

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 1416/2015

In the matter between:

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

and

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

APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT on a date to be arranged with the Registrar of the above Honourable Court or upon such direction as the Court may give, the applicants will make application for leave to appeal against the judgment and orders, save for the

orders as to the structural relief and costs, made by Mr Justice Muller and delivered on or about 23 April 2018.

TAKE NOTICE THAT, in the event leave to appeal is granted, the applicants will request the learned Judge to issue a direction in terms of section 17(6)(a)(i) of the Superior Courts Act, 10 of 2013, as amended (“the Act”), that the appeal be heard by the Supreme Court of Appeal of South Africa (“the SCA”) on the ground that the points of law and/or facts, and also the constitutional issues that arise from the appeal are of fundamental importance as to require the attention of the SCA. In the event the learned Judge does not make that direction the applicants will request that the appeal be heard by the Full Bench of this Honourable Court.

TAKE NOTICE FURTHER THAT the applicants will seek leave to appeal on one or more of the grounds more fully set out below upon which there exist reasonable prospects of success on appeal. In the alternative, the applicants will seek leave to appeal on the grounds that there exists compelling constitutional questions arising from the intended appeal and that it is in the interest of justice that the appeal court, whether it is the SCA or the Full Bench of this Court, should express itself on those questions.

In respect of the declaratory order

1. The Honourable Judge erred in dismissing the prayer for a declaratory order that the defendants have breached their constitutional obligations in respect of the

rights contained in sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution on the basis that it would be of no value to learners and parents at schools in Limpopo.

2. The declaratory order is fundamental to clarifying the duties of the respondents in respect of the rights of learners.
3. With respect to the right to basic education in section 29 of the Constitution the crux of the declarator is that adequate and safe sanitation is a component of the right to basic education, which is not subject to progressive realisation by the state.

In respect of claim A

4. The Learned Judge erred, on the facts, and he should have held that the applicants have established their case, on the evidence, in respect of claim A, having regard to the following facts and considerations:
 - 4.1. The respondents accepted on the facts, and the evidence established, that the applicants suffered emotional shock and have suffered cognizable damages as a result thereof;
 - 4.2. The respondents accepted and conceded their liability, both on the record, and with prejudice, and also in their written heads of argument confirmed in the course of their oral submissions, that the applicants are entitled to compensation in respect of claim A.

- 4.3. The respondents' concession on claim A was based on facts and that concession was neither withdrawn nor repudiated before the judgment and order were granted on or about 23 April 2018.
 - 4.4. The respondents' concession of liability was both to their obligation, on the merits, to compensate the claimants in respect of claim A and the quantum thereof, as was assessed and offered by them both in their written offer made with prejudice, and the quantum assessed on their behalf in the heads of argument.
 - 4.5. The only debate before the learned Judge in respect of claim A was in respect of the assessment of the quantum of damages in respect of that claim, and not the merits of claim A.
5. In respect of the quantum of damages on claim A, the learned Judge erred in failing or refusing to award to the applicants the quantum claimed by them in paragraph 41.2 of the particulars of claim, having regard to the following considerations:
- 5.1. The quantum claimed was neither excessive nor unreasonable.
 - 5.2. The quantum claimed was consistent with the quantum of damages previously considered and awarded by courts in previous comparable cases.

- 5.3. The quantum claimed took into account the nature, degree and effect of trauma, emotional shock and suffering and the consequences thereof suffered by each of the applicants separately and also as a family in their attempt to cope with the loss of their family member.
6. The learned Judge should have found, at a minimum, that the respondents' analysis of the quantum of damages suffered by the applicants in respect of claim A entitled the applicants to the award of damages in the amount assessed by the respondents and ordered them to pay compensation in the amount so assessed.
7. The learned Judge failed to appreciate that claim A was based on a cause of action founded upon emotional shock, and confused it with claim B which was based on the cause of action founded upon grief, and the development of common law in respect of claim B. Had the learned Judge appreciated the distinction between the two claims he ought to and should have found that the uncontested evidence established the applicants' case in respect of claim A. In that connection, the learned Judge erred, as a matter of fact, and he should have found that:
- 7.1. The evidence of the claimants established the requisite emotional shock on their part and sequelae which justified compensation.

- 7.2. The report of Mrs Sodi, canvassed in the oral testimony of Mr Molepo established the requisite emotional shock and its immediate and long term effect on the applicants.
- 7.3. The unchallenged evidence of Mr Molepo also established emotional shock and post-traumatic stress disorder on the part of the applicants.
8. The learned Judge erred, as a matter of law, in that he concluded, or appears to have concluded that the applicants were required to prove the existence of psychiatric lesion or illness in order to support claim A, and that such evidence was not produced before him. In that regard, the learned judge confused claim A and claim B, and treated these claims on the same basis.
9. The learned Judge should have found, in respect of claim A that:
 - 9.1. In the established authorities, more particularly the judgment of the SCA in *Mbhele v MEC for Health for Gauteng Province* (355/15) [2016] ZASCA 166 (18 November 2016), the proof of psychiatric lesion or illness by expert evidence was a precondition for compensation, in as much as other forms of evidence to establish emotional shock will be sufficient to establish a claim. In that respect the learned Judge departed from the precedent set by the SCA in *Mbhele* and did not justify this departure beyond his disagreement with the conclusion reached.

- 9.2. On established jurisprudence of the SCA, including the judgment of that Court in *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) the learned Judge was bound to apply the approach to compensation in *Mbhele*.
- 9.3. On the evidence before Court, there was sufficient evidence to prove emotional shock suffered by the applicants and the sequelae therefrom, as to entitle them to compensation.
10. The applicants accordingly contend that there are reasonable prospects of success on appeal and that there are reasonable prospects that an appeal court, faced with the same facts and evidence, and upon a proper application of the law, might come to a different conclusion.

In respect of claim B

11. The learned Judge erred in dismissing claim B and in failing to develop the common law as was urged by the applicants. In that regard, the learned Judge should have found that:
- 11.1. The evidence established as a fact that the applicants suffered bereavement and mourning as a result of the death of Michael Komape, and that the evidence of Mr Molepo referenced these psychological conditions interchangeably with, and proved the existence of grief on their part.

11.2. The common law requirement that there should, in all circumstances – and without regard to the circumstances of each case – be proof by way of expert evidence of psychiatric lesion or illness, required development in terms of section 39(2) of the Constitution, consistent with the constitutional norms and values set out in section 1(c) and section 7(1) and (2) of the Constitution, when such a claim is brought against state organs for delictual compensation arising from serious breaches and violation of fundamental rights set out in chapter 2 of the Constitution.

11.3. The common law requirement was based on an arbitrary consideration, insofar as it fails to distinguish claims based on serious breaches and violation of fundamental rights, and prevented the vindication of constitutional rights and as well as the granting of appropriate relief in terms of section 38 of the Constitution.

12. The learned Judge failed to consider the need for the development of the common law as was urged by the applicants and should have done so, having regard to the following facts and circumstances:

12.1. The learned Judge was obliged in terms of section 39(2) of the Constitution to consider and develop the common law in order to promote the values, spirit and purport of the Constitution, and to vindicate the constitutional rights asserted by the applicants. The

learned Judge did not do so and has failed to fulfil the obligation he has in terms of section 39(1)(a) read with section 8(1) of the Constitution.

12.2. The facts of the present case, the evidence led and the nature of the fundamental rights asserted by the applicants and violated by the respondents, and also the impact of that violation on the applicants, justified the development of the common law, having regard to the following considerations:

12.2.1. The applicants are marginalized members of society, and have neither the means, resources nor skills to assert and vindicate the fundamental rights they asserted and which were violated by the respondents. The common law requirement upheld by the learned Judge had a chilling effect on the applicants' rights of access to court and vindication of their constitutional rights.

12.2.2. The applicants established the violation by the respondents of their constitutional rights, including the rights to dignity and family life, and violation of the best interests of their minor child that ought to have been held paramount.

- 12.2.3. The respondents were no ordinary delictual wrongdoers, but were state actors who had the unmistakable constitutional obligations to protect, promote and fulfil the applicants' constitutional rights.
- 12.2.4. The spirit, values and purport of the Constitution required the vindication of the applicants' fundamental rights through the development of the common law, and grant of claim B as a form of appropriate relief in terms of section 38 of the Constitution, rather than the strict application of the common law to deny claim B.
- 12.2.5. The spirit, purport and values of the Constitution calls for a development of the common law to recognise the value of a life, even where the deceased is not a breadwinner.
- 12.3. The learned Judge erred when he held that recognition of a claim for grief would result in "*bogus and unwarranted proliferation of claims for psychiatric injuries*" and declined to recognize the development of the common law claim for grief on that basis. The approach of the learned Judge was mistaken because:
- 12.3.1. There was no scintilla of evidence placed before the Court to justify such a consideration.

12.3.2. None of the respondents sought to resist the applicants' claim for development of the common law claim for grief on that basis, or policy consideration of a possibility of multiplicity of action, let alone "*bogus*" claims.

12.3.3. The said consideration failed to consider the circumstances of the applicants as the claimants before the Court, as is manifestly and obviously required. Each claim will be assessed on its own merits or demerits.

12.3.4. The applicants were not afforded the opportunity to consider that fact and if necessary to lead evidence to show why it did not present a bar to their claim.

13. The applicants therefore contend that there are compelling constitutional considerations and justification for the development of the common law claim for grief and that there are reasonable prospects of success on appeal, and also that there are reasonable prospects that, based on the record before this Court, the appeal court might come to a different conclusion and recognize claim B asserted by the applicants and compensate them on it.

In respect of the alternative claim for constitutional damages

14. The learned Judge erred in his treatment of constitutional damages and structural relief as mutually exclusive. The learned Judge should have

recognised the multiple levels on which constitutional rights were violated, and granted relief in respect of each of those levels of violation. Instead, the learned Judge granted a prospective remedy that may potentially prevent future violations of the rights of learners and parents, which remedy does not vindicate the rights of the applicants.

15. The learned Judge should have considered and concluded that an award of constitutional damages would be an appropriate remedy to vindicate the applicants' rights in the circumstances of the present case, having regard to the following uncontested evidence:

15.1. The respondents have been repeatedly made aware, over an extended period of time (at least two years before the death of Michael Komape) that sanitation for learners across schools in Limpopo Province was not healthy and posed a real risk of life and limb to the learners.

15.2. The respondents repeatedly undertook to but failed to address the problems concerning inadequate sanitation brought to their attention.

15.3. The respondents had the necessary financial means and resources to address the problems of sanitation but failed to do so, and their

failure was not explained through any credible evidence placed before the Court.

- 15.4. An award of constitutional damages would be a recognition of the personal loss of the Komape family in order to vindicate the constitutional rights whose violation is now established on the record.
16. The learned Judge held that to award constitutional damages to the applicants would amount to overcompensation. In this regard the learned Judge failed to have regard to the different nature and purpose of the different claims for damages, as compensation for the different nature of harm sustained. On the facts there was no compensation to the Komape family which warranted the conclusion of overcompensation to them.
17. The learned Judge rejected constitutional damages as a deterrent to future violations. On this score the learned Judge failed to consider whether the grant of constitutional damages would deter the respondents' likelihood of future violations, and as fate would have it, another death of a learner has since occurred in the Eastern Cape Province arising from the breach of at least the first respondent's obligation towards learners in the country.
18. The learned Judge erred by not considering the multiple related functions and purpose of compensation for the vindication of constitutional rights asserted by the applicants in the context of the present case.

19. The applicants therefore contend that there are reasonable prospects of success on appeal and that the appeal court might award the claim for constitutional damages asserted by them, in the alternative, based on the record before this Court, and grant compensation asserted by them.

In respect of claim C

20. The learned Judge erred by not addressing claim C asserted for Moses Komape, having regard to the following considerations, based on undisputed evidence:

- 20.1. The undisputed expert evidence establishing the future medical expenses for psychological treatment for Moses Komape.

- 20.2. The respondents did not produce any countervailing evidence to contest that evidence and claim for Moses Komape.

- 20.3. There is simply no indication in the judgment why the learned Judge did not allow Moses Komape's claim.

21. The applicants therefore contend that there are reasonable prospects of success on appeal and that the appeal court might come to a different conclusion and recognize claim C in respect of Moses Komape.

Conclusion

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