IREPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

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CASE NO: 1416/2015

In the matter between:

ROSINA MANKONE KOMAPE	FIRST PLAINTIFF
MALOTI JAME 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

JUDGMENT

MULLER J:

Introduction

[1] This case is about a five year old boy named Michael Komape. Michael was the youngest child of Maloti and Rosina Komape and attended grade R at Mahlodumela Lower Primary School at Chibeng village near Seshego.

[2] The case is also about the Komape family. The life of this young boy together with the dreams and expectations of his parents and his siblings came to a shattering and tragic end when Michael lost his life when he fell into a pit toilet situated on the school premises

[3] But the case is not only about Michael and his family. The case is also about the plight of learners attending schools in rural areas across the great Province of Limpopo who are without basic sanitation at schools administered by the National Department of Basic Education and the Provincial Department of Education of Province of Limpopo.

The Amici Curiae

[4] Two *amici curiae* were admitted to participate in the proceedings, the first of which had been discharged at its request soon after the trial commenced. The second *amicus*, Equal Education, presented evidence by way of affidavit in terms of rule 38(2) of the Uniform Rules of the High Court. The affidavit was accepted without demur by the parties. Counsel on behalf of the second *amicus* attended the proceedings throughout and also made valuable submissions at the conclusion of the evidence.

[5] The plaintiffs are all members of the Komape family. The first plaintiff is Rosina Komape (the mother). The second plaintiff is Maloti James Komape (the father). The third plaintiff is Mokibelo Lydia Komape (the sister) and the fourth Plaintiff is Khomotso Lucas Komape (the brother). First and second plaintiff also instituted

action in their representative capacities on behalf of their three minor children Maria, Onica and Moses Komape. (Claim A and B relate to them only).

The Plaintiffs Case

[6] The cause action in Claim A is premised on a wrongful and negligent breach of a variety of duties of care toward Michael which caused his death. As a result of his death the plaintiffs together with their minor children suffered grief, emotional shock.

[7] In the alternative punitive damages are claimed as a penalty and deterrence for the wrongful conduct which attributed to the death of Michael and also the breach of the defendants constitutional duties.

[8] It is also averred under the alternative that the plaintiffs and the minor children suffer from post-traumatic stress disorder (hereinafter PTSD), bereavement as well as depressive disorder.

[9] The plaintiffs claim that the common law be developed for two reasons. The first is that the plaintiffs do not have an effective remedy for compensation. The second is that compensatory damages in the factual circumstances of the case are integral to vindicate the constitutional rights of the plaintiffs for the loss suffered as a result of the breach of the constitutional duties of the defendants. Put differently, plaintiffs claim is for compensation for loss suffered as a result of the breach of constitutional rights and duties.

Claim A

[10] Claim A is a delictual claim for damages for emotional trauma and shock the family members each have experienced.

Claim B

[11] The plaintiffs claim the amount of R2m for grief suffered by the plaintiffs as immediate family members. In the alternative constitutional damages are claimed. on the following basis:

(a) the defendants failed to discharge various duties of care inclusive of their constitutional duties to protect Michael;

(b) the plaintiffs were entitled to expect that Michael will be protected from harm whilst in the care of the defendants;

(c) the death of Michael was foreseeable given the condition of the toilets on the premises.

Claim C, D and E.

[12] Claim C relates to past and future medical expenses as a result of their impaired mental health resulting from the shock and trauma they have suffered because of the death of Michael. In claim D the first and second plaintiffs claimed for funeral expenses and in Claim E the first plaintiff claimed for loss of earnings.

The Declaratory Order

[13] In addition to the claims for damages, the plaintiffs also seek 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.

Liability Conceded

[14] Counsel appearing for all the respondents conceded liability in respect of claim A, C, D and E in relation to all the plaintiffs and the minor children. Foreseeability of harm with regard to secondary victims has likewise been conceded and need not be determined.

[15] The amounts claimed in claims D and E were also conceded and judgment was granted by consent in respect of those claims.

The Disputes

[16] In respect of claim A, the *quantum* of compensation claimed by each plaintiff and the minors, as general damages, is disputed. The whole of claim B as well as the declaratory order remained in dispute. With regard to claim C, the necessity for, and number of sessions required in respect of future medical expenses for psychological treatment in respect of the plaintiffs and in particular the minor children Maria and Onica were not conceded. The onus to prove the above remained with the Plaintiffs.

The Background Facts

[17] The Komape family resides at Chebeng village. Michael was in school for three days when his death occurred. On the day in question Michael went to the outside toilets situated on the school premises during break at about 10h00. The toilets were pit toilets covered by corrugated iron cubicles erected on a concrete base. He was unaccompanied. When the break ended Michael did not return to class. The principal, Mrs Malothane, (who was also his class teacher) phoned the first plaintiff to determine the whereabouts of Michael. She then phoned the second plaintiff but was unable to get through to him. At about 12h30 Mrs Malothane was able to reach the first plaintiff who was at home. She was of the opinion that Michael could have gone to his old crèche or back home.

[18] The first plaintiff proceeded to the school. When she arrived there she was informed that the staff looked everywhere for Michael, even at the toilets, but could not find him. The first plaintiff decided to go to the toilets, but did not go close to the cubicles, due to the long grass that has grown in the area. At Michael's former crèche a small girl who was in Michael's class in school informed the first plaintiff and the principal that Michael has fallen into the toilet at school. Upon their return to school Michael's body was discovered in one of the pit toilets.

[19] The first plaintiff fainted at the sight of her son's hand protruding from the pit. She requested assistance from the teachers but was told to wait because they had called someone to retrieve the body from the pit. The second plaintiff arrived soon afterwards in the company of one Charles Malebana. Second plaintiff also observed the body of his child in the pit toilet which was filled with water. He was told by the principal that Michael had been in the toilet for a long time already and that they had to wait for the body to be removed by the "first aid." He and Mr Malebana remained at the pit toilet whilst waiting for the body to be removed. He requested Mr Malebana to take photographs with his cell phone of the condition of the toilets. Mr Malebane was instructed to delete the photographs from his phone by the principal and the circuit manager stating that they did not want news of the incident to spread. When he refused, the circuit manager took his phone and deleted the photographs he had

taken from his phone. After the body was removed, he took further photographs of the toilets. (These latter photographs were presented as exhibits during the trial.)

[20] Soon after the body was removed from the pit (at about 16h00), Michael's sister Lydia arrived at toilets at school after she had heard from her brother Lucas that Michael had died. She viewed his body on the cement slab where he was placed in front of the cubicles before removal of his body.

[21] A post mortem examination was performed subsequently which revealed that Michael died due to aspiration of foreign material which is consistent with drowning.

[22] The second plaintiff expected the principal and the Department of Education to come to his home to discuss the matter and also expected the state to tender payment of the funeral expenses. He reasoned that his child died whilst in the care of the school and as a consequence the state is responsible for his death and the resultant expenses for the funeral.

[23] The second plaintiff testified that no one came forward which was upsetting and angered him. This latter aspect was disputed. Evidence was presented by the defendants that welfare officers attended at the home of the plaintiffs and that certain contributions associated with the funeral were made to the family. In my view, the dispute whether the officials from provincial government should have come to his home to show him respect and present their condolences (or to admit liability) at that time and to offer to contribute to the funeral costs is a moral question.[1] The resolution of that dispute did not advance the case of any of the parties to any significant degree and need not burden the judgment.

[24] Evidence was presented of Mr Heywood who is employed by an organisation named Section 27[2] (who also acted as the attorney for the plaintiff) that the organisation engaged with the Limpopo Department of Education during 2012 regarding the poor state of the toilets at schools in Limpopo. The Limpopo department also reported the critical sanitation challenges in the Province to the National Department of Basic Education. Despite the engagement of Section 27 as well as visits to schools and reports to the department no significant progress was made to tackle the problems identified.

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[1] There being no legal duty resting on the state to admit liability.
[2] A non-governmental organization.

[25] It became apparent during the evidence presented by a budget analyst called by the plaintiffs that although funds were allocated in the 2012-2013 budget for provision of sanitation facilities at 66 schools nothing was achieved because the signing of service level agreements could not be attained. What is clear from the evidence, however, is that the Limpopo Department of Education displayed a total lack of urgency or commitment to use the funds allocated for specific programs foreshadowed in the budget. Millions of unused funds were returned to the treasury instead of spending it.

The Expert Evidence in respect of Claim A and B

[26] The experts employed by both sides, all of which are clinical psychologists, agreed in a joint minute:

(a) that the plaintiffs suffered severe trauma due to the manner in which Michael passed away;[3]
(b) that although there is a considerable improvement in everyone's functioning, the plaintiffs' current presentation of the symptoms is perpetuated by the prolonged legal process;
(c) Lucas, Lydia and James are functioning optimally;
(d) Rosina is functioning moderately;
(e) The plaintiffs have considerably, objectively and subjectively improved psychologically due to psychological support they have been receiving, however, the plaintiffs require further psychotherapy.
(f) The recommendation for further therapy for first and second plaintiffs is 12 sessions each. And for the third and fourth plaintiffs-6 sessions each.

[27] No recommendation was made in respect of the minor children in the joint minute for the need and the number of sessions in respect of them.[4]

[28] The plaintiffs relied upon the expert evidence of the witness Lepoliso Steven Molepo a clinical psychologist who testified with regard to his expert report that has

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[3] No reference is made in the joint minute that the plaintiffs or minors suffer from bereavement or grief. All that is stated is that the experts agree that plaintiffs and minors suffer from severe trauma without stating that the trauma resulted in a recognised psychiatric injury.
[4] The experts employed by the defendants intimated that they had no mandate to discuss the position of the minor children.

been filed.[5] His report, in my view, fell dismally short of the requirements of rule 36(9)(b).[6] It contains a relatively brief overview of the history together with the clinical impressions, without specific reference to the individual diagnosis in respect of each of the plaintiffs or minors or the reasons for such diagnosis, save to state under the heading "Conclusions and Recommendations" that the clinical conditions presented may have caused a clinically significant distress and impairment in the manner the family functions. Continuous psychological intervention was recommended. Under the heading "PRESENTING PROBLEM" a superficial summary appears of symptoms the family presented:

> "Family members presented with symptoms that characterised Bereavement. Posttraumatic Stress Disorder and Major Depressive as well as Adjustment Disorders."

[29] It is significant that the report makes no mention of a diagnosis of grief nor is there any specific reference to grief as a psychological disorder or condition as claimed in claim B. In short, the expert report simply makes no reference of grief. The report states that family members indicated that the death of Michael was a traumatic experience for them and was followed by a drastic change in the functioning of the family with first Plaintiff losing her job as a domestic worker during the period of bereavement. And from consultations with the witness it appeared that the family has been going through a period of grief. The report further states that a differential diagnosis of bereavement, post-traumatic stress disorder and major depressive disorder were indicated without stating the reasons and facts upon which the diagnosis was made in relation to each of the plaintiffs and minor children.

[30] In evidence in chief, however, the witness was referred to several psychological reports prepared by Ms Edzinsani Sodi and attached to the amended particulars of claim (Neither was a notice in terms of rule 36(9)(a) or (b) delivered in respect of the reports prepared by her nor was she called as a witness). The evidence of the witness was not confined to the contents of his report nor to his interaction with and diagnosis of the plaintiffs and the minors. Counsel, leading his evidence, referred him to the factual findings and conclusions reached by Ms Sodi in respect of each of

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[5] The witness was a party to the agreement in the joint minute.

[6] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Fur Schädlingsbekämpfung MBH* 1976 (3) SA 352 (AD) 370E-372A. *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) par109; 117-119. Also *Hing supra* 363H.

the plaintiffs and requested him to elaborate and comment on her findings. In this way counsel attempted to introduce the contents of the reports by Ms Sodi as evidence without calling her. Her reports formed the basis of the conclusions and diagnosis by the witness Malepo in respect of the plaintiffs and minors. He explained that it is practice (in their practice) that one psychologist conduct the initial consultation, who then makes a diagnosis and prescribes treatment for the patient. A second psychologist will then render the psychological services to a patient, based on the prescribed treatment. I understood his evidence to be that the second psychologist accepts the diagnosis and treatment which has been prescribed by the first psychologist and treat the patient accordingly.

[31] When leading the evidence of the expert witness Molepo, counsel for the plaintiffs referred him to the subject matter of claims A and B and requested him to give an overview of grief. He explained that it is a grieving process which a person who suffers a loss goes through in order to achieve a form of healing. He explained that it is a subjective feeling which is precipitated by death of a loved one and is sometimes used synonymously with mourning. He explained that the expressions grief, mourning and bereavement are often used interchangeably.[7]

[32] Grief, therefore, is not a condition, but subjective feelings which takes time to process. Bereavement and grief is a common human experience which is a natural consequence following the death of a loved one.

[33] The presence and intensity of grief will depend on the emotional make up and the effect of the experienced as well as the closeness of the relationship between the person who died and the person who suffered the loss. It seems that there is no significant difference between grief and bereavement if the ordinary meaning of the words are taken into account.

[34] Since *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*[8] it has been accepted that shock which caused psychiatric injury sounds in damages:

> "Om bostaande redes kom ek tot die gevolgtrekking dat daar in ons reg geen rede bestaan waarom iemand, wat as gevolg van die nalatige handeling van 'n ander, senuskok op psigiatriese besering met gevolglike ongesteldheid opgedoen het, nie op

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[7] Although he called in doubt having said so when he was cross-examined.
[8] 1973 (1) SA 769 (A).

> genoegdoening geregtig is nie, mits die moontlike gevolge van die nalatige handeling voorsien sou gewees het deur die redelike persoon wat hom in die plek van die onregpleger sou bevind het. Ek verwys hier nie na niksbeduidende emosionele skok van kortstondige duur wat op die welsyn van die person geen wesenlike uitwerking het nie, en ten opsigte waarvan genoegdoening gewoonlik nie verhaalbaar is nie".[9]

[35] In *Barnard v SANTAM Bpk*[10] the court stated, with specific reference to the argument that claims for mental or nervous shock suffered as a result of hearsay should be restricted. In rejecting the argument the court stated:

> "Tweedens moet n eiser natuurlik bewys dat hy 'n erkende psigiatriese letsel opgedoen het en sal hy dus in die reël op ondersteunende psigiatriese getuienis aangewese wees."[11]

[36] Burchell[12] asserts that the court in the *Barnard* case had either 'psychological or psychiatric harm or injury in mind where it used the words 'psigiese letsel'.[13] The contention cannot be sustained. Emotions such as anxiety, grief and sorrow not being psychiatric injury do not sound in damages.[14] The Court reiterated that a plaintiff must have suffered recognisable psychiatric harm or injury induced by an event to be successful.[15] In my view, the quoted passage explicitly put beyond doubt that psychiatric harm or injury, has to be proved by means of psychiatric evidence.[16] Damages are not recoverable, in delict, for normal grief, or sorrow following a bereavement.[17]

[37] In *White and Others v Chief Constable of the South Yorkshire Police*[18]Lord Steyn reiterated:

> "The classification of emotional injury is often controversial. In order to establish psychiatric harm expert evidence is required. That involves the calling of consultant

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[9] 779G-H. Also *Hing supra* para 21.
[10] Fn 2.
[11] 216 E-F. *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) para 7; 9; 18. *Hing supra* para 18.
[12] Burchell J "An Encouraging Prognosis for Claims for Damages for Negligently Inflicted Psychological Harm" 1999 *The South African Law Journal* 697-698.
[13] 208H.
[14] Teff H "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" 1998 *Cambridge Law Journal* 102-103.
[15] 208H; 216E-F.
[16] *Barnard* 210 H-211A.
[17] *Barnard v SANTAM* 1999 (1) SA 202 (SCA) 217A-B. Also *Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC) para 24.
[18] [1999] 2 AC 455. *Alcock and Others v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 (HL).

psychiatrists on both sides. It is a costly and time consuming exercise. If claims for psychiatric harm were to be treated as generally on par with physical injury it would have implications for the administration of justice."

[38] The requirement that psychiatric evidence is necessary to prove recognisable psychiatric harm or injury here, as in England, has hitherto never been doubted. I think, however, that labelling such a cause of action for recognisable psychiatric harm or injury as a claim for nervous shock or emotional shock is unnecessarily restrictive and may be misleading.[19]

[39] This court is requested to develop the common law to award damages for grief which did not give rise to detectable or recognised psychiatric injury. In Claim B, grief is claimed as a substantive and different cause of action from bereavement, emotional shock and trauma suffered. There is, in my opinion, neither reason in law nor any policy consideration to draw a distinction between grief and any other psychiatric injury or harm. A claim for grief, if proved to have resulted in a detectable or recognised psychiatric injury, as explained in the *Bester* judgment, will sound in damages, as any other injury.[20] A claim for grief, which caused no recognisable injury cannot be justified, as a psychiatric injury or on any policy considerations. It will no doubt lead to bogus and an unwarranted proliferation of claims for psychiatric injuries and pave the way for limitless claims for every conceivable cause of grief whether insignificant without expert psychiatric evidence.[21]

[40] Counsel for the plaintiffs (and the *amicus*) placed reliance on the recent judgment of *Mbhele v MEC for Health for the Gauteng Province*[22] as authority for the proposition that the Supreme Court of Appeal has held that grief, generally, without proof of resultant psychiatric harm or injury by expert psychiatric evidence, is sufficient to sustain a damages claim. I cannot agree with the submission. The judgment, on the face of it, is a radical departure from *Bester* and *Barnard* judgments with regard to the requirement of expert psychiatric evidence to prove a psychiatric

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[19] *Barnard* 208I-209A.
[20] 779H. It is unnecessary to distinguish for purposes of this discussion between pathological grief and non-pathological grief. There was as a matter of fact no evidence that the grief suffered was pathological.
[21] Fn 16 at para 33.
[22] (355/15) [2016] ZASCA 166 (18 November 2016).

injury. [23] No reference is made in *Mbhele* to either of the two judgments, let alone overrule them. Until such time that they are overruled as being clearly wrong, this Court is obliged to follow them.[24]

[41] It must be recalled that the judgment in *Mbhele* is premised on an agreed statement of the fact that the appellant experienced severe shock, grief and depression. The court in *Mbhele* did not regard grief, as such, separate from emotional shock. Grief was considered cumulatively with other factors to establish emotional shock. Put differently, the court, against the background of the particular facts of that stated case, regarded grief as emotional distress and considered emotional distress, without medical evidence, as sufficient to sound in damages.[25]

[42] Even if I am wrong, Mr Malepo, the clinical psychologist who treated the members of the Komape family testified, in brief, with reference to the facts and conclusions set out in reports written by Ms Sodi that the first and second plaintiff, presented with symptoms of bereavement, post-traumatic stress disorder, and depressive disorders when they consulted with him. He also mentioned that they both have improved since the initial consultation in 2015. Second plaintiff, according to his observations, did not experience grief.

[43] The witness testified that Lydia Komape (third plaintiff) like her mother, also presented with symptoms similar to first plaintiff. The witness, however, changed his evidence after the facts as set out in the report of Ms Sodi were put to him and after a leading question was put to him that she indeed presented with post-traumatic stress disorder.[26] Mr Malepo answered the question in the affirmative on the strength of the diagnosis made by Ms Sodi. He himself was unable to make such a diagnosis, because the third plaintiff only presented with symptoms. The fourth plaintiff, too, only presented with signs and symptoms of post-traumatic stress disorder. He also showed signs of, but no symptoms for, bereavement.

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[23] Teff H "Liability for Negligence inflicted Psychiatric Harm: Justifications and Boundaries" 1998 *Cambridge Law Journal* 95-96; 102.

[24] *Ex Parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC) para 61; *Patman Explorations (Pty) Ltd v Limpopo Development Tribunal* (1250/2016) [2018] ZASCC 19 (16 March 2018) para 3-4.

[25] *Mbhele* par 11.

[26] Counsel for plaintiff in leading the evidence of the expert followed a similar pattern in relation to all the plaintiffs and minor children.

[44] The witness, with reference to the minor Onica, testified that in his opinion she only displayed symptoms of post-traumatic stress disorder or bereavement at the time he consulted with her. Maria, the twin sister of Onica, presented with sad mood.

[45] The presentation of symptoms for post-traumatic stress disorder were stronger in her case as in the case of Onica. No symptoms for bereavement were present. Moses the youngest only showed symptoms (or signs) for bereavement.

[46] The joint minutes drawn up by the respective experts are of very little value with regard to diagnosis made in respect of each of the plaintiffs and the minors individually with regard to psychiatric injury as a result of trauma, emotional shock or grief. It contains a general observation that the plaintiffs suffered from severe trauma without reference to the minor children. The joint minute focusses on the future medical treatment of the plaintiffs with the result that the reason for the meeting of the experts to reach common ground on any recognised psychiatric injuries or harm sustained by the plaintiffs as a result of the severe trauma suffered, was overlooked. The psychiatric treatment for such injury or harm was therefore not adequately addressed.

[47] I pause here to add that counsel for the defendants did not object to the evidence of the witness Malepo with reference to the contents of the reports of Ms Sodi and also did not object to his evidence with regard to grief of which no mention was made in his report or the joint minute. His evidence, apart from deviating from the agreement between the experts in the joint minute, and the failure to set out the facts upon which he relied in his report for his opinion that the plaintiffs suffered grief or other psychiatric harm or injury, was insufficient for finding that the family members suffered grief or any recognisable psychiatric injury or harm. He was unable to make a diagnoses in respect of any of the plaintiffs and minors due to lack of symptoms being present. The so-called differential diagnosis made by him in his report in the face of his clinical findings and the contents of the joint minute is difficult to reconcile, understand and accept. It is evident that the reports prepared by Ms Sodi contained the information and the diagnosis required for medico-legal purposes. Yet the contents of those reports were not proved by means of the

evidence of Ms Sodi and thus cannot assist the plaintiffs as evidence placed before this court.[27].

[48] The result is that due to the insufficiency of the expert evidence, the plaintiffs were unable to prove that any of the members of the Komape family suffered from "'n erkende psigiatriese letsel' of treuring"[28] (grief as a recognisable psychiatric illness) due to the death of Michael.[29] On the contrary the evidence established grief as a process similar to bereavement and mourning, which is not a recognisable psychiatric injury or illness.

[49] Having reached this conclusion, there is no basis upon which the common law can or should be developed. Policy considerations militate against compensation for emotional suffering short of a recognisable psychiatric illness. Damages cannot be awarded for grief without the resultant recognisable psychiatric lesion or illness which is a requirement for claim A and B to succeed. Grieve, as any other recognised psychiatric injury caused by foreseeable wrongful negligent conduct, must be proved by expert psychiatric evidence. [30]

[50] As to Claim C, the reports of Ms Sodi, which were not put in as evidence and cannot be taken into account with regard to the number of sessions required for future physiological treatment in respect of the minor children. Mr Malepo, in his report, has failed to set out the reasons for or the number consultations the minor children in particular are required to attend in future. The failure is probably attributable, to his uncritical acceptance of the assessments made by Ms Sodi.

[51] Nevertheless, the parties have reached agreement with regard to the costs per consultation for the future medical expenses in respect of the plaintiffs. The court has to determine the number of future consultations needed, (if any) by the minor children.

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[27] s 34 Act 25 of 1965.

[28] According to the Odendal FF *et al Verklarende Handwoordeboek van die Afrikaanse Taal (HAT)* Perskor (1994) "treur" means "Bedroef wees, verdriet hê."

[29] Also *Hing supra* para 25-26.

[30] *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122.

[52] I believe that in terms of the joint minute by the experts that the necessity for future treatment as indicated for the plaintiffs, without being diagnosed with a recognised psychiatric injury, has been established.

[53] The complex personalities of people who suffer from varying kinds of emotional distress following upon a traumatic event such as a traumatic death of a child and brother, differ from person to person. The need for psychotherapy to assist patients to overcome psychological distress caused by such traumatic event, should be recognised even where the symptoms fall short of a psychiatric injury or harm when psychological treatment is indicated to overcome the effects of such an event or to prevent the development of a recognised psychiatric injury as a result. Such treatment is warranted. A court should, in such cases, always be guided by expert evidence.

[54] It has been acknowledged by the experts from both sides, in the joint minute, that future treatment as a result of severe trauma, is indicated for the plaintiffs. I am minded to make an award in favour of the minor children for future medical treatment as claimed, although the witness made no mention of them in his report. The minors are part of the family the members of which suffered severe trauma and who are in need of treatment. The defendants consented to an order in respect of the plaintiffs. The minors too suffered trauma and bereavement as a result of the tragic death of their younger brother and will benefit from treatment. Mr Maleka on behalf of the plaintiffs has argued that a case has been made to include the minor Moses for which no claim was made in the particulars of claim. The simple answer to that submission is that the plaintiffs are bound by their pleadings. The older siblings Lucas and Lydia were awarded six sessions each for future treatment. I am of the view that six sessions each for Maria and Onica are reasonable for future treatment.

Constitutional Damages for Violation of Basic Human Rights.

[55] It is common cause that the defendants failed to perform certain obligations towards learners from schools in rural Limpopo including Michael, in particular, which in his case, resulted in his death. The claim for constitutional damages as a result of the failure by the defendants to perform those obligations. The Constitution places

positive obligations on the state "to protect, promote and fulfil" fundamental rights.[31] In *Fose v Minister of Safety and Security*[32] Ackermann J stated:

> "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".[33]

[56] It has been acknowledged that courts are mandated, if a constitutional duty has been breached, to grant appropriate relief.[34] To do so, courts may fashion new remedies, if necessary, depending on the nature of the case.[35] Usual remedies[36] may be held to be appropriate relief to protect and enforce the Constitution.[37] Relief must also be just and equitable.[38]

[57] An appropriate remedy may well be a structural interdict in terms whereof the defendants, as organs of state, are ordered to perform their constitutional obligations and in terms whereof the court may perform a supervisory function to ensure compliance with and proper implementation of the order.[39]

[58] The plaintiffs also seek a declaratory order that the defendants have breached various fundamental rights to vindicate the rights of the learners at these schools. A declaration of rights, although discretionary in nature, no doubt, may be a means by which the vindication of rights can be achieved.

[59] I turn to consider whether the different fundamental rights involved have been breached and, if so, what appropriate relief should be granted. The undisputed evidence shows that the witness Heywood from Section 27 engaged the second respondent by addressing correspondence to the second defendant drawing attention to the unsafe toilets at schools and the need to install safe toilets. Second

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[31] s 7(2) of the Constitution states: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."
[32] 1997 (3) SA 786 (CC).
[33] Para 69.
[34] *Modderfontein Squatters Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Recources Centre Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Recources Centre Amici Curiae)* 2004 (6) SA 40 (SCA) para 18.
[35] Para 19.
[36] An interdicts declaratory orders or damages may be awarded as an appropriate remedy.
[37] s 38 of the Constitution.
[38] s 172(1)(b) of the Constitution.
[39] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 96.

defendant identified schools which needed upgrades. The photographic evidence adduced revealed distressing, dangerous and poor sanitary conditions at a large number of rural schools. In some schools leaners are forced to make use of open dilapidated pits, not worthy for use as toilets by humans which afford those using them no privacy at all. The evidence also showed that there are safe and affordable products available in the market for use by children. It is disturbing to learn from the evidence that funds allocated to second defendant in annual budgets are not utilised for the purpose budgeted for. It is clear that due to lack of political will no effort was made to better the situation at schools of which the second defendant was well aware of.

[60] Section 9(2) and (3) of the Constitution guarantees the right to equal enjoyment of all rights and freedoms and place a positive duty on the state not to unfairly discriminate against anyone. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs; Thomas and Another v Minister of Home Affairs and Others* [40] the importance of human dignity was explained:

> "The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis."[41]

[61] The systemic practice or policy, not to take active steps to equip schools in rural areas with safe and adequate toilets, and by allowing the lack of adequate sanitation to persist in those schools is viewed as a breach of human dignity.[42]

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[40] 2000 (3) SA 936 (CC).

[41] Para 35.

[42] s 10 states: "Everyone has inherent dignity and the right to have their dignity respected and protected." In so far as the right to dignity may be regarded as a socio economic rights, the absence of proper and adequate sanitation effects the dignified existence of those children.

[62] The right to an environment which is not harmful, as set out in the Constitution,[43] applied not only to Michael but applies to all children in the Limpopo Province faced with the dangerous and harmful effects of inadequate or non-existing sanitation at toilets in schools, are beyond doubt. There is, apart from the direct obligation to the children attending schools in the Limpopo Province, also an indirect general overarching duty resting upon the state to protect the environment for the benefit of future generations.[44]

[63] Society presently, and future generations still to come, have the right to reasonable action to rectify the current state of affairs. To take remedial action will ensure that the learners in rural areas (and their parents) are recognised as human beings and not as second rate citizens. The right to basic education includes provision of adequate and safe toilets at public schools for learners the failure of which compromised the best interests of the children referred to in section 28(2) of the Constitution. Provision of adequate toilet facilities at schools is not only basic requirement for daily human existence but it also provides for a healthy environment where the children spend their days. The importance of education as one of the pillars of society since ancient times which is the means by which every child is able to realise their dreams by exercising this right can hardly be over stated.[45] I am satisfied that the evidence proved that the human rights contained in section 9 10, 11, 24, 28 and 29 of the Constitution had indeed been breached.

[64] During argument Mr Maleka, was pertinently asked whether a structural interdict to oblige the state to install proper sanitation facilities at rural schools in the province to vindicate the Constitution is not the appropriate remedy as such an order will benefit all the learners where there is a dire need for safe toilets, instead of payment of compensation as constitutional damages to one family.[46]

[65] The failure of the Department of Education to utilise funds allocated in the budget specifically to upgrade existing toilets to install new and safe toilets at

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[43] s 24.

[44] Section 24(b) of the Constitution. It implies that one generation must hand the planet over to a new generation in a better condition than before. Weiss EB. "Our right and obligations to future generations for the environment" 1990 *The American Journal of International Law* 200.

[45] *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng and Another* 2016 (4) SA 546 (CC) para 1-3.

[46] Mr Maleka displayed reluctance to accept that a structural interdict may be an appropriate remedy but persisted with the argument that compensation for constitutional damages is the appropriate remedy. .

schools since the tragedy and even prior to it is testament to a complete lack of understanding of the basic human rights of learners are without question reprehensible. The efforts of Section 27, and its engagement with the second defendant, as to the plight of all those learners having to use inadequate and unsafe toilet facilities seems to have been lost. Society[47] has a substantial interest in the safety of their children when absorbed into the school system and placed in the care of schools and teachers who are charged with upholding the rights of children protected by the Constitution. Its failure to do so touches upon their dignity, safety and health and as such their best interests of every learner attending school in rural Limpopo.

[66] Tt is explained in *Ferreira v LevinNO and Others; Vryenhoek and Others v Powell NO and Others*[48] thus:

> "As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that *nexus* is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous."[49]

[67] What then is the object of the claim for constitutional damages and an order for a declaration of rights? The aim of a claim for damages *ex delicto* is not to enrich a claimant who has suffered loss, but to compensate for the loss suffered.[50] In my judgment the reality is that the compensation claimed, as constitutional damages, is nothing short of a claim for punitive damages.[51] A court, faced with such a claim, must decide whether an award of constitutional damages is just and equitable. An appropriate remedy, in my view, is an order directed at the enforcement, protection

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[47] In this case the parents of children attending school in particular.
[48] 1996 (1) SA 984 (CC). *Fose supra* para 95.
[49] Para 229.
[50] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 12.
[51] A claim for punitive damages is against public policy and foreign to South African law. In *Jones v Krok* 1995 (1) SA 677 (AD) 696C-H. The claim for compensatory damages is not a delictual claim based on fault. Neethling J Potgieter JM *Neethling-Potgieter-Visser Law of Delict* 6th ed Lexisnexis Durban (2010) 123-124.

and the prevention of future encroachment of the rights protected in the Bill of Rights if the harm suffered is not adequately addressed by an effective common law claim for damages the elements of which include violations of protected human rights.[52]

[68] I am not persuaded that punitive damages can be claimed as appropriate relief. If such a claim is successful the Komape family will, be over compensated, on the one hand, and on the other, not serve the interests of society.[53] No convincing evidence emerged that punitive damages, will serve to achieve to protect the rights violated or that such an award will act as a deterrence to prevent future violations by the defendants. The punitive nature of such an award in itself do not serve to enforce any of the violated rights.[54]

[69] A declaratory order, to effectively vindicate the Constitution is a discretionary remedy.[55] In my view a declaration of rights will not sufficiently vindicate the rights of the learners attending rural schools in this Province.[56] A declaration of rights where learners at school are exposed to danger, when going to a toilet on the school premises, will hardly be of any value to the learners and parents and will serve no immediate purpose.

[70] I have come to the conclusion, after a careful consideration of all the facts, that a structural interdict is the only appropriate remedy that is just and equitable which will effectively vindicate the Constitution. The best interests of all learners at schools with pit toilets must take preference. It is the only means by which the state will be compelled to take active steps to provide the lacking basic sanitary requirements to learners in those schools. It will, no doubt be a mammoth task for the state to undertake. But that cannot deter this court from ordering the state to comply with its

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[52] *Modderklip Squatters, Greater Benoni City Council; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (AGRI SA and Legal Recources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) 62; *Darson Construction (Pty) v City of Cape Town* 2007 (4) SA 488 (CPD) 509-510; *Moniel Holdings (Pty) Ltd v Premier of Limpopo Province* [2007] 3 SA All SA 410 (T) 421-422; *Fose supra* para 97-103.De Vos P (Ed) *South African Constitutional Law in Context* Oxford University Press Goodwood (2014) 410-412. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) para70. Courts are also under a general obligation to develop the common law under section 39(2) of the Constitution if the common law is deficient. *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 958 (CC) para 44-45; 57.

[53] With specific reference to parents and learners attending rural schools in Limpopo without adequate and safe toilet facilities. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 82.

[54] It cannot serve as a substitute for an unsuccessful common law remedy.

[55] *Ex Parte Nell* 1963 (1) SA 754 (A).

[56] *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC) para15.

obligations in terms of the Constitution. The evidence shows that efforts were made, inadequate as they are, to replace old pit toilets at some schools. Effective remedial action is to be undertaken to restore the dignity and wellbeing of learners attending government schools in this province. The flagrant violation of their rights cannot be allowed to continue without remedial steps being taken to enforce, protect and prevent future encroachment of the rights of learners protected in the Bill of Rights. A declaration of rights will not serve the intended purpose if it is left to the defendants to observe the law in due course.[57] History has shown that that the defendants lack the will to act in the interest of learners.

[71] It has to be reiterated that this court is ever mindful that an order that the state replace the pit toilets at rural schools will place an additional burden on the resources of the state. Information as to the time it will take and the program to be developed to achieve that goal in the shortest period of time must be placed before the court to enable this court to play a supervisory role in the execution of the order to vindicate the constitutional rights of the children attending schools with pit toilets in rural Limpopo.

[72] The defendants shall be required, for the order to be implemented, to file a report under cover of an affidavit at this court which must specifically deal with the required issues in detail.

Costs

[73] The defendants delivered an offer with prejudice of a total amount of R450 000.00 in full and final settlement of all the claims.[58] Judgment has already been granted in respect of Claims C, D and E which were settled during the trial for R135, 372.65.

[74] A structural interdict in the public interest instead of constitutional damages in respect of Claim B will be granted. The plaintiffs are substantially successful. A cost order against the plaintiffs will not promote the advancement of constitutional justice where the aim is also to vindicate the rights of a large number of children in this

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[57] It would necessitate fresh action and unnecessary costs to be incurred to institute action in due course to enforce those rights.
[58] On 3 October 2017.

Province.[59] Counsel for the plaintiffs requested that a punitive costs order be granted against the respondents mainly in view of the way in which the litigation was conducted. I have, after considering the totality of the case, come to the conclusion that a punitive order is not warranted. The defendants are successful to a limited extent.

[71] In my view the plaintiffs are entitled to costs. The court was requested to note that all counsel acting on behalf of the plaintiffs acted *pro bono*. They, no doubt, incurred costs for disbursements for their accommodation before and during the trial inclusive of travelling expenses to and from Polokwane also when preparing for trial.

[72] I am also of the view that the *amicus curiae* is entitled to costs. The *amicus* assisted this court by advancing comprehensive and useful argument.

Order

1. **Claim A**:

The claim is dismissed

2. **Claim B**:

The claim for grief is dismissed.

2.1 Alternative to Claim B

2.2 The first and second respondents are ordered to supply and install at each rural school currently equipped with pit latrines in the Province of Limpopo with:

2.2.1 a sufficient number of toilets for each school for the use of children which are easily accessible, secure and safe and which provide privacy and promote health and hygiene based on an assessment of the most suitable safe and hygienic sanitation technology.

2.3 The first and second respondents, are ordered to furnish this court with the following information:

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[59] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) para 16; 19-20

2.3.1 a list containing the names and location of all the schools in rural areas with pit toilets for use by the learners;

2.3.2 the estimated period required to replace all the current pit toilets at schools so identified.

2.3.3 a detailed program developed by the relevant experts based for the installation of the toilets on an assessment made in respect of the suitable sanitation technology requirements of each school inclusive of a proposed date (and reasons for the proposed date) for the commencement of the work referred to *supra*.

2.4 The first and second defendants shall, for the order to be implemented deliver detailed reports under cover of affidavits at this court which must *inter alia* comprehensively deal with all the issues referred to above on or before 30 July 2018.

2.5 The plaintiffs are at liberty to deliver an answering affidavit within 20 days of the reports being delivered. And if so, the defendants will have the right to reply, if necessary within 15 days. Both parties may thereafter place the matter on the opposed roll for hearing (and for further directives, if necessary) on a date to be arranged with the trial Judge.

3. Claim C:

3.1 The claim for future medical treatment in respect of the minors Maria and Onica Komape succeeds. The first and second defendants are ordered to pay for the future treatment in respect of:

(a) Maria Komape the amount of R6 000.00 and
(b) Onica Komape the amount of R6 000.00.

4. Costs

4.1 The first and second defendants are ordered to pay the costs of the plaintiffs jointly and severely (the one paying the other to be absolved) which costs shall include:

4.1.1 the reasonable reservation and qualifying fees (inclusive of the costs for preparation of the reports, accommodation and travelling fees) if any, of the following experts:

(i) D Still;

(ii) MS Malepo

(iii) E Sodi and

(iv) Dr Matlala

4.1.2 the reasonable costs for disbursements incurred by or on behalf of two counsel appearing *pro bono* on behalf of the plaintiffs.

4.2 The defendants are ordered to pay the costs of the second *amicus curiae*.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1.ADV FOR PLAINTIFFS	: V Maleka SC
	: U Dayanond-Jugroop
	: N Stein
2. ADV FOR DEFENDANTS	: M.S Phaswane
	: K Ramailela
3. FOR SECOND AMICUS CURIAE	: K Hofmayer
	: N Luthuli
	: H Cassim
	:A Armstrong
3. DATES OF HEARING	:13-17 November 2017
	:20-23;27-28 November 2017
	:1-2 February 2018
5. DATE JUDGMENT DELIVERED	: 23 April 2018