consider that an appropriate award will be an amount of R200 000.00."*[220] (own emphasis)

157. The damages in 2017 value amount to R251 000.

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218 ECP unreported case no 337/2008 (24 March 2009).

219 [2013] ZAECPEHC 19 (9 April 2013).

220 At para 33.

157.1. *Walters v Minister of Safety and Security*[221] **-** the plaintiff was awarded R185 000 for post-traumatic stress disorder and depression after her husband committed suicide while in police custody. She had asked the police to detain him overnight because he was drunk. The 2017 adjusted amount is R245 000.

157.2. *Road Accident Fund v Ruth FS Draghoender*[222]- the plaintiff's eight-year old son was killed in a motor collision in front of the family home. The plaintiff suffered severe emotional shock and trauma which rendered her permanently disabled to earn an income. She was awarded R80 000 damages for emotional shock and trauma. The present-day (2017) value of the damages is R157 000.

157.3. *Potgieter v Rangasamy and Another*[223]- the Plaintiff, a netball coach was awarded R75 000 for emotional shock after 3 pupils were killed during an accident on a school excursion. The present-day (2017) value amounts to R105 000.

157.4. *Mbhele*[224] – the SCA awarded the plaintiff R100 000 in damages after finding that "*there can be no doubt that the appellant*

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221 [2012] ZAKZDHC 19 (12 April 2012).

222 [2006] JOL 18271 (SE).

223 [2011] ZAECPEHC 36 (16 August 2011).

224 Note 211 above.

experienced severe shock, grief and depression". The plaintiff's baby was stillborn due to the respondent's negligence.

157.5. *R and Others*[225] - a majority decision of the Full Bench of the North Gauteng High Court set aside on appeal the amount of general damages awarded to a family who suffered psychological injuries after the police unlawfully entered their home. The court a quo had awarded the appellants R25 000 each in damages. On appeal, the first, second and third appellants were awarded damages in the amount of R200 000 each. The fourth appellant was awarded general damages in the amount of R250 000.

158. We now turn to deal with the plaintiffs' evidence in support of Claim A.

The emotional trauma and shock suffered by the plaintiffs and the minor children

159. The plaintiffs told this Court about the emotional trauma and shock that they experienced when they learnt of Michael's death at school on 20 January 2014. We submit that their evidence cannot be gainsaid.

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225 Note 213 above.

160. Mr Molepo, the clinical psychologist who has been providing counselling to the Komape family since 2015, provided expert testimony about the nature and extent of their psychological injuries. His evidence is uncontested.

Mrs Komape

161. Mrs Komape testified about how she had rushed to Mahlodumela in the rain, carrying her new-born baby, when the principal reported that Michael was missing.[226] She told the court about the search at Michael's old crèche[227] and how the search ended when little Tshego took her by the hand and led her to the pit toilet at Mahlodumela where Mrs Komape saw her 5-year-old son's outstretched hand in the pit toilet.[228]

162. Mrs Komape fainted at the scene. She testified: "*I said my child died while he was looking for help.*"[229] Mrs Komape testified that when she re-gained consciousness she said to the principal that they should pull Michael out of the pit. She stated: "*During that time I saw him I thought that we can be*

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226 Transcript: p 60, lines 2-5, lines 17 – 25.

227 Transcript: p 65, lines 1 – 11.

228 Transcript: p 66, lines 5 – 17.

229 Transcript: p 66, lines 17 – 22.

able to rescue him and we can take him to the hospital and he can still be alive."[230]

163. Mrs Komape explained how Michael's death had affected her.

> *"Things were very difficult for me to an extend(sic) that when I was sleeping I would see the hand of the child and I would think that the child is calling me and I thought that I will never survive."* [231]*...*
>
> *"If I could start thinking about him before I could go to sleep I will cry until in the morning and I was unable to eat."* [232]*....*
>
> *"The way I felt the pain I do not think I will even forget it now."*[233]

164. On 10 June 2014, five months after Michael's death, Mrs Komape was assessed by Mrs Sodi, a clinical psychologist.[234] In her report, Mrs Sodi listed 27 symptoms that had been reported by Mrs Komape.[235] These included: difficulty sleeping, fatigue, poor appetite, blaming herself for taking Michael to school, often sees her son's coffin, feels that the death of

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230 Transcript: p 68, lines 11 – 25; p 69, line 1.

231 Transcript: p 76, lines 21 – 25.

232 Transcript: p 77, lines 1 – 7.

233 Transcript: p 93, lines 6 – 10.

234 Pleadings bundle: p 41.

235 Pleadings bundle: pp 44 – 46.

her son has shortened her lifespan, breathing problems and fear of using a pit toilet.

165. Mrs Sodi observed that Mrs Komape's symptoms were "rated as being extreme on the PCL".[236] The PCL was described by Mrs Sodi as being the "Posttraumatic Stress Disorder Checklist – civilian version".[237]

166. Mrs Sodi diagnosed Mrs Komape as suffering from "PTSD, Bereavement and Major Depressive Disorder"[238] and recommended that she should have 40 psychotherapy sessions.[239] She noted that "*Mrs Komape has experienced and, is still experiencing emotional suffering following the tragic death of her six year old son. The diagnosed clinical conditions cause clinically significant distress and impairment in Mrs Komape's social, occupational, or other important areas of functioning.*"[240]

167. Mr Molepo first consulted with the Komape family on 2 October 2015[241], almost one year and four months since their initial assessment by Mrs Sodi. He stated in his report and testified that the family members "presented with symptoms that characterised Bereavement,

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236 Pleadings bundle: p 46, line 5.

237 Pleadings bundle: p 42, para 3.2.

238 Pleadings bundle: p 50, para 9.

239 Pleadings bundle: p 51, para 10.

240 Pleadings bundle: p 51, lines 1 – 5.

241 Notice bundle: p 87; Transcript: p 265, lines 21 – 22.

Posttraumatic Stress Disorder and Major Depressive as well as Adjustment Disorders."[242]

168. He testified that when he first consulted with Mrs Komape in 2015, she had many symptoms of major depressive disorder: sadness, depressed mood, loss of interest, loss of energy, lacking concentration, difficulty sleeping.[243] He stated that Mrs Komape isolated herself from the rest of the family and preferred to be alone. She was irritable most of the time and did not want to talk to anyone.[244]

169. Mr Molepo testified that while Mrs Komape has now almost dealt with the grieving process, she would still need ongoing support.[245] Mrs Komape told the Court that she has not yet found closure: "*I did not get closure even now, because even like I still tell myself that I had I had three boys and even now my children are no longer complete*."[246]

Mr Komape

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242 Notice bundle: p 88, para 3; Transcript, p 283, lines 22 – 25; p 284, lines 1 – 5.

243 Transcript: p 284, lines24-25; p 285, lines 1 – 6.

244 Transcript: p 286, lines 1 – 7.

245 Transcript: p 288, lines 11 – 14.

246 Transcript: p 79, lines 3 – 10.

170. Mr Komape testified that he was informed by the principal telephonically to go to Michael's school and that he heard his wife in the background saying that Michael had fallen into the toilet and died.[247]

171. He stated that when he arrived at Mahlodumela, the principal showed him where Michael was: "*I found that Michael took out his hand. Michael's hand was out of the toilet and I asked let us take him out of there*."[248]

172. Mr Komape told the Court that the principal refused to help him and told him that "it has been long that Michael had passed away; he fell in the toilet a long time."[249] Michael's body was removed from the pit around 4pm. Mr Komape testified that in the hours while he waited for the first aid people to arrive, he sat at the pit toilet next to Michael's body.[250]

173. Mr Komape saw his son's body taken out of the pit toilet, he saw how Michael's body was put on a mat and covered with a cloth.[251] He stated: "*The way it was so painful for me because of Michael I did not come closer. Because I saw that it will cause me to have sickness.*"[252]

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247 Transcript: p 137, lines 10 – 19.

248 Transcript: p 139, lines 4 – 6.

249 Transcript: p 139, lines 10 – 16.

250 Transcript: p 140, lines 13 – 21.

251 Transcript: p 144, lines 15 – 19.

252 Transcript: p 145, lines 8 – 11.

174. He stated further: "*I was hurt very much. Because I see that thing every day. Every day when I go to sleep I see Michael's hand*."[253]

> "*It was very painful for me. Even now when I start to think about the boy it still hurts me*."[254]

> "*My son died and he died in the toilet. It is for the first time I saw something like that*."[255]

175. Mr Komape was also assessed by Mrs Sodi on 10 June 2014.[256] She diagnosed him as suffering from PTSD and Bereavement[257] and recommended that he should have 30 psychotherapy sessions.[258] Mr Komape had symptoms including: depressed mood, sleeping difficulties, lack of interest, distress when he went to Michael's school, preoccupation about Michael's death and fear related to toilets.[259]

176. Mr Molepo testified that he first consulted with Mr Komape on 2 October 2015. He stated that Mr Komape still had most of the symptoms that had been recorded by Mrs Sodi over a year ago. He testified that Mr Komape

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253 Transcript: p 145, lines 12 – 14.

254 Transcript: p 148, lines 17 – 20.

255 Transcript: p 149, lines 17 – 19.

256 Pleadings bundle: p 34.

257 Pleadings bundle: p 39.

258 Pleadings bundle: p 40, para 10.

259 Pleadings bundle: p 36, para 5.

felt he needed to be strong for the family but "*he acknowledged that he is struggling to cope. He still experiences difficulty sleeping. He still experiences sadness and irritability.*"[260]

177. Mr Molepo told the court the Mr Komape was still displaying almost all the symptoms of PTSD during the first consultation: "*For him also what was more intense was the experience where he relives or reliving the experience of the trauma. Having visual imageries of the son's hand in the toilet and extreme sadness*."[261]

Lydia Komape

178. Lydia Komape, the eldest child in the Komape family, told the Court about the close bond that she had with Michael. She bathed him and got him ready for school and he slept in her bedroom.[262]

179. She described Michael as a proud mother would – that he was a good child, he was a good listener, he did not like to fight and he was clean. He loved his books and he liked to read most of the time.[263]

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260 Transcript: p 290, lines 11 – 20.

261 Transcript: p 290, lines 21 – 25; p 291, lines 1 – 2.

262 Transcript: p 212, lines 16 – 19.

263 Transcript: p 213, lines 1 – 5.

180. Lydia testified that she was in Polokwane when her mother phoned and told her that Michael had fallen into a toilet. Lydia stated that during the taxi ride back home she was telling herself that Michael was still alive.[264] But when she got home, her brother Lucas broke the news to her that Michael was dead. Lydia stated that she refused to believe it: "*I did not deny with my mouth, but just told myself in my heart that Michael has not passed away because I did not see him*."[265]

181. Lydia testified that she was scared and fearful when she heard the news. She took off her shoes and set off for Mahlodumela.[266] She stated that when she got to the school, "*Michael was removed from the toilet and they had placed him on the ground. I uncovered him and looked at him*."[267]

182. She stated that she had uncovered Michael's body "*because I could not accept or believe that it is him. I thought I would find it is someone else*."[268]

183. Lydia testified that she was very hurt and could not sleep after Michael's death – "*I was always dreaming about the toilet and the way he was and his face, because I saw him*." This went on for a year and a half.[269]

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264 Transcript: p 213, lines 19 – 21; p 214, lines 1 – 5.

265 Transcript: p 214, lines 17 – 24.

266 Transcript: p 215, lines 1 – 6.

267 Transcript: p 216, lines 6 – 9.

268 Transcript: p 216, lines 16 – 22.

184. Mrs Sodi reported that Lydia had extreme symptoms of PTSD.[270] She diagnosed her as suffering from PTSD and Bereavement and stated that she was "still experiencing emotional suffering" following Michael's death. Mrs Sodi also recommended an opinion from an educational psychologist "*given the concentration difficulties reported*".[271] She further recommended that Lydia should have 30 psychotherapy sessions with a clinical psychologist.[272]

185. Mr Molepo stated in his report that Lydia "*demonstrated difficulty comprehending and coping with the loss at most sessions and responded most tearfully.*"[273]

186. Mr Molepo testified that during his first consultation with Lydia on 2 October 2015, "*Ms Komape's reaction presented with symptoms almost similar to those of her mother. She presented with symptoms such as post traumatic stress disorders. She also had symptoms that suggested that she was depressed and she was going through a bereavement and grieving process*."[274]

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269 Transcript: p 217, lines 15 – 20.

270 Pleadings bundle: p 55, para 5.2.

271 Pleadings bundle: p 57, para 9.

272 Pleadings bundle: p 58, para 10.

273 Notice bundle: p 88(a), para 5.

274 Transcript: p 295, lines 16 – 24.

187. He stated that Lydia's symptoms relating to bereavement "*were a little bit prolonged as well. Going into 2016 she was still experiencing those symptoms and she still required a lot of supportive intervention*".[275]

Lucas Komape

188. Lucas Komape found out that Michael had died when he passed by Michael's school on his way home. Lucas testified that he wanted to go the toilet to see where Michael fell but the police stopped him.[276] He stated that he went home and was crying when his sister Lydia arrived. He said he was "feeling pain because of what happened to my sibling."[277]

189. Lucas testified that spending time with his brother made him feel good. He and Michael would mostly read books and look at the pictures in the books. They sometimes played soccer. Lucas described Michael as being "a very clever boy" who "used to picture himself and see himself as a big man driving big expensive cars."[278]

190. Mrs Sodi reported that Lucas Komape had symptoms that rated "as being high on PTSD Checklist".[279] She found that he "displays symptoms that are

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275 Transcript: p 297, lines 10 – 15.

276 Transcript: p 236, lines 20 – 25; p 237, lines 1 – 11.

277 Transcript: p 238, lines 5 – 10.

278 Transcript: p 236, lines 1 – 16.

279 Pleadings bundle: p 61, para 5.

related to PTSD and Bereavement but he could not express his emotions.[280] She recommended that Lucas should have 10 psychotherapy sessions.[281]

191. Mr Molepo testified that when he first consulted with Lucas on 11 December 2015, almost two years after Michael's death, Lucas stated that "*he was very sad and that he was unable to cope as effectively as he should or as he needs to with disturbing disturbances in sleep and concentration as well*."[282]

192. Mr Molepo stated that Lucas still had symptoms of post-traumatic stress disorder and bereavement. He was not able to concentrate and lead a full and independent life and Lucas was finding it difficult to "adjust to the absence of his brother. Both emotionally and mentally."[283]

Onica Komape

193. Onica Komape did not give evidence at the trial. However, the reports by Mrs Sodi and Mr Molepo establish clearly the devastating emotional suffering that Michael's death had on her.

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280 Pleadings bundle: p 63, para 9.

281 Pleadings bundle: p 64, para 10.

282 Transcript: p 299, lines 14 – 25.

283 Transcript: p 300, lines 1 – 17.

194. Mrs Sodi diagnosed Onica with PTSD and Bereavement. She found that Onica was unable to play with other children and that the conditions "cause clinically significant distress and impairment in Onica's social, occupational, or other important areas of functioning. She recommended that Onica should have 30 psychotherapy sessions.[284]

195. Mr Molepo testified that when he first saw Onica on 11 December 2015, she was tearful and she reported that she was "*worried about Michael and how he had died and she felt that she was missing him at the time*."[285]

196. He stated that Onica had symptoms that were "suggestive of post-traumatic stress disorder" – she was sad and irritable, she had nightmares and found it difficult to concentrate and she isolated herself from her peers. Mr Molepo stated that Onica was still suffering from bereavement in December 2015.[286]

197. He testified that Onica still required "*more support so that she continues to make peace with the passing of her brother and to be able to adjust to her optimal level of functioning*."[287]

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284 Pleadings bundle: p 70, paras 9 and 10.

285 Transcript: p 306, lines 15 – 16; p 307, lines 1 – 8; Notice bundle: p 88(a), para 5.

286 Transcript: p 307, lines 9 – 21.

287 Transcript: p 309, lines 11 – 15.

Maria Komape

198. Maria is Onica's twin. She also did not give evidence at the trial.

199. Mrs Sodi found that Maria displayed symptoms that were "related to PTSD and Bereavement" but that she could not express her emotions. She recommended that Maria should have 10 psychotherapy sessions.[288]

200. Mr Molepo testified that he first saw Maria on 11 December 2015. He stated that she was emotionally withdrawn and very sad. She was experiencing "intense form of longing for seeing her brother and missing him." Maria had difficulty sleeping and concentrating and isolated herself from her friends.[289]

201. Mr Molepo said that symptoms of PTSD were more "visible" in Maria than they were in her sister Onica.[290] She also had symptoms of bereavement.[291]

202. Mr Molepo stated that Maria still needed counselling and ongoing support.[292]

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288 Pleadings bundle: p 76, paras 9 and 10.

289 Transcript: p 311, lines 5 – 15.

290 Transcript: p 311, lines 17 – 20.

291 Transcript: p 312, lines 1 – 9.

Moses Komape

203. Moses Komape was Michael's immediately older sibling. He was almost 8 and a half years old when Michael died.[293] They both went to school at Mahlodumela. Moses did not give evidence at the trial.

204. During his assessment by Mrs Sodi on 10 June 2014, Moses told her that it had been some time since Michael's death and that he was "sharp". Mrs Sodi reported that "no clinically observant symptoms" were observed during the session with Moses. However, Mrs Komape had reported that Moses was forgetful and could not seem to concentrate. [294]

205. Mrs Sodi recommended that Moses should be assessed by an educational psychologist and would benefit from family therapy.[295]

206. Mr Molepo's report painted a different picture. He observed that Moses "*had responded tearfully whenever the name of his brother was brought up*

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292 Transcript: p 313, lines 9 – 13.

293 Trial bundle: Vol 1, p 6.

294 Pleadings bundle: p 79, para 5.

295 Pleadings bundle: p 80, para 9; p 81.

during the consultations although he appeared to have developed insight into the loss."[296]

207. Mr Molepo testified that when he first consulted with Moses on 2 October 2015, he was withdrawn and tearful. He stated that while Moses could not express himself openly, "*he was able to relate the emotional sadness and that he would wish that his brother could still be alive, come back so that he is able to play with him. He spend (sic) much of his time when alone very quiet and sad.*"[297]

208. Mr Molepo stated that Moses also had symptoms of bereavement and he diagnosed him as having the condition.[298]

209. Mrs Komape had testified that Moses' emotional state troubled her. She stated that she would hear Moses tossing and turning in his sleep. When she checked on him, he would be "*talking in his sleep, calling Michael and say Michael let us go, let us go and play. Talking the things that they used to talk when he was still alive*." [299]

210. Mr Molepo testified that in his last session with Moses on 6 November 2017, Moses seemed to be happy but "*he still presented with a lot of*

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296 Notice bundle: p 88(a), para 5.

297 Transcript: p 314, lines 15 – 21.

298 Transcript: p 314, lines 22-24; p 315, lines 3 – 8.

299 Transcript: p 78, lines 8 – 18.

sadness and tearfulness". Mr Molepo stated that Moses needed further counselling and that he needed it "a little more than his sisters would". [300]

Conclusion

211. As we stated above, the defendants have conceded the merits in respect of Claim A. Mr Molepo's evidence stands uncontested and so too, the evidence by the plaintiffs.

212. We submit that there can be no doubt that all the members of the Komape family were severely traumatised by Michael's death and the circumstances surrounding his death. They all showed symptoms of PTSD, some like Mrs Komape, Lydia, Maria and Onica more severely. They all suffered from bereavement, even in October 2015 when Mr Molepo first saw them. Some members of the family also suffered from depressive condition: Mrs Komape and Lydia in particular.

213. We submit that the claims for damages for emotional shock for the plaintiffs and the three minor children are well-founded and are reasonable, fair and just given the exceptional circumstances of the case.

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300 Transcript: p 316, lines 13 – 20.

214. We submit further that this Court should apply the reasoning by Tolmay J in *R and Others*, that a court "*should consider the person before the Court as well as the circumstances of the incident*." The learned Judge held that deciding to award plaintiffs the same amount of general damages because they were subjected to the same incident was a "simplistic" approach.[301]

215. We therefore submit that this Honourable Court should exercise its discretion and award a higher sum to Mrs Komape and Lydia Komape in particular, if regard is had to the emotional trauma and shock that they experienced following Michael's drowning in the pit toilet at his school.

216. In the premises we ask the Court to grant the relief sought in paragraph 41.2 of the plaintiffs' particulars of claim.

H. *Damages for grief*

217. "*The way I felt the pain I do not think I will even forget it now*."[302] This was what Michael Komape's mother told the Court about what she experienced when she saw her 5-year-old son's body in the pit toilet with his hand outstretched.

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301 *R and Others*, note 213 above, para 22

302 Transcript: p 93, lines 6 – 10.

218. Mrs Komape and the other plaintiffs want this Court to recognise that the exceptional, horrific, circumstances of this case gave rise to a grief in the Komape household that was prolonged and not normal. We argue that the applicants should be compensated for their anguish over Michael's death.[303] The development of the common law is necessarily implicated.

219. The defendants, as we stated earlier, have conceded that their negligent actions caused Michael's death. However, they dispute whether claim B is competent, both the claim for damages for grief and the alternative claim for constitutional damages.[304]

220. We will demonstrate that the common law <u>does</u> allow for delictual damages for grief when it is, and should always be, viewed through the lens of the spirit, purport and objects of the Bill of Rights. We will also argue that your Lordship has no choice but to embark on an inquiry into developing the common law.[305]

<u>The circumstances of Michael's death justify compensation for grief</u>

221. As far as we can establish, thankfully, no other child in South Africa has drowned in a school pit toilet. Michael Komape's death in the pit toilet at

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303 Pleadings bundle: p 23, paras 31 – 31.4.

304 Transcript: p 49, lines 1 – 18; p 51, lines 5 – 25; p 52, lines 1 – 10.

305 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 34.

Mahlodumela has immortalised him for a reason that his family could never have imagined.

222. His mother,[306] father,[307] sister Lydia[308] and brother Lucas[309] testified that they had never before heard of a person dying in a pit toilet. James Komape testified: "*My son died and he died in the toilet. It is for the first time I saw something like that*."

223. The Komape family not only had to deal with the fact that Michael had died in a toilet, but three of the plaintiffs saw Michael's little body in the filthy pit latrine. Mr and Mrs Komape had rushed to Mahlodumela when they heard the news. Mrs Komape was the first to discover Michael's body with his arm sticking out of the water in the pit toilet.

> *"When I looked inside the toilet I saw the hand of Michael in the toilet. I said my child died while he was looking for help. Then my child died while he was looking for someone to rescue him, because he raised him hand and he thought that if he raised his hand*

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306 Transcript: p 79, lines 11 – 14.

307 Transcript: p 149, lines 15 – 19.

308 Transcript: p 228, lines 20 – 23.

309 Transcript: p 241, lines 19 – 22.

> *someone will come and see him and took him out and pull him with the hand and from there I fainted*."[310]

224. Mr Komape arrived at school a while later and he too saw his little son lying in the pit.

> "*The principal showed me where Michael was. I found that Michael took out his hand. Michael's hand was out of the toilet and I asked let us take him out of there*."[311]

225. Both parents wanted to take their boy out of the filthy toilet. Mrs Komape testified that she thought that if they could pull Michael up by his hand, he could be rescued and taken to hospital and would still be alive.[312]

> "*What is painful is that he died at school and he was in the pit toilet and he was in the care of the teachers at school and the time he was in the pit toilet I thought that he can be taken out and we can press his stomach maybe he will be able to be rescued and be alive*".[313]

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310 Transcript: p 66, lines 16-22.

311 Transcript: p 139, lines 3-6.

312 Transcript: p 68, lines 16-25; p 69, line 1.

313 Transcript: p 92, line 25; p 93, lines 1 – 4.

226. Mr and Mrs Komape then sat by the toilet to be near Michael waiting for his body to be removed.

227. Lydia Komape testified that she refused to believe that Michael was dead. She testified that when she got to Mahlodumela, Michael's body was removed from the pit toilet and placed on the ground. Lydia stated that she uncovered Michael "*because I could not accept or believe it is him. I thought I would find that it is someone else*."[314]

228. It is common cause that the plaintiffs and the three minor children were first evaluated by clinical psychologist, Mrs Sodi, on 10 June 2014, almost five months after Michael's death.[315] Her evaluation was that various members of the Komape family were experiencing Bereavement, PTSD and Major Depressive Disorder. Mrs Sodi reported that the family was going through a grieving process following Michael's death and that there were *"factors that seem to complicate and perpetuate the processing of the loss. Such factors include the circumstances surrounding the death and other psychosocial stressors."*[316] (emphasis added)

229. Mrs Sodi's recommendation was that the family needed psychological intervention to help them deal with the trauma of Michael's death which she observed was affecting the manner in which the family functioned. She

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314 Transcript: p 216, lines 16 – 22.

315 Transcript: p 280, lines 9 – 11.

316 Pleadings bundle: pp 30 – 33.

recommended 150 individual psychotherapy sessions and 20 family therapy sessions.[317]

230. Rosina, James, Lydia and Moses Komape had their first counselling session with clinical psychologist, Stephen Molepo, on 2 October 2015. It was one year and four months since their evaluation by Mrs Sodi.[318] It was one year and eight months since Michael's death.

231. Significantly, when Mr Molepo first consulted with the Komape family, he noted that they were going through "a period of grief related to the death of Michael"[319] and that the initial sessions were difficult for the family as "they attempted to avoid talking about the loss."[320]

232. Mr Molepo testified that in the first counselling session, Mrs Komape still presented with symptoms of bereavement, PTSD and depressive disorder almost one year and nine months since Michael's death.[321] In fact, Mr Molepo stated that in his last session with Michael's mother on 6

317 Pleadings bundle: p 33.

318 Transcript: p 283, lines 19-21; Notice bundle: pp 87(a) and 88, para 2.2.

319 Notice bundle: p 88(a), para 5.

320 Notice bundle: p 89, para 5.

321 Transcript: p 283, lines 22-25; p 284, lines 1-5.

November 2017, his assessment was that "she has almost dealt with the grieving process."[322]

233. It is clear that Mrs Komape was still grieving for Michael more than three and half years since he drowned in the pit toilet. And she would still need ongoing psychological support.

234. Mrs Komape testified that her pain would have been different if Michael had perhaps died in a car accident: "*We would accept that the person was hit by a vehicle, but the manner in which this matter is it is painful because you see the child in the pit toilet and in the toilet there are waste products of other people*."[323]

235. Lydia Komape was also struggling to cope with Michael's death. Mr Molepo testified that she had similar symptoms to her mother in their first session – PTSD, depression, bereavement and grief.[324] He stated that Lydia's symptoms were "a little bit prolonged" and that in 2016 she was still experiencing PTSD and bereavement and required a lot of supportive intervention.[325]

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322 Transcript: p 287, lines 17-25; p 288, lines 1-14.

323 Transcript: p 92, lines 17 – 22.

324 Transcript: p 295, lines 16 – 24.

325 Transcript: p 297, lines 10 – 17.

"*After Michael's death I was very hurt and I could not sleep. I was always dreaming about the toilet and the way he was and his face, because I saw him*."[326]

236. Michael's death and the manner in which he died also had a profound and debilitating effect on his younger siblings. Onica Komape displayed symptoms of PTSD almost one year and eleven months after Michael's death. She also met the diagnostic criteria for bereavement. She told Mr Molepo that she worried about Michael and how he had died.[327] Mr Molepo testified that it was in 2016 that Onica was able to talk about Michael without intense crying.[328]

237. Onica's twin sister, Maria had "more visible" symptoms of PTSD, according to Mr Molepo.[329] In the first counselling session in December 2015, Maria was "*extremely sad and extremely worried about Michael and how he died. Feeling despair. Not being able to accept that her brother had died the way he did. She also reported feeling of(sic) disgusted about where he died and the manner that he died*."[330]

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326 Transcript: p 217, lines 15 – 20.

327 Transcript: p 307, lines 9 – 21.

328 Transcript: p 308, lines 16 – 23.

329 Transcript: p 311, lines 17 – 20.

330 Transcript: p 312, lines 1 – 9.

238. Moses Komape needs further counselling sessions a little more than his sisters would, according to Mr Molepo. He testified that when he last saw Moses on 6 November 2017, he was still sad and tearful about his brother's absence.[331] Moses still cries when he recalls the circumstances in which his brother Michael died.[332]

239. It is clear that the place and manner of Michael's death – drowning in a pit toilet at his school – complicated and prolonged the grieving process that his family went through since 20 January 2014. Mr Molepo testified that Michael's family had thought that Michael would be safe at school and the fact that he died there "*contributed to the pain that they went through and their(sic) prolonged nature of the grief that they experienced*." He stated that the Komape family "put the blame onto the school and the fact that the school has not reached out as they may have expected"[333] contributed more negatively to their grieving process.

240. Mr Komape testified:

> "*I would have been satisfied if the education came to me and they sit down and discuss with me or talk to me. Because, they are the ones*

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331 Transcript: p 316, lines 15 – 24.

332 Transcript: p 317, lines 1 – 3.

333 Transcript: p 320, lines 1-10; p 272, lines 5 – 17.

who killed my child. I would have appreciated that. But they did not come and do that.[334]

…

The other painful this is that after the funeral no one came to check how the family was doing." [335]

241. A person's sudden death or in horrific circumstances, like Michael's, would also make it more difficult to go through the grieving process and achieve healing.[336] Mr Molepo stated that some people take at least 6 months to a year to go through the grieving process. When the grieving process goes beyond a year, he stated that "*the symptoms and reactions are a little more complicated and at times present some abnormal features*" like hallucinations, depression and PTSD.[337]

242. Mr Molepo testified, during questioning by the Court, that bereavement is a psychological and psychiatric condition that can be diagnosed. He stated that it presents with symptoms almost similar to those of major

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334 Transcript: p 169, lines 19 – 23.

335 Transcript: p 153, lines 11 – 12.

336 Transcript: p 267, lines 22 – 25; p 268, lines 1 – 3.

337 Transcript: p 269, lines 15 – 25; p 270, lines 1 – 2.

depression. He stated that "they just differ in terms of the intensity and the pathological part of that."[338]

243. Mr Molepo further confirmed that the criteria for diagnosing bereavement would be contained in the Diagnostic and Statistical Manual of Mental Disorders, known as DSM-5, being the latest edition.[339] Indeed, the DSM-5 makes reference to "*Persistent Complex Bereavement Disorder*" which is diagnosed after at least 12 months (6 months in children) have elapsed since the death of someone with whom the bereaved had a close relationship.[340] The death of a child heightens the risk of the disorder.[341] Where the death occurred in traumatic or violent circumstances, bereaved persons can develop persistent complex bereavement disorder as well as PTSD.[342]

244. According to the diagnostic criteria, at least one of the symptoms is experienced by a bereaved adult for at least 12 months after the death of a loved one and at least six months for bereaved children.[343] A further 6 symptoms must be experienced over the same time period – these include: marked difficulty accepting the death; experiencing disbelief over the loss;

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338 Transcript: p 368, lines 20-25; p 369, lines 1 – 17.

339 Transcript: p 369, lines 18 – 23. A copy of the relevant pages is attached to these heads of argument.

340 DSM-5, p 790.

341 DSM-5, p 791.

342 DSM-5, p 792.

343 The symptoms are: persistent yearning/longing for the deceased; intense sorrow and emotional pain; preoccupation with the deceased and preoccupation with the circumstances of the death.

difficulty with positive reminiscing about the deceased; bitterness or anger related to the loss and excessive avoidance of reminders of the loss.[344]

245. We submit that the evidence before the Court of the Komape family's prolonged grief and anguish makes it clear that they displayed many of the symptoms outlined in the DSM-5 for "*Persistent Complex Bereavement Disorder*". Mr Molepo did not, in his evidence, refer directly to the Disorder. However, he did diagnose "Bereavement" as one of the conditions that the family was suffering from, in his report of 14 April 2016.[345] We submit that the grief that the Komapes experienced, because of Michael's death and the way in which he died, can in no way be regarded as normal.

246. It is this <u>context</u> of Michael's death, outlined above and earlier in these heads of argument, which will play a pivotal role in the inquiry that this Court will have to undertake to develop the common law of delict.

<u>The development of the common law of delict</u>

247. The plaintiffs' case is clear: the common law must be developed in accordance with section 39(2) of the Constitution in order to compensate

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344 DSM-5, p 790.

345 Notice bundle: pp 88(a) – 89.

the Komape family for the grief that they have suffered as a result of the defendants' negligent actions which caused Michael's death.[346]

248. Section 39(2) of the Constitution states:

> "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*."

249. In *K*, O'Regan J stated that:

> *"The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law."*[347]

250. In *Carmichele* it was held that:

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346 Pleadings bundle: p 23, paras 31 – 31.4.

347 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 17.

> *"It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately."*[348]

251. This Court is, therefore, obliged to reconsider the common law rule relating to delictual damages for grief in the light of section 39(2). In *Thebus and Another v S,*[349] Moseneke J referred to at least two instances in which the need to develop the common law under section 39(2) of the Constitution could arise.

> "*The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be*

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348 *Carmichele v Minister of Safety and Security and Another* above n 149 at para 39.

349 2003 (6) SA 505 (CC).

adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution."[350]

252. In a recent judgment, *MEC, Health and Social Development, Gauteng v DZ*[351], the Constitutional Court confirmed the general approach to developing the common law under section 39(2).[352] Froneman J held that a court must:

252.1. determine what the existing common law position is;

252.2. consider its underlying rationale;

252.3. enquire whether the rule offends section 39(2) of the Constitution. If not, whether there are wider interests of justice considerations that require their further development;

252.4. if it does so offend, consider how development in accordance with section 39(2) ought to take place; and

252.5. consider the wider consequences of the proposed change on the relevant area of the law.

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350 At para 28.

351 [2017] ZACC 37 (31 October 2017).

352 At para 31.

I. *Applying the general approach to developing the common law*

The existing common law position

253. A claim for damages in delict for grief is not actionable under our common law. The court in *Hing*[353] succinctly summarised the current legal position:

> "*Grief and sorrow over the death of anyone held in deep affection is a natural phenomenon. The closer the relationship the greater the hurt that falls to be resolved in the grieving process and the longer and more disabling the effect of the process is going to be. That much is a matter of common human experience, which expert 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*."[354]

254. In *Barnard*[355], Van Heerden ACJ held that "*the appellant's 'grief' for her son…was clearly not a psychiatric injury, otherwise the question of law formulated in relation thereto would have been tautological. It accordingly had to be accepted that the parties had only emotional grief in mind. The*

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353 *Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC).

354 At para 24.

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

appellant's counsel correctly conceded that no damages could be recoverable in respect of such grief."[356]

255. The court clearly drew a distinction between a claim for grief and a claim for 'nervous shock', which is actionable under our common law. It is not clear what the court meant by '*only emotional grief*' but it appears that Van Heerden ACJ viewed the plaintiff's grief and its *sequelae* as falling within the realm of 'nervous shock'.

The underlying rationale for the common law position

256. In *Hing,* the Full Bench referred to damages not being recoverable in delict for 'normal grief and sorrow following a bereavement'. The court, however, did recognise "*that there is a distinction between deep and disabling grief and psychiatric injury"*[357] *which necessitated "cogent expert evidence being available to enable the courts to draw the distinction rationally."*[358]

257. The court came to this conclusion after referring to the House of Lords decision in *White* and the Australian case *Pusey*.

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356 English translation of the case: [1998] ZAENGTR 1 (25 September 1998) at p 8. The court was asked to determine two questions of law: whether the plaintiff could claim damages for shock and psychic trauma upon being told that her son had died; and whether the plaintiff's grief over her son constitutes legally recoverable damages.

357 At para 25.

358 At para 27.

258. In *White*, Lord Steyn referred to two groups of persons who had sustained 'mental suffering' following the Hillsborough stadium disaster:

> "*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: see the explanation in Munkman Damages for Personal Injuries and Death (10th edn, 1996) p 118, note 6. Yet the law denies redress in the former case: see Hinz v Berry [1970] 1 All ER 1074 at 1075, [1970] 2 QB 40 at 42 but compare the observations of Thorpe LJ in Vernon v Bosley (No 1) [1996] EWCA Civ 1310; [1997] 1 All ER 577 at 610, 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."[359]

259. The court in *Pusey* confirmed that sorrow does not sound in damages. However, the court recognised that "*it is however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had*."

260. *Vernon v Bosley*[360] which was referred to by Steyn LJ in *White* (discussed above) grappled with the concept of 'pathological grief disorder' ("PGD") which was described as grief which "*becomes so severe as to be regarded as abnormal and gives rise to psychiatric illness, the symptoms of which may include depression and anxiety*."

261. Stuart-Smith LJ stated that "there are in fact two separate illnesses, PTSD and PGD; their symptoms may in some respects be similar, i.e. include depression and anxiety, but their aetiology is different." However, a plaintiff could recover damages for the former but not the latter.[361]

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359 *White and Others v. Chief Constable of South Yorkshire and Others* [1999] 1 All ER 1 (HL) at para 33.

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

361 At 585 f-h.

262. He held further that: "*This is not a case where damages for grief, even if it causes mental illness, is too remote in law. On ordinary grounds of foreseeability it is not too remote. But as a matter of policy the law stops short of giving damages in such a case; it is uncompensetable loss*."[362]

263. Evans LJ stated that the limitation on damages for grief was not 'the policy-induced rule' recognised in *McLoughlin* and later decisions. It was a rather "a restriction on the heads of damage which may be recovered by a successful plaintiff." He made the following observation:

> *"The question, in my view, is one of remoteness of damage and of the kinds of injury for which damages may be recovered. Mental injury suffered in consequence of witnessing at first hand an accident involving a loved one as its primary victim is actionable in law.....Mental illness, as distinct from grief and other emotional sufferings resulting from bereavement, is a kind of injury which is recognised by the law. Therefore, I would hold that damages are recoverable for mental illness caused or at least contributed to by actionable negligence of the defendant i.e. in breach of a duty of care, notwithstanding that the illness may also be regarded as a pathological consequence of the bereavement which the plaintiff,*

362 At 587a-b.

where the primary victim was killed, must inevitably have suffered."[363]

264. He added that: "*As medical science advances, these or different categories may come and go. The duty of the courts, as I see it, is to take account of contemporary knowledge and to decide whether the plaintiff has suffered mental injury caused by the negligence of the defendant, and then to apply the policy limits on recovery which have been identified in Alcock and elsewhere, and which may themselves change with the law*."[364]

265. We submit that there appears to be no cogent and rational reason why the courts have chosen to restrict a plaintiff's heads of damages for grief despite it being an identified and recognised psychological injury or disorder.[365] It is evident that such damages are not too remote in law. Policy considerations and misplaced fears of limitless liability should not trump the injunction to infuse the common law with the normative values of the Constitution.

266. Indeed, in *Carmichele*, the Constitutional Court noted that before the advent of the Interim Constitution, the refashioning of the common law entailed "policy decisions and value judgments" which had to reflect the "wishes, often unspoken, and the perceptions, often but dimly discerned,

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[363] At 604h-605a.

[364] At 607e-f.

[365] See references to DSM-5 referred to above.

of the people." The Court held that under section 39(2) of the Constitution, concepts such as "policy decisions and value judgments" reflecting "the wishes . . . and the perceptions . . . of the people" and "society's notions of what justice demands" might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.[366]

267. We submit further that the following dictum by Innes CJ is apposite:

> *"It is the duty of a court – especially of an appellate tribunal so to administer a living system of law as to ensure – without the sacrifice of fundamental principles – that it shall adapt itself to the changing conditions of the time. And it may be necessary sometimes to modify or even to discard doctrines which have become outworn."*[367]

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366 *Carmichele* above n 149 at para 56.

367 O' *Callaghan N.O. v Chaplin* 1927 AD 310 at 327.

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

268. This Court is enjoined to consider the foundational values of human dignity, freedom and equality as well as the state's obligation to respect, protect, promote and fulfil the rights in the Bill of rights, when re-considering the common law rule on delictual damages for psychiatric injury involving grief.

269. Froneman J held that context is important when carrying out this evaluation.[368]

270. Thus the Court must take into consideration the death and the circumstances of Michael's death including the following:

270.1. Five-year-old Michael died in his first week at school when he went, unsupervised, to a pit toilet to relieve himself;

270.2. The structure could not hold Michael's weight. He fell into the pit and drowned as a result of inhaling excrement, urine and other putrid substances;

270.3. Michael's body lay in the pit for hours before it was removed;

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368 *MEC, Health and Social Development* above n 351 at para 36.

270.4. The principal and teachers at Michael's school failed to ascertain his whereabouts when he failed to return to class;

270.5. The principal and teachers at Michael's school failed to summon emergency medical assistance that could have saved Michael's life;

270.6. The principal and teachers at Michael's school suppressed evidence of Michael's death and instructed the learners not to inform anyone, including Michael's family, about his death or that he was in the pit;

270.7. The principal and teachers at Michael's school did not inform his mother when she arrived at the school that Michael was dead in the pit. Instead they led her on a contrived search for him, away from the school;

270.8. Michael's parents and older sister saw his body in the pit. They sat next to the pit for a long time until Michael's body was removed;

270.9. The defendants owed a duty of care and constitutional duties to Michael which duties they admitted;

270.10. Michael's parents were entitled to expect that the defendants would protect him from harm;

270.11. Michael's death was foreseeable given the condition of the school's pit toilets;

270.12. Michael died as a result of the defendants' wrongful and negligent conduct. The defendants have conceded negligence.

271. It is within the context of Michael's horrifying death, and his family's almost immediate presence at the scene, that we argue that the common law should be developed to allow damages for grief to be recoverable. The defendants have conceded that their negligence, inter alia relating to the state of the pit toilets at Mahlodumela, as well as their failure to provide a duty of care, led to Michael's death. It was foreseeable and an accident waiting to happen.

272. The defendants' counsel conceded that "*it could have been any child. It would not have been Michael, it would have been any…one of the children who were at school…it was unfortunate to be Michael who went to the toilet at the time.*"[369]

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369 Transcript: p 245, lines 10-18.

273. The Komapes have no other remedy in law to compensate them for their prolonged grief over the gruesome way that Michael died. The Court should also recognise that their grief was aggravated by the defendants' conduct after Michael's death. The plaintiffs' undisputed evidence was that none of the defendants have apologised to them for Michael's death at Mahlodumela. In addition, the plaintiffs' undisputed version was that none of the defendants have explained to them how Michael drowned in the pit toilet. A further aggravating factor was the defendants' unwillingness to pay compensation for Michael's death and the subsequent "insulting"[370] offer of settlement that was made just a few weeks before the trial began.

274. The current common law position which denies the Komape family relief, is a violation of the most important and foundational value in the Constitution – the right to human dignity. We also outlined earlier in these heads of argument the inter-linking constitutional values that are implicated in this case. It is thus inescapable that the impugned common law rule offends the normative structure of the Constitution.

275. We submit that the reconsideration of the common law should also be through the prism of another constitutional value: Ubuntu. The Constitutional Court has held that it is "*necessary to start giving serious attention to how African conceptions of our constitutional values should be*

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370 Transcript: p 133, lines 19 – 21.

used in the development of the common law in accordance with those values."[371]

276. Moseneke DCJ reached the same conclusion in *Everfresh*:

> "*Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and "carries in it the ideas of humaneness, social justice and fairness" and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity".*[372]

277. In *Dikoko*[373], the Constitutional Court outlined how the values of Ubuntu are intrinsic to our constitutional order. The following two paragraphs are significant:

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371 *MEC, Health and Social Development* above n 351 at para 34.

372 *Everfresh* above n 305 at para 71.

373 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

"Ubuntu - botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past. In present day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution. As this Court said in Port Elizabeth Municipality v Various Occupiers

"The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

Ubuntu - botho is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our

> *society, it links up with world-wide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our country, processes that have long been, and continue to be, underpinned by the philosophy of ubuntu - botho."*[374] *(footnotes omitted)*

278. We argue that the defendants have, since the time of Michael's death, displayed a singular lack of Ubuntu towards the Komape family. This can be seen in their failure to approach Mr Komape as the head of the family to discuss the funeral arrangements and compensation, their failure to apologise to the Komape family, their failure to provide trauma counselling and psychological help to the Komape family and their failure

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374 At paras 113 – 114.

to take responsibility for Michael's death until a few weeks before the trial began.

279. It is evident that Mr Komape expected the education department to demonstrate social justice and fairness and compassion towards his family in the wake of the tragedy:

> "*What I wanted from the education. Because my son died in their care at school. They should come to me. Even today our matter between me and the education would not have been in court if they came to me and discussed this and we will know how we are going to bury Michael. Even today we would not have been here."* [375]

280. We submit further that section 39(2) must be read together with section 173 of the Constitution which provides for the common law to be developed in the interests of justice.

How development of the common law rule ought to take place

281. The development of the common law that we seek is incremental and does not challenge the heart of the common law on delict for the infringement of personality rights.

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375 Transcript: p 154, lines 14 – 20.

282. The common law position on recovering damages for negligently caused psychiatric injury will remain unchallenged. However, the rule should be extended on a case-by-case basis where a new set of facts exists that are not all fours with previous judgments but which fall within the rule.[376]

283. Therefore, all the elements to prove a psychological lesion or injury like 'emotional shock' should be applied to a claim for grief. Such a claim is usually supported by expert evidence which is able to classify the grief as a psychiatric injury.

284. The policy considerations that apply to cases of emotional shock in our law, should also apply to cases where grief results in a mental injury. Thus, the relationship between a primary and secondary victim will be a factor to be considered, together with fairness and justice.

285. We submit, however, that the primary consideration in each case should be whether the psychological injury – the prolonged and complicated grief - has resulted in a violation of a constitutional right. The Court has to be guided by the spirit, purport and objects of the Bill of Rights as well as the interests of justice.

<u>The wider consequences of the proposed change on the law of delict</u>

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376 See *K* above n 347 at para 16.

286. It is not envisaged that the proposed change will have a significant effect on the law of delict. The area where it will be applicable is discrete, ie non-patrimonial, general damages.

287. We submit that the proposed extension of the common law will not 'open the floodgates' and lead to limitless liability, particularly as the courts will continue to apply the test of reasonable foreseeability of harm. We further submit that there are no policy considerations that militate against the development of the common law. The situation is similar to the common law position pre-*Bester*.

Conclusion

288. We submit that a clear and detailed factual basis of the exceptional circumstances of this case has been laid to support our argument that the common law must be developed to give justice to the Komape family.

289. The legal principles outlined above, particularly the values of Ubuntu-Botho, confirm that the time has come for the courts to implement a living system of law in the interests of justice.

290. We therefoe ask the Court to award damages in the sum of R2 million, in terms of paragraph 41.3 of the plaintiffs' particulars of claim, in the event the common law is developed as we contend.

291. There is another basis for arriving at the same award, in the event the Court is not inclined to develop the common law. It is to award constitutional damages in the same amount of R2 million. We explore the basis of the award, in the section that follows.

J. *Constitutional damages*

The requirement of relief that is appropriate, just and equitable

292. Section 172(2)(a) of the Constitution empowers courts, when hearing constitutional matters, to *"make any order that is just and equitable."* (emphasis added)

293. Moreover, section 38 of the Constitution lists the parties who may approach a competent court, *"alleging that a right in the Bill of Rights has*

been infringed or threatened, and the court may grant <u>appropriate relief</u>, including a declaration of rights."[377] (emphasis added)

294. The Constitutional Court discussed the meaning of "appropriate relief" in its *Fose* decision.[378] In that case, the plaintiff sued for damages arising from a series of assaults by members of the South African Police Service. He asserted that he should be awarded constitutional damages over and above the recognized common-law damages for the breach of his constitutional rights arising from the assaults. He stated that these constitutional damages should include an element of punitive damages.[379]

295. The Court had the following to say about appropriate relief:

> *"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so,*

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377 Section 38 of the Constitution.

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

379 Id at paras 11 – 13.

> *the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."*[380]

296. The Court went on:

> *"I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. 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."*[381]

297. The Constitutional Court reiterated these comments more recently, in holding that the power to grant a just and equitable order is "wide and flexible" in order "to address the real dispute between the parties by

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380 Id at para 19.

381 Id at para 69.

requiring them to take steps aimed at making their conduct to be consistent with the Constitution."[382]

298. We submit that the question of appropriate – or effective – and just and equitable relief is the ultimate determinant as to whether constitutional damages should be awarded. While the question as to whether the claimant has sufficient remedies outside of constitutional damages is relevant to the assessment of what is just and equitable, it is not on its own decisive. The SCA's approach to this question was set out in *Kate* as follows:

> *"No doubt, the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And, no doubt, delictual principles are capable of being extended to encompass State liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only where there is no alternative – and indirect – means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy, it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights are required. Where that is*

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382 *Economic Freedom Fighters and others v Speaker of the National Assembly and another* [2017] ZACC 47 (29 December 2017).

> *so, the further question is what form of remedy would be appropriate to remedy the breach."*[383]

299. We submit that there are two aspects to appropriate relief in these circumstances: the first is an adequate award of damages to the members of the Komape family to compensate them for the violation of their constitutional rights, discussed in detail above. This includes direct violations of their rights to dignity and equality. It also includes the destructive impact of Michael's death, and the subsequent conduct of the defendants, on their right to family life.

300. The manner in which they lost Michael, and the treatment they received, entrenches the family's marginalization from society. This marginalization arises from a pre-existing and continued denial of their rights. The core of their right to dignity, and the integrity of their family unit, has been violated severely.

301. In this regard we note that the claim for emotional shock, namely claim A, is one founded in delict and is not directed at compensating the plaintiffs for the breaches of their constitutional rights. To allow the defendants to escape these breaches with impunity would, we submit, undermine the principles of just and appropriate relief.

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383 *MEC, Department of Welfare, Eastern Cape v Kate* above n 8 at para 27.

302. The second aspect arises from the evidence of the plaintiffs which establishes that, unless there is a marked and urgent departure from the defendants' "business as usual" approach, it is only a matter of time until the tragedy is repeated.

303. The effective relief for which we ask the Court takes both of these aspects into account. We submit that the circumstances of this case warrant an award of constitutional damages, as set out in the alternative to claim B.

Previous awards of constitutional damages

304. The concept of constitutional damages is not a new one. Although not awarded in *Fose*, this head of damages was foreshadowed, and laid the basis for the award of constitutional damages in subsequent cases.

305. The award of constitutional damages in *Modderklip*[384] arose from what amounted in fact to the expropriation of a farm without compensation. The respondent's farm had been unlawfully occupied by people evicted from an informal settlement. Although the respondent had taken steps to remove the unlawful occupiers from its farm – including charges of trespass, an eviction order, and an offer to sell the relevant portion of the farm to the City Council – it received no cooperation from the state and

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

could not therefore secure the removal of the occupiers from its property. As time passed, the number of occupiers and the area they occupied continued to grow, ultimately amounting to approximately 50 hectares accommodating 40 000 occupants.

306. The Constitutional Court confirmed the decision of the Supreme Court of Appeal ("SCA"),[385] which found that the respondent's right to property entrenched by section 25 of the Constitution had been infringed by the unlawful occupation of its property, and that the State had acted in breach of its obligations under section 26 of the Constitution to provide the occupiers with access to housing. On this basis, the SCA found that the State had failed to protect the respondent's rights.

307. The SCA granted an order allowing the occupiers to remain on the property until alternative land was made available to them, and ordered the State to pay constitutional damages calculated in accordance with the relevant provisions of the Expropriation Act 63 of 1975.

308. The Constitutional Court confirmed this award, finding that the award of constitutional damages carried with it advantages that were not apparent in other forms of relief. The damages would compensate the respondent for the unlawful occupation of its property, without disrupting the

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385 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and others v Modderklip Boerdery(Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA).

community set up by the occupiers and without relying on the State to take urgent steps to provide suitable alternative accommodation.[386]

309. In other words, the award placed all of the parties in the position that they would have been had the State not breached its constitutional obligations.

310. The Supreme Court of Appeal adopted a similar approach in *Kate*, [387] although it went further than the individual circumstances of that case in granting "effective" relief. It did so because – as in this case – the facts before the Court were not representative of an isolated incident. They were an example of a sustained and systemic failure by the State to meet its constitutional obligations.

311. The Court was faced with an unreasonable delay on the part of the Eastern Cape Department of Welfare in considering and granting the respondent, Mrs Kate's application for a social grant. Mrs Kate had applied for a disability grant on 16 April 1996. Although the evidence in that case was that it should have taken three months for her application to be considered, she was only advised in August 1999 that her application had been successful. She claimed the amount that had accrued to her (since her application was granted, she was entitled to the payment of her social grant from the date of application), plus interest on this amount. By the

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386 *Modderklip* above n 384 at para 59.

387 *Kate* above n 8.

time the matter reached the SCA, the crisp question was whether Mrs Kate was entitled to constitutional damages in the amount of the outstanding interest. She could not claim this amount under the common law because the common-law principles of accrual did not apply.[388]

312. Mrs Kate's argument was that the unreasonable delay in considering her application deprived her of her right to receive a social grant in terms of section 27 of the Constitution, and that she should be awarded damages to remedy the breach of that right.[389]

313. The Court described what it considered to be "a conspicuous and endemic failure"[390] on the part of the state to meet its obligations arising from section 27 of the Constitution[391] as follows:

> *"Why that has been so is not altogether clear because the government has failed to explain it at all in the present case. But the result has been a plethora of litigation in the High Court between the poor of that province and the provincial administration. In some cases the failure lies in not expeditiously considering applications for social grants. In other cases it lies in not paying what is due to beneficiaries once their applications have been approved. At times it*

388 Id at paras 7 – 14.

389 Id at para 17.

390 Id at para 3.

391 In particular, the State had breached its obligation to ensure the progressive realisation of the right to social security entrenched in section 27 of the Constitution.

lies even in the disregard of court orders for the payment of moneys that are due. . . . what is particularly distressing is that there seems to be no end in sight."[392]

314. It was this endemic failure that the Court considered as one of the two reasons justifying a direct vindication of the right. In this regard the SCA held that –

"In my view the breach in the present case warrants being vindicated directly, for two reasons in particular. First, I see no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. Secondly, the endemic breach of the rights that are now in issue justifies – indeed, it calls out for – the clear assertion of their independent existence."[393]

315. The Court then went on to consider whether a mandamus would be an effective remedy, and concluded that, in the circumstances before it, it would not:

"I pointed out earlier in this judgment that the problem that was faced by Kate is one that is endemic in the Eastern Cape. The

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392 *Kate* above n 8 at paras 4 – 5.

393 Id at para 27.

> *pattern that emerges from cases that have been brought in the High Court is that an application that has been made by an individual and is being delayed usually rises to the surface only when legal proceedings are brought, which must necessarily mean that, at least for the moment, similar applications by others move a step down in the pile. There is no reason to think it will be otherwise if the individuals concerned seek to enforce their rights by proceedings for a mandamus, raising the spectre of even more litigation, with each applicant attempting to leap-frog over others in order to secure its benefits. Anything that is conducive to that occurring is in my view most undesirable. <u>There is no doubt that the proper resolution lies in the administration getting its house in order so that all applications are dealt with expeditiously, rather than in encouraging yet more litigation</u>."*[394]

316. On this basis the Court awarded constitutional damages to Mrs Kate, in the amount equivalent to the interest payable when money is unlawfully withheld.

<u>Comparative law</u>

317. The recognition of constitutional damages as an effective remedy is not unique to South African law. We submit that decisions on this relief in

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394 Id at para 31, emphasis added.

comparative law are of assistance to this Court in making the appropriate order. In this regard we draw the Court's attention to the position in three foreign jurisdictions: Canada, New Zealand and Trinidad & Tobago.

318. These jurisdictions permit constitutional damages that extend beyond mere compensation, allowing vindicatory and/or punitive damages.

Canadian law

319. The Canadian Supreme Court has developed a nuanced approach for assessing constitutional damages. In *Vancouver (City) v. Ward,*[395] the Court developed a four-step test, requiring 1) proof of a Charter violation; 2) functional justification of damages; 3) absence of countervailing factors; and 4) determination of quantum of damages.

320. The second step of functional justification requires establishing that the damages "fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches."

321. The third step allows the state to demonstrate that other considerations—such as the existence of alternative remedies, and concerns for good governance—render constitutional damages inappropriate or unjust. In

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395 *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, accessed at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7868/index.do

describing the countervailing factors, the Court noted that the mere existence of an alternative remedy is not enough; the alternative remedy must be sufficient to adequately address the Charter breach.

322. With regard to the purpose of constitutional damages, the Court noted:

> *"Damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles."*

323. The Court went on to note the broad range of compensation available:

> *"Compensation focuses on the claimant's personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant's intangible interests. In the public law damages context, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety . . . Often the harm to intangible interests effected by a breach of rights will merge with psychological harm.* ***But a resilient claimant whose intangible interests are harmed should not be precluded from recovering***

damages simply because she cannot prove a substantial psychological injury."" (emphasis added).

324. However, the Court also held that constitutional damages should not duplicate damages awarded under private law causes of action, such as delictual damages, where compensation of personal loss is at issue. It further noted that "public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect" but at the same time recognized *"a general reluctance in the international community to award purely punitive damages."*

<u>New Zealand law</u>

325. In *Taunoa and Ors v The Attorney General and Anor,*[396] Justice Tipping affirmed the importance of vindication as a source of constitutional damages, noting that:

> *"The dual purpose of Bill of Rights remedies is reflected in the fact that when there is a breach of human rights there are two victims. First there is an immediate victim. The interests of that victim require the court to consider what, if any, compensation is due. But, because the breach also tends to undermine the rule of law and*

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396 *Taunoa and Ors v The Attorney General and Anor* [2007] NZSC 70 SC6/2006, accessed at http://www.courtsofnz.govt.nz/cases/taunoa-and-ors-v-the-attorney-general-and-anor/.

> *societal norms, society as a whole becomes a victim too. Hence, the Court must also consider what is necessary by way of vindication in order to protect society's interests in the observance of fundamental rights and freedoms."*

326. A similar purpose was recognized in the *Fose* concurrence by Justice Didcott.[397] Justice Tipping, however, further noted that:

> *"In private law cases the focus tends to be on what the plaintiff should receive. In the present public law environment the court should consider not only what the plaintiff ought to receive but also what the defendant should pay. The defendant must pay what, if anything, is necessary to vindicate the breach or denounce the conduct concerned or deter future breaches. The plaintiff should receive whatever is necessary to compensate effectively for the breach."*

327. When comparing the amount of compensation and vindication, he explained:

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397 *Fose* above n 378 ("Violations of constitutionally protected rights harm not only their particular victims, but it as a whole too. That is so because, unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another. The importance of the two goals is obvious and does not need to be laboured. How they are best attained is the question.")

> *"It is important that there be no double counting as a consequence of the vindicatory amount being paid to the plaintiff. If what is enough to vindicate is also enough to compensate, that amount is all that should be awarded. The same applies if the amount which is appropriate to compensate is also enough to vindicate. This approach implicitly involves considering how much is necessary to achieve each purpose and then awarding the higher of the two sums. Save to the extent of the excess of one sum over the other, every dollar awarded can properly be regarded as serving both purposes because of its impact on both the plaintiff and the defendant."*

328. This approach may be akin to the one taken by the Constitutional Court in *Fose*, where the Court rejected constitutional damages because of the existence of alternative remedies that could award "substantial damages" and thereby provide sufficient vindication of the constitutional rights breached. But it does not follow that any entitlement to damages through alternative remedies would defeat a claim for constitutional damages; the overall question is what is necessary for the effective vindication of rights.

Trinidad & Tobago law

329. Section 14 of the Trinidadian constitution permits the court to award remedies for constitutional violations. In *Attorney General of Trinidad and*

Tobago v. Ramanoop, the Privy Council awarded "vindicatory damages" as constitutional damages.[398] The Privy Council explained:

> *"An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."*

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398 *Attorney General of Trinidad and Tobago v. Ramanoop (Trinidad and Tobago)* [2005] UKPC 15 (23 March 2005), accessed at https://www.casemine.com/judgement/in/5779fc3be561096c93131a61

330. The claim for constitutional damages in this case is therefore supported by principles of South African law, as well as principles in comparative law. What all of these cases emphasise is that a decision to award constitutional damages will be context-specific. We therefore turn now to the circumstances of this case and to our submissions as to why constitutional damages are warranted.

<u>The need for constitutional damages in this case</u>

331. In his oral evidence, Mr David Still[399] described in detail the safety risks that are associated with pit toilets. For example, Mr Still testified as follows:

> *"The VIP toilets if they are not carefully, if they are not properly designed or maybe not in a good state of repair can pose a threat to the lives of users because of the exact problem that we discussed earlier. The user is sitting over a pit. Which may be full enough of liquid for a child to drown in. So there is a safety issue. You can not help, there will be times when that pit, where the VIP, there will be times when that pit is deep enough to drown in. . . . One of the key points highlighted here 63% of principles (sic) indicated they do not believe their learners are safe using the school toilets and so that is, and again you will see it in some of the photographs. But it is*

399 Transcript: p 374 ff.

common to find pit covers missing. Old toilets standing open. So there is not a good culture of safety around pit toilets out there."[400]

332. Mr Still went on to quote a report that he had prepared in September 2016 entitled 'Rural on-site school sanitation in South Africa – can we do better?',[401] and stating that "*Smelly, dark, scary, filthy conditions in the toilets undermine learners' dignity and psychological wellbeing."*[402] The same report records that 44% of learners in Limpopo describe their toilets as dangerous, and that they have the highest perception of toilets as being dangerous.[403]

333. Mr Still's evidence established the unhygienic, unsafe and undignified condition of school toilets across Limpopo, confirming the poor condition of the toilets reflected in the photographs included in the trial bundle,[404] which he described as "typical of the environment".[405]

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400 Transcript: p 391, lines 3 – 19.

401 Trial bundle: vol 2, pp 476 – 638.

402 Transcript, p 394, lines 23 – 25, quoting from p 483 of the report.

403 Transcript, p 400, line 6 and lines 19 - 20, quoting from p 529 of the report.

404 Volume 3, pages 865 – 894.

405 Transcript, p 437, line 8.

334. This evidence went unchallenged during cross-examination. Indeed, both the defendants' legal representative and the expert engineer agreed that toilets of this nature are commonly used in rural areas.[406]

335. So, too, was the evidence that the defendants knew about the state of the toilets at Mahlodumela, as we discussed in detail above. In failing to take measures to address this threat to learners' safety, they seriously breached their constitutional obligations and should be held liable for this breach.

336. In addition, the fact that the condition of the toilets at Mahlodumela was not unique is common cause. It emerged during the trial that what is also common cause is that, despite recognizing the safety risks posed to learners and undertakings to address these, the defendants still do not have a comprehensive programme to provide safe and adequate sanitation facilities to learners across Limpopo.

337. In his evidence, Mr Mark Heywood described in detail the engagement between SECTION27 and the national and provincial education departments, in an effort to secure safe and adequate sanitation facilities for learners.

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406 Transcript, p 441, lines 22 – 23; notices bundle, volume 2, pp 118 – 126.

338. Since 27 September 2012, SECTION27 had addressed correspondence to these education departments, detailing its concerns about sanitation facilities at public schools in Limpopo.[407] While this correspondence prompted some action from the state, including a sanitation plan to provide safe and adequate sanitation facilities to schools,[408] these steps were inadequate.

339. One of the primary problems with the measures adopted to date is that it is not clear on what basis schools would be entitled to receive new sanitation facilities. In other words, despite five[409] requests for the criteria used in identifying schools that would receive new toilets, there remains no clarity as to how the defendants identify the schools that will receive intervention.

340. In this regard Mr Heywood testified as follows:

> *"So part of our interaction with the department over the following months was drawing to their attention schools that were absent from the plan and trying to understand from the department what was the methodology by which they compiled this plan and on what*

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407 Trial bundle: vol 1, pp 26 – 30.

408 Trial bundle: volume 1, pp 92 – 114. This plan was subsequently updated: see trial bundle: volume 1, pp 129 – 146.

409 Trial bundle: volume 1, pp 115 – 117, para 4.4; pp 158 – 162, paras 4 – 6; pp 163 – 166, para 5; pp 171 – 175, para 4; pp 180 – 190, para 6.5.3.

basis a school was entered on to the sanitation plan or left off the sanitation plan."[410]

341. A perfect illustration of this is the fact that, despite the State's acknowledgement of the state of the toilets at Mahlodumela, it was not until October 2013 that this school was identified as needing new sanitation facilities.[411] Unfortunately, these new toilets did not arrive in time to prevent Michael's death. Had there been a systematic mapping of schools and a clear list of criteria as to what interventions would be required in each school, Michael's death could perhaps have been prevented.

342. On this point Mr Heywood testified that "*one of the responses that we got was that sometimes whether a school got on was something that was quite arbitrary."*[412]

343. The response that Mr Heywood refers to is included in the trial bundle.[413] It is a record of a meeting held on 18 September 2013 with representatives of the defendants, including Mr Mzwandile Matthews, who was the head of the intervention team appointed in terms of section 100(1)(b) of the Constitution. Paragraph 6.5.3 of this letter states:

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410 Transcript: pp 489 line 21 to p 490 line 1.

411 Trial bundle: volume 3, p 687.

412 Transcript: p 496, lines 7 – 17.

413 Trial bundle: vol 1, pp 180 – 190.

> *"When asked about the criteria of inclusion of schools on the sanitation plan, Mr Matthews suggested that objective criteria do not exist, and that it is possible that the person driving infrastructure planning has a "specific agenda"."*

344. Moreover, the defendants did not adhere to their self-imposed time frames for the provision of safe and adequate sanitation facilities to all schools in Limpopo. Mr Heywood testified that *"we were told yes, we will do this. Yes, we are committed to the sanitation plan. June 2013. But, the commitment that was apparent in the correspondence and in some of the meetings did not translate into action at the level of the school."*[414]

345. Indeed, the defendants submitted as exhibit "D" a list of sanitation projects that have still not been completed. This was confirmed during the evidence of Mr Mabidi.[415] Notably, this list of sanitation projects that will still be undertaken does not include any of the schools depicted at pages 865 to 894 of the trial bundle. According to the undisputed evidence of Mr Still, the sanitation facilities depicted in these photographs are unhygienic and unsafe for use by learners.

346. The defendants did not dispute any of this evidence. Indeed, the cross-examination of Mr Heywood by the defendants' representative suggested

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414 Transcript: p 527, lines 1 – 4.

415 Transcript: p 839.

that there is no intention on the part of the defendants to change their approach to the provision of safe and adequate sanitation facilities, nor has there been any change in the approach since the death of Michael Komape. At most, the defendants have established only that sanitation is not their sole priority, and this is acknowledged by the plaintiffs.[416]

347. The defendants did not raise directly any budgetary constraints. In any event, the undisputed evidence of Mr McLaren defeats any arguments on budgetary constraints that they could have made.

348. For the above reasons we ask for an order in terms of paragraph 41.3 of the particulars of claim.

The relevance of the actio popularis

349. The Court requested the parties specifically to deal with the applicability of the *actio popularis*, which is an action rooted in Roman law brought on behalf of the public. As we understand it, this is a principle applicable to the *locus standi* of a plaintiff to bring an action in the public interest.

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416 See transcript: p 562 ff.

350. The Appellate Division held, before the enactment of the Constitution, that the *actio popularis* has become obsolete.[417]

351. However, the introduction of the Constitution brought with it the enactment of section 38, which provides as follows:

> *"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. the persons who may approach a court are –*
>
> *(a) Anyone acting in their own interest;*
>
> *(b) Anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) Anyone acting as a member of, or in the interest of, a group or class of persons;*
>
> *(d) Anyone acting in the public interest; and*

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417 *Wood and others v Ondangwa Tribal Authority and another* 1975 (2) SA 294 (A) at 310F-G.

(e) An association acting in the interest of its members."

352. As such, we submit that section 38, which expressly allows proceedings to be instituted in the public interest, has overtaken the *actio popularis* and should be the principle that guides the standing of the plaintiffs in this matter, and in all other constitutional matters.

353. The defendants have not placed the plaintiffs' standing in dispute. We submit that the applicability of section 38 is therefore clear.

Conclusion

354. We submit that there are two conclusions to be drawn from this evidence:

354.1. First, that unless immediate measures are adopted by the defendants, it is only a matter of time until the tragedy that befell the Komape family is repeated; and

354.2. Second, that the defendants do not intend, nor do they consider themselves obliged, to take any measures to mitigate this risk.

355. It is for these reasons that the plaintiffs seek an award of constitutional damages.

356. In making this request, we are mindful of the comments of Nugent JA, in his decision in *Kate*:

> *"It is indeed troubling, as pointed out by counsel for the appellant, that the public purse, upon which there are many calls, should be depleted by claims for damages. If the provincial administration must seek further funds, in addition to those that have been appropriated for providing social assistance, in order to meet claims for damages, one hopes its accountability to the Legislature will contribute to a proper resolution. But the cause for that is the unlawful conduct of the provincial administration, and it does not justify withholding a remedy."*[418]

357. The defendants have not disputed any of the evidence used to justify a claim of constitutional damages. They have also led no evidence as to why such an order should not be made. We submit that this award is critical to ensuring that there is real progress in ensuring the safety and dignity of learners across Limpopo.

K. *The Declaratory Order*

358. The plaintiffs also ask this Court for a declaratory order that "*the defendants have breached their constitutional obligations in respect of the*

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418 *Kate* above n 8 at para 32.

rights contained in sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution".[419]

359. We submit that this relief flows directly from the submissions made in support of claims A and B above, in particular, the claim for damages for grief, alternatively constitutional damages. We have outlined in detail the interlinking constitutional rights that are at play in this case, and we have, we submit, demonstrated indisputably how the defendants have violated these fundamental rights and continue to do so.

360. The state failed to uphold the rights to equality, dignity, life, health care services, basic education, and the right to the paramountcy of the child's best interests in every matter concerning the child, in respect of the late Michael Komape, but also in respect of his family, the plaintiffs and the minor Komape children, and minor children who attend schools in Limpopo and who are unable to institute proceedings to vindicate their constitutional rights.[420]

361. The plaintiffs' uncontested evidence, particularly the evidence of Mr Still and Mr Heywood, has shown that the constitutional delinquency by the state, in respect of school sanitation in Limpopo, is pervasive and ongoing. Repeated efforts to alert the department to the problem and their duties did not result in systematic improvements. The two witnesses gave

[419] Pleadings bundle: p 26, para 41.1
[420] Pleadings bundle: p 4, para 7.3

undisputed evidence about photographs in the trial bundle[421] which showed the appalling conditions of pit toilets at nine schools in Limpopo as at September 2017. The declaratory order that we seek will, at the very least, vindicate the rights of the learners at these schools.

362. It is settled law that once it has been demonstrated that the state has engaged in conduct that is inconsistent with the Constitution and has breached its section 7(2) constitutional obligations, the Court has no choice but to declare such conduct invalid.[422] In *TAC*, the Constitutional Court held:

"The primary duty of courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights".-Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."[423]

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[421] Volume 3: pp 865-894.
[422] This is mandated by section 172(1) (a) of the Constitution and reinforced by section 237 of the Constitution.
[423] Minister of Health & Others v Treatment Action Campaign & Others (No 2) 2002 (5) SA 721 (CC) at para 99.

363. Further, section 38 of the Constitution permits a court wide powers to grant "appropriate relief" where a fundamental right has been infringed. In *Fose*, it was held that "*appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights*".[424]

364. We submit that the exceptional circumstances and unchallenged facts of this case merit a finding that the declaratory order that we seek is not a discretionary remedy. Rather, the constitutional violations have been so egregious and the remarkable fact that they are ongoing more than four years after Michael Komape's tragic, but avoidable death, makes the order mandatory. This is not a case dealing with abstract, academic or hypothetical issues.[425] Rather, real lives are at stake; the lives of innocent, mainly poor African school children, including those at the nine schools in Limpopo, who have no choice but to use unsafe and unhygienic pit toilets.

365. The declaratory order that we seek will have a practical effect.

365.1. It would firstly, and importantly, hold the state accountable for failing to uphold the Constitution in respect of Michael Komape, the

[424] *Fose* Note 378 above at para 19
[425] See: *JT Publishing (Pty) Ltd v Minister of Safety & Security* 1997 (3) SA 514 (CC) at para 15. We submit that this case is not apposite.

plaintiffs, the minor Komape children and minor children at Limpopo schools.

365.2. Second, it would be effective relief. A declaratory order would be a reflection of this Court's findings.[426] A failure to grant the order would not vindicate Michael Komape's rights or the rights of the plaintiffs and the minor children and school children.

365.3. Third, the rights of children are implicated in this case – starting with the late Michael and continuing with all the learners in Limpopo who use pit toilets of the like that was canvassed in evidence. Section 28(2) requires their best interests to be of paramount importance in deciding an order that is just and equitable. If there is no declaratory order, we submit that, on the evidence before the Court, it is a matter of time before another similar tragedy strikes.

365.4. Fourth, the state, both national and provincial education departments, would have to ensure that it fulfils its constitutional and statutory obligations to provide safe and decent sanitation in schools, a duty directly connected to the immediately realisable right to basic education. Put another way, basic education envisaged by the Constitution is nigh impossible without functional school toilets. This may mean reconsidering its policies and budget allocations, for example, as the evidence showed. Failure to do so would mean that the communities who

[426] *MEC for Education: Kwazulu-Natal and Others v Pill*ay 2008 (1) SA 474 (CC) at para 115.

are directly affected by these constitutional violations would be empowered to hold the state to account, either by approaching a court or by putting pressure on the state.

365.5. Finally, the facts of this case and the context of this case call for making an order that is just and equitable. There surely cannot be justice for Michael Komape if the defendants are allowed to plunder the public purse to pay the damages for their willful negligence without any further sanction. As we stated earlier in these heads of argument, this case requires a judicial sanction that is exemplary and the declaratory order is an important component of the groundbreaking relief that we ask this Court to grant.

L. Counselling for the minor children

366. Claim C relates to the future medical expenses that the plaintiffs and the minor children will incur as a result of their impaired mental health resulting from the shock and trauma due to Michael's death.

367. In the course of the trial, on 17 November 2017, this Court granted a consent order in terms of which the defendants agreed to a partial settlement of claim C. In particular, the parties reached agreement on the future medical expenses for the plaintiffs.

368. The defendants dispute, however, that they are liable for the future medical expenses in respect of the three minor children: Maria Komape, Onica Komape and Moses Komape.[427]

369. The plaintiffs persist in their claim for the counselling costs for these three children, and base their contentions on the undisputed evidence of Mr Molepo. The defendants attempted to dispute the fact of the experience of emotional shock and grief in minor children. Mr Molepo's evidence was clear that minor children experience grief, and that there are possible long-term negative consequences if they do not receive therapeutic intervention. In this regard his evidence was as follows:

> *"Young children are not able to verbalise their emotions and expressions of loss. So they often keep it to themselves. They often keep quiet about it. But you would often see it in their behaviour how they display it."*[428]

370. In response to a question as to the effect on young children on not receiving counseling for grief, Mr Molepo stated –

> *"It may not be a conclusive thing to say, but well we anticipate that they will grow and outgrow it at some stage. But we also could*

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427 Transcript: p 331, lines 8 – 10.

428 Transcript: p 277 line 22 to p 278 line 1.

expect that there could be certain instances where they at their later stage get to remember or have recollections of what may have happened and begin to re-experience the grief symptoms and that could also be a little difficult to deal with. Because, it will have been highly and more delayed."[429]

371. In addition to their own grief following Michael's death, the minor children also experienced changes in family interactions. Mr Molepo reported that Mrs Komape dealt with her grief by isolating herself from the rest of her family. Mr Molepo stated further that Mrs Komape had become more irritable with her family.[430]

372. Mr Molepo has been providing counseling to the family in implementation of the recommendations of Mrs Edzisani Sodi, the clinical psychologist who assessed and diagnosed the members of the Komape family on 10 June 2014.[431]

373. Mrs Sodi made the following assessments in respect of each of the minor children:

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429 Transcript: p 278, lines 13 – 21.

430 Transcript: p 286, lines 1 – 7.

431 Pleadings bundle: p 30.

373.1. Maria presented with traits of bereavement and post-traumatic stress disorder. Based on this assessment, she should be referred to a clinical psychologist for ten psychotherapy sessions, to assist her in a healthy grieving process, resolving the loss and beginning the necessary adjustments to reach functional interactions and reducing the negative impact that the traumatic event had on her life.[432]

373.2. Onica met the diagnostic criteria for post-traumatic stress disorder and bereavement. Mrs Sodi recommended 30 sessions of psychotherapy to provide assistance to Onica in beginning a healthy grieving process, resolving the loss and beginning the necessary adjustments to achieve functional interactions and reducing the negative impact that the traumatic event had on her life.[433]

373.3. Although Moses told Mrs Sodi that he was "sharp", Mrs Komape expressed concern that he had become forgetful and lost concentration. Based on these concerns, Mts Sodi recommended that Moses be referred to a clinical psychologist.[434]

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432 Pleadings bundle: p 76.

433 Pleadings bundle: p 70.

434 Pleadings bundle: pp 79 – 80.

374. Mr Molepo first counselled Maria and Onica Komape on 11 December 2015, and Moses Komape on 2 October 2015.[435] He testified that he made the following assessments in relation to each child:

374.1. Maria was emotionally withdrawn and appeared to be very sad. She reported an intense form of longing for her brother and missing him. She also reported sleep disturbances and poor concentration, and that she was isolating herself from her friends and her peers. She was showing symptoms of both post-traumatic stress disorder and bereavement.[436]

374.2. Onica was withdrawn at the time of the consultation and communicated very little. She was able to express the emotional symptoms of sadness and was tearful during the session. She reported that she was worried about Michael and that she missed him.[437] Onica displayed symptoms of post-traumatic stress disorder and met the diagnostic criteria for bereavement.[438]

374.3. During his first counseling session on 2 October 2015, Moses was withdrawn and tearful, and could not express himself very openly. Although he acknowledged that he will not ever see Michael again,

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435 Notice bundle: volume 1, pp 87a – 88.

436 Transcript: p 311 line 9 to p 312 line 9.

437 Transcript: p 307, lines 1 – 8.

438 Transcript: p 307, lines 12 – 21.

> Moses expressed that he wished that Michael could still be alive so that they could play together. At that stage, Moses was showing the symptoms of bereavement.[439]

375. These assessments are reflected in the summary of Mr Molepo's expert evidence delivered in terms of Uniform Rule 36(9)(b). In this summary, Mr Molepo recorded the following:

> *"Maria and Onica indicated difficulty coping with the loss of their little brother and responded tearfully during some sessions. They rationalized about the situation and were encouraged to find hobbies that could keep them preoccupied when not doing school work."*[440]

> *"Moses Komape had responded tearfully whenever the name of his brother was brought up during the consultations although he appeared to have developed insight into the loss."*[441]

376. Given the plaintiffs' reliance on the evidence of an expert clinical psychologist, the defendants arranged for their own psychologist to assess

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439 Transcript: p 314 line 15 to p 316 line 2.

440 Notice bundle: volume 1, p 88a, para 5.

441 Notice bundle: volume 1, p 88a, para 5.

members of the Komape family.[442] It is apparent from the defendants' notice in terms of Uniform Rule 36(2) that Ms Mathiva Mudzhunga was instructed to examine only the first to fourth plaintiffs, and not the minor children.

377. The defendants filed the summaries of Ms Mudzhanga's assessments in terms of Uniform Rule 36(9)(b) on 11 April 2017.[443] There are no assessments of the minor children included in these summaries.

378. On 19 May 2017, the expert clinical psychologists held an experts' meeting.[444] The minute of this meeting, which was delivered on 24 August 2017,[445] reflects agreed recommendations in respect of the first to fourth plaintiffs, but makes no mention of the minor children. During his examination in chief, Mr Molepo stated as follows:

> *"The joint minute was based on only the parents, Mr and Ms Komape, as well as the two eldest siblings, Lydia and Lucas. It excluded the minor children Maria and Onica, as well as Moses and*

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442 Notice bundle: volume 1, pp 127 – 128.

443 Notice bundle: volume 2, pp 160 – 213.

444 Notice bundle: volume 2, pp 229 – 30.

445 Notice bundle: volume 2, pp 226 – 8.

when I checked with my colleagues they indicated that they had an instruction only to focus on the four and exclude the three."[446]

379. The defendants' representatives did not challenge this during cross-examination.

380. When asked about the current emotional state of the minor children, Mr Molepo gave the following evidence:

380.1. During a session with Mr Molepo on 6 April 2017, Maria was still withdrawn but more at ease. She was able to communicate more openly than before and was reaching a level of acceptance of her brother's death. She was no longer showing symptoms of bereavement and post-traumatic stress disorder. On this basis Mr Molepo recommended that Maria receive between four and eight further counseling sessions.[447]

380.2. When Mr Molepo last saw Onica on 6 April 2017, she reported that she was able to cope. She feels less sad when she thinks about Michael, although she will still miss him. The symptoms of grief and bereavement were not present, but Onica was experiencing

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446 Transcript: p 279, lines 2 – 7.

447 Transcript: p 312 line 12 to p 313 line 17.

minor difficulties adjusting to living without Michael.[448] Based on Onica's condition on 6 April 2017, Mr Molepo recommended that she receive between four and eight further counseling sessions.[449]

380.3. When Mr Molepo saw Moses on 6 November 2017, he was communicating much more openly and expressively. However, he still presented with "a lot of sadness and tearfulness".[450] Mr Molepo recommended that Moses receive between 6 and 10 further counseling sessions.[451]

381. The defendants did not dispute these recommendations. Through their legal representatives, they accepted that all of the members of the Komape family still require therapeutic sessions.[452] Although Mr Molepo conceded that one cannot predict with certainty the precise number of sessions required in order to return to normal functionality,[453] the defendants did not place in doubt whether the suggested number of sessions is appropriate, nor did they propose any alternative. The objection to their general challenge to the reliability of Mr Molepo's evidence was

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448 Transcript: p 308, lines 6 – 14.

449 Transcript: p 309, line 17.

450 Transcript: p 316, lines 16 – 20.

451 Transcript: p 317, line 5.

452 Transcript: p 321, lines 1 – 5.

453 Transcript: p 340 line 24 to p 341 line 16.

overruled.[454] There is therefore no reason not to accept Mr Molepo's recommendations with regard to future counseling for the minor children.

382. We submit that, because an exact prediction is not possible, and given the context of this case and the nature of the harm for which compensation is sought, the Court should err on the side of caution and make provision for the maximum number of future counseling sessions that Mr Molepo recommended for each of the minor children. This would allow a higher level of certainty that the minor children would become able to cope with their loss of their brother and would therefore be in their best interests as required by section 28(2) of the Constitution.

383. This approach is also supported by the expert clinical psychologists' joint minute, which states as follows:

> *"The helping Clinical psychologist will assist the plaintiffs during the number of sessions stipulated above. We agreed further that provision should be made for additional psychotherapy sessions which will be determined by the helping Clinical Psychologist with clear reasons."*[455]

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454 Transcript: p 352, lines 8 – 22.

455 Notice bundle: volume 2, p 230.

384. On this basis, and calculated at the agreed rate of R1 000 per session,[456] we submit that a case has been made out for an order of R26 000 in respect of claim C, which would allow for eight counseling sessions each for Onica and Maria Komape, and ten sessions for Moses Komape.

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456 As per the consent order of 17 November 2017.

M. *Costs*

385. In the event that the plaintiffs are successful and are awarded a portion of their claim greater than what the defendants' have offered, [457] we submit that they be awarded costs. [458]

386. The plaintiffs' counsel have acted *pro bono,* and counsels' fees ought not to be part of the costs order. However we ask that disbursements incurred by or on behalf of counsel should expressly be accommodated in the costs order.

387. The costs order should also provide for qualifying fees of the plaintiffs' experts, Mr Still and Mr Molepo, including costs of the preparation time, consultation fees, drafting of expert reports, and attendance in court, as well as disbursements incurred by them or on their behalf in connection with their testimony.

388. We submit that a special costs order on attorney and client scale is merited in this case due to the manner in which the defendants have

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457 The defendants offered the plaintiffs, with prejudice, a total amount of R450,000 in full and final settlement of all of the plaintiffs' claims. During the trial, the parties already settled for an amount of R135,372.65 in respect of claims C, D and E. Therefore, should the court award the plaintiffs an amount substantially greater than the difference between what is offered and what was settled (R314,627.35), then we submit that the plaintiffs have been successful (*Fleming v Johnson & Richardson* 1903 TS 319, 325.)

458 See: *Zeman v Quickelberge (*2011) 32 ILJ 453 (LC) paras 77; 103. See also: Section 79A of the Attorneys Act on law clinics reclaiming costs, and Uniform Rule 40(7) on litigants *in forma pauperis.*

conducted themselves in this litigation. The following aspects of the defendants' conduct, canvassed in detail earlier in these heads of argument, are grounds for an adverse costs order on a punitive scale:

388.1. The defendants put the plaintiffs through unnecessary trouble and expense,[459] in some cases delaying the trial of the action, and in doing so, acted vexatiously. [460]

388.2. The defendants engaged in lengthy, and sometimes frivolous and cryptic cross-examination of many of the plaintiffs' witnesses. [461]

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459 The offer of settlement was incomprehensible and not clarified until the first day of the trial, despite the plaintiffs' earlier request (Transcript, p 11, lines 1 – 4; pp 13 – 14). The plaintiffs were kept in the dark as to the defendants' defence throughout the trial, and until such evidence was actually led, the defendants stating at the pre-trial conference that they would call four witness (Pleadings bundle, p 133), at the opening of the trial that they would call no witnesses (Transcript, p 54, lines 17 – 18), then stating that they would indeed call witnesses (Transcript, p 91, lines 5 – 6) and without giving any indication who these witnesses were and what they would testify to. The defendants refused to admit aspects of the plaintiffs' case (photographs) despite not having any counter-argument (Transcript, pp 615 – 616; 691 – 692).

460 In *Mokhethi v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ) the court awarded costs on an attorney-client scale as a marker of its displeasure with the defendant's uncooperative attitude. In particular, the defendant refused to make certain admissions, thus compelling the plaintiff to call certain witnesses whose evidence was then not contested (p 99). In *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) the court awarded costs on an attorney and client scale where the respondent raised on procedural opposition to a case, and did not engage with the facts alleged by the applicant in order to show that they were erroneous (para 16).

461 Transcript: p 159 – 160 (cross-examination of James Komape on what constitutes an "accident"); p 184 – 185 (cross examination of Charles Malebana on taking photographs of a "crime scene", when this is not a criminal offence and when counsel had no basis to suggest this); pp 229 – 230 and pp 248 – 250 (cross examination of Lydia and Lucas Komape on contributions made to the family when it was clear that they were not the people in the family in charge of this, and when Lucas was a mere child). See: Rule 39(24), *van der Schuff v Gemeenskaps Ontwikkelingsraad* 1984 (2) SA 497 (W) where costs were awarded for two days where extensive cross-examination led to the waste of these days.

388.3. The defendants imputed ulterior motives to several of the plaintiffs' professional witnesses without foundation, [462] and denigrated the plaintiffs without foundation. [463] In doing so, the defendants acted recklessly and unfairly. [464]

388.4. The defendants disregarded the rules of court in a number of instances [465] which prejudiced the plaintiffs in the preparation of their case. [466]

388.5. They failed to make discovery of documents which were referenced in the course of testimony of witnesses they called. They failed to put versions of their witnesses to plaintiffs' witnesses during cross-examination.

389. These examples, taken together call for a punitive costs order.

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462 Transcript: pp 433; 744.

463 Defendants counsel explicitly accused the plaintiffs, in cross-examination of the youngest plaintiff, of using Michael's death to get rich: "*[A]t the end I will argue that it seems to me that somebody wanted to be or to get rich because of Michael's death*" (Transcript: p 257, lines 10 – 11).

464 *Morris v Jacobs and Wolpert* 1950 (2) SA 189 (D).

465 Despite numerous requests by the plaintiffs' attorneys, the defendants' representatives failure to sign the pre-trial minute until the first day of the trial (Pleadings bundle, p 133). The plaintiffs were further forced to bring an application to compel compliance with the rules of court when the defendants failed on three occasions to comply with a discovery notice (Transcript, pp 7 – 9; Application to compel – separate bundle).

466 *Medox Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA) 315.

390. We respectfully submit that if the plaintiffs are unsuccessful in claims A and B (the remaining claims having already been settled in favour of the plaintiffs), then they should not be held liable for costs. The plaintiffs in this matter have raised constitutional issues relating to the performance by the state of its obligations.[467] They are represented by three counsel acting *pro bono.* They are also represented by SECTION27, a registered law clinic which represents indigent people and which does not charge for its services.

N. *Conclusion*

391. At the heart of this case lies a terrible tragedy that could have been prevented. A death of a loved one is always tragic. The death of a child is even more tragic. In this case the Komape family did not just lose a child. They lost him in an unthinkable way. And their trauma and loss was given short shrift by those responsible for it.

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467 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC): "[T]he general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct" (para 53).

392. Mrs Komape stated in her testimony that *"If it was possible for my child to live again I would not want money. I would want my child."*[468]

393. The law cannot bring Michael back. But it can be used to compensate the Komape family for their shock, their grief, and the violations of their constitutional rights. It can be used to put measures in place to ensure that this terrible tragedy is not repeated. It can be used to ensure that Michael is not just a child who was bound to lose his life because of the circumstances into which he was born; he was a child who bore rights to life, dignity, and the right to ensure that his safety was prioritized at all times.

394. For these reasons, we submit that a case has been made out for the relief that the plaintiffs seek.

DATED AT SANDTON ON THIS THE 22 DAY OF JANUARY 2018.

VINCENT MALEKA SC

USHA DAYANAND-JUGROOP

NIKKI STEIN

Counsel for the plaintiffs

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468 Transcript: p 110, lines 11 – 12.

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