

LIFE ESIDIMENI ARBITRATION

**HELD AT: EMOYENI CONFERENCE CENTER, 15 JUBILEE ROAD,
PARKTOWN, JOHANNESBURG**

Date: 9th of February, 2018

5SESSION 1 – 2.

BEFORE ARBITRATOR –JUSTICE MOSENEKE

10WITNESSES:

[Contents](#)

9 February 2018

SESSION 1

ARBITRATOR JUSTICE MOSENEKE: Good morning. Please be seated.

ADV DIRK GROENEWALD: Good morning, Justice.

5**ARBITRATOR JUSTICE MOSENEKE:** Good morning. Good morning, Adv Groenewald.

ADV DIRK GROENEWALD: I will try to pick up where we left off yesterday.

ARBITRATOR JUSTICE MOSENEKE: Yes, indeed.

ADV DIRK GROENEWALD: Justice, in respect of the government's actions
10 subsequent to the tragedy, we would argue that there has been no
accountability. In the wake of this tragedy, we have seen three resignations, six
final warnings, and the head of the Mental Health Review Board was found not
guilty. No criminal charges has been instituted against any of these officials,
and no action has been taken against them by their professional councils.

15 So we respectfully submit that there has been no accountability, and that
is indeed a factor to be taken into account in the award which is to be made for
compensation.

ARBITRATOR JUSTICE MOSENEKE: What should we make of the
resignations?

20**ADV DIRK GROENEWALD:** Well, Justice, the explanation that we received
was well, basically that neither Dr Manamela or Dr Selebano gave a proper
reason for resigning. It is not that, "I have taken responsibility. This has

happened under my watch and therefore, I resign.” The evidence is that, especially in respect of Dr Manamela’s, she did not provide any reason. We know that they have benefitted almost 10 months’ worth of salary in that time being suspended, but there is no explanation. There is no proper explanation given.

In respect of the MEC, my colleague from Legal Aid SA has correctly pointed out a few irregularities in her submissions as to why she resigned and untruths, if I can put it like that, in her reasons to resign. So I submit that in respect of their resignation, that does not per se assist us in finding closure. Yes, it is a humble gesture but it does not take us closer to finding equitable redress. Justice, I then turn to the constitutional issues and the State’s failure to uphold the constitution, and my colleagues have dealt with some of the fundamental rights which has been infringed upon and I would just like to highlight a few.

15 The right to life; we heard the evidence of Dr Gnocchi who said that he concedes that any reasonable person should have foreseen that these patients could have died under these circumstances. He made that concession. The government should have foreseen, and it seems that they have reconciled themselves with the fact that these mental healthcare users will die.

20 Further to this, Justice, we submit that with regards to the cruel and inhumane and degrading treatment, the minutes of the meetings at CCRC was quite astounding. You had nurses requesting letters indemnifying them of wrongful conduct. We have minutes that show that these nurses say, “Well, we are in a ethical predicament. We cannot see to all of the patients.”

We in fact have— the minutes show that the government said, “Well, at least, if you see a patient suffering, assist them.” It is clear indication that they were, these patients were subjected to cruel and inhumane and degrading treatment.

5ARBITRATOR JUSTICE MOSENEKE: If you wanting to individualise the foreseeability, question who would you say must have foreseen? Let us start step by step, I do not know where, maybe with the MEC.

ADV DIRK GROENEWALD: Justice, my colleagues have [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Did she— should she have foreseen
10this, that death will ensue?

ADV DIRK GROENEWALD: Indeed. Justice, my submission is that she should have and she must have foreseen it. The minutes of the meeting shows that in April, she was well aware of the fact that the NGOs were not properly assessed, that 950 patients had to be transferred within three weeks’ time. Now
15in the wake of all those— that evidence, you do not know what is the circumstances at the NGOs. You do not know that they have been assessed. You do not know that they are capable of caring for these patients. I mean, and the warning signs were already there. She knew of all the institutions that warned them there are dangers on its way, but still, and again the minutes
20show, that she said, “We will go on no matter what.”

And I submit she has reconciled herself with the consequences. She should have foreseen it, and she said, “We are going on, no matter what.” That was her instruction and she could not dispute that because the minutes was quite clear.

In respect of Dr Manamela, once again, Justice, she had direct knowledge of what was happening there. She had direct knowledge. We know from the evidence of Mrs Jacobus that she said, "Just issue the licences. Sort it out." They knew. They said, "Well, send the patients there. We will assess them and if needs be, we will then transfer them." But even those assessments did not take place.

They knew that it might be required that these patients needs to be assessed and we need to determine whether or not these NGOs can treat and look after them but they did not do the follow up.

10 **ARBITRATOR JUSTICE MOSENEKE:** And when she says, "I did not know. I did not know what to expect. I could not have wished for their deaths. I did not know the NGOs were good enough." Should that be believed?

ADV DIRK GROENEWALD: Justice, we know that disputes of facts are treated with three distinct issues. You look at credibility, reliability, and 15 probabilities and I submit that she was not a credible witness. The evidence that we tendered that she knew was reliable and the probabilities is just against her version that she did not know. Justice, we move then on to section 32 of the constitution.

ARBITRATOR JUSTICE MOSENEKE: Dr Selebano?

20 **ADV DIRK GROENEWALD:** Dr Selebano, ja, my apologies, Justice.

ARBITRATOR JUSTICE MOSENEKE: No problem. What finding should I make of [?] fact about him?

ADV DIRK GROENEWALD: Once again, Justice, he was in the meetings. He

was part of the meetings. The minutes shows it. The minutes shows that he also knew that the NGOs was not properly assessed. He also know that there was going to be 950 patients transferred in three weeks' time. He is a doctor. He has an obligation to ensure that the wellbeing of these patients are looked after, that everything was in order.

But he could not put forward, accept for say that he supported Mr Mosenogi's contention that the contract, that it should be extended but for that, he tendered no evidence to say that, "Well, you know what, I at least went to all of the NGOs," or "I at least said before patients are transferred, I want to see that the NGOs are indeed capable of looking after."

His explanation is hindsight, in hindsight he now knew. Now, in his cross-examination we had with him we said well, all those issues in hindsight he should have foreseen that. A reasonable person would have foreseen that. A person with his qualifications and experience should have foreseen that, and therefore I submit, Justice, that he also knew about, ought to have known about it but he did not intervene.

ARBITRATOR JUSTICE MOSENEKE: And the test should be higher if your duty is to prevent harm, is it not?

ADV DIRK GROENEWALD: Indeed so, Justice, indeed so. In respect of him, he is a clinician and he is the head of the department. Those are two factors. He cannot claim as the MEC did and say, "Well, I am not a clinician. I am not a doctor. I do not know." He is a doctor and he had a professional responsibility except for his managerial responsibilities as well.

Justice, then if we go to section 32 of the Constitution which recognises

that everyone has the right to access to information held by the State, I would like to refer to the Ombudsman's reports at page 50 thereof where he makes the following comments:

5 "Other administrative rights which would have secured the protection of the abovementioned rights were also violated during the chaotic transfer process. This includes the right of access to information by the mental healthcare users as well as their family members. The notion of the right of the affected people to free, [indistinct] and informed consent in
10 a participatory process of consultation before the policy decision for transfer were taken was violated at different stages of the implementation process by the Department. The basket of administrative rights also provides that States must ensure accurate and accessible information
15 about service options and that non-medical approaches are made available while preventing abuse by non-State actors such as the NGOs."

Justice, it is a clear contravention of that constitutional right. Further to that, Justice, section 33 of the Constitution recognises that "everyone has the right of
20 administrative action that is lawful, reasonable, and procedurally fair." Now, if we look at the rationale for terminating the Life Esidimeni contract, it was neither of the aforementioned. It was not reasonable. There was no fair process followed, and at the end of the day, the family members have– are still– still do not have the information. Some of them still do not know what caused the death
25 of their loved one.

ARBITRATOR JUSTICE MOSENEKE: Is there any doubt that that decision was unlawful?

ADV DIRK GROENEWALD: There is no doubt that the decision was unlawful.

ARBITRATOR JUSTICE MOSENEKE: Even the one signed by Dr Selebano, 5collectively, individually, I mean, was that a lawful decision?

ADV DIRK GROENEWALD: It was not a lawful decision, Justice, and the State has conceded that, and that is not in dispute here. Now, Justice, we briefly turn to section 195 of the Constitution [intervenes]

ARBITRATOR JUSTICE MOSENEKE: In other words, besides the point of–
10Counsel, I think we are together, besides the fact that the decision in its implementation violated so many other constitutional protections and other legal protections, in its taking itself as an administrative law matter was clearly unlawful.

ADV DIRK GROENEWALD: Indeed so, Justice, indeed so.

15**ARBITRATOR JUSTICE MOSENEKE:** So too its whole series of consequences, including death.

ADV DIRK GROENEWALD: Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: Very well, you may proceed.

ADV DIRK GROENEWALD: Justice, my colleagues have also referred to
20section 195 of the Constitution and Justice yesterday requested what should we make of the ignorance claimed by some of the State officials. Justice, I would like to refer you to the constitutional case of *Nyati vs. MEC of Health*. Now the constitutional court there, and I have quoted the relevant citation and everything

in my heads of argument, but the court, constitutional court confirmed the following:

5 "Certain values in the Constitution have been designed as foundational to our democracy. This in turn means that as pillar stones of this democracy, they must be observed scrupulously. If these values are not observed and their prescripts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."

10 That, in my view, means at least at the very least that there should be strict compliance with our orders. Now, Justice, we have the evidence of Mrs Jacobus who said that during this project, there was a lack of moral and ethical consciousness within the Department. The constitutional court goes further. It says that:

20 "The State's functions is to execute its duties in terms of the relevant legislation. The failure of the State to edify its functionaries about the very legislation which governs their duties is unacceptable. It may be true that the problem lies with the officials who do not know what their responsibilities are and regrettably, with the legal representatives who do not know who the responsible

functionaries are.”

And here is the point I would like to make.

“However, this ignorance is no justification for their failings. I may explain the cause of the problem but it constitutes neither a good excuse nor a justification thereof and cannot serve to protect the State from being held responsible.”

And therefore, Justice, these ignorance pleaded is no excuse by these officials.

ARBITRATOR JUSTICE MOSENEKE: Yes. State officials’ conducts and its lawfulness and justification is judged objectively, is it not?

ADV DIRK GROENEWALD: Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: Policeman could fire at you and later asked and he says, “[Vernacular] I did not know that I did not have to fire in these circumstances.” There is no lawful justification for that omission or commission, right?

ADV DIRK GROENEWALD: Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: So the test is always objective and *Nyati* just reminds us that State officials must act lawfully and their mere ignorance can never withstand a proper claim against the State or against themselves.

ADV DIRK GROENEWALD: Indeed so, Justice. Justice, I have referred to the case of *Brummer vs. Minister of Social Development* in respect of the right to access to information.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV DIRK GROENEWALD: And the importance thereof, and I am not going to quote the constitutional court in respect thereof.

ARBITRATOR JUSTICE MOSENEKE: But here that right was totally negated 5by chaotic management of this project, is it not so?

ADV DIRK GROENEWALD: Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: You could never know who was where, sent where and that is why so many other mental healthcare users cannot even be traced. So the one end is having access. The other is just 10keeping no proper records and therefore denying access.

ADV DIRK GROENEWALD: Exactly so, Justice. Justice, in respect of– we have argued that constitutional damages is three-fold: it is to compensate the individual and place the individual he or she would have been in was it not for the infringement; it is to vindicate the constitutional rights; and it is to deter 15future infringements. Now, Justice, I would like, and I think it is common cause that maladministration has one of the causes of this great tragedy, and as alluded to by the minister, perhaps even corruption.

I would like to refer Justice to the matter of *MEC for Health Eastern Cape AO vs. Kirkland Investments* 2014, and paragraph 47 thereof, the constitution 20court says:

"Corruption and maladministration do not only pose a serious threat to our democratic order, but are also inconsistent with the constitution as observed by this court

in *Shaik*. Corruption is antithetical to the founding values of our constitutional order.”

Now the court goes further and court quotes from the constitutional court judgment in *South African Association of Personal Injury Lawyers vs. Heath* 2000. It quotes as follow:

10 "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our constitution. They undermine the constitutional commitment to human dignity, the achievement of equality, and the advancement of human rights and freedoms. They are antithesis of the open accountable democratic government required by the constitution.”

And here is the point I would like to make, Justice.

15 "If allowed to go unchecked and unpunished, they will pose a serious threat to our democratic state.”

So, Justice, this– that brings me to the claim itself. Now, to answer what is just and equitable compensation to be awarded, having regard to the fact that it should be aimed at compensating, vindicating, and deterring, we submit that the question should be asked, “May a government be allowed to benefit from any 20unlawful conduct?”

Now, the uncontested evidence is that the government will save R1.5 million in respect of each deceased mental healthcare user. Now that we submit is a benefit that befalls them and it is a benefit that befalls them due to unlawful conduct on their side. And we submit that therefore, the claim of R1.5 million is

justified because no matter how you look at it, they are receiving some form of benefit from an unlawful conduct. Now they [intervenes]

ARBITRATOR JUSTICE MOSENEKE: I hear that argument. You heard me debate that with your colleague, Adv Hassim.

5**ADV DIRK GROENEWALD:** Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: It is a bit of a stretch, “We will kill them and then keep the money.”

ADV DIRK GROENEWALD: Well, the government [intervenes]

ARBITRATOR JUSTICE MOSENEKE: And we will save money because we
10kill them.

ADV DIRK GROENEWALD: And that is indeed so, Justice, but that is the facts before this arbitration. Those are the facts. We heard the actuaries testify that the government will save R1.5 million. That is uncontested.

ARBITRATOR JUSTICE MOSENEKE: But we know that out of all these
15legality, they spend much, much more.

ADV DIRK GROENEWALD: Indeed so, Justice, but [intervenes]

ARBITRATOR JUSTICE MOSENEKE: They are still spending even more up to this day.

ADV DIRK GROENEWALD: Now [intervenes]

20**ARBITRATOR JUSTICE MOSENEKE:** [Indistinct] same thing you are saying therefore there should be no constitutional damages. I am just on that narrow platform. There are many platforms you have built up which is admirable but on

that narrow platform, I am not sure [intervenes]

ADV DIRK GROENEWALD: What we do have further, Justice [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Can you imagine if, God forbid, one's son or daughter were killed and you calculate and say the other side say, "Ja, she is no longer here and therefore in fact, there should be no damages because you are saved. We do not have to look after your daughter from now till the age of 20 whatever, so you are a beneficiary because you no longer spend on them."

That is to, I think it is basically to mingle values that do not quite belong together, that is money and human life, human loss. I have made argument, the same debate I had with your colleague, Adv Hassim, [indistinct – microphone disturbance] the fact the government did not save money, they lost money. They tried to save money but they lost it in tonnes, and they are still losing it and they are going to lose it by the end of this case.

ADV DIRK GROENEWALD: The point that we are making, Justice, is that government cannot benefit from any unlawful conduct. We have established that the conduct is unlawful, and we must determine what is the benefit and we have presented the evidence that there is some benefit for them; 144 mental healthcare users at 1.5 million is R260 million.

ARBITRATOR JUSTICE MOSENEKE: Where does it fit into your three plunks of argument?

ADV DIRK GROENEWALD: That– and that is why [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Compensation, vindication, and

deterrence.

ADV DIRK GROENEWALD: It falls within the bounds of vindication and deterrence because a government cannot be seen to benefit from any kind of unlawful conduct and I think our constitutional court has made that clear: we must act upon any unlawful conduct. So the award in that respect is aimed at vindicating and deterring. You cannot make or you cannot receive the benefit from unlawful conduct.

But in respect we [intervenes]

ARBITRATOR JUSTICE MOSENEKE: You have to set a factual platform for that benefit. As I have said, the facts show that they have lost in the whole enterprise.

ADV DIRK GROENEWALD: Well [intervenes]

ARBITRATOR JUSTICE MOSENEKE: They went to Esidimeni at even higher rate, the survivors. They having to pay compensation now. The very question is you know, how would you calculate? Is that a relevant consideration in determining constitutional damages but for the death, they would have to pay and therefore this is the amount that the deceased's family is entitled to. That is the narrow thing that I am struggling to get my arms around.

ADV DIRK GROENEWALD: Well, Justice, I think that is also why we in our statement of claim suggested and made the recommendation that a portion of that amount should go the office of the Ombud to assist them in further investigations of complaints by the public, and I submit that it is within the discretion of you, Justice, to make that allocation and to say, "Well, the parties have indicated that they wanted to donate money to the Ombudsman."

And I think that will assist in bringing back the confidence of the public the health system to know that the purpose of vindication and deterrence is to see to it that that award that has been made instils some confidence in the system again.

5ARBITRATOR JUSTICE MOSENEKE: Yes, with that I agree entirely, yes.

There are enough, it may be subject to the argument by State, there are enough factors that point to each of the subsets of reasons for constitutional damages and the facts are more than enough. All I am saying is I do not think and compute it in a way that is suggested and that is why adjudicators [indistinct –
10microphone disturbance] tribunals in courts are given that discretion to look at the whole basket and say, “We look at all this and here are the relevant considerations.” Is it appropriate to grant compensation? Is it appropriate to vindicate? Is it appropriate to deter future infringement, you know, to send a clear message, and also protect the constitution and our constitutional
15democracy. So those are powerful considerations. I think you have done quite a bit in the area. In any event...

ADV DIRK GROENEWALD: Thank you, Justice. Justice, the only two further issues; at paragraph 30 of our heads of argument, we have set out some guiding principles that we have gathered from the supreme court of Canada’s
20judgments, which has also been referred to by my colleague, and we have set out there a few considerations which need to be taken into account in determining the quantum of the damages which is to be awarded.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV DIRK GROENEWALD: I am not going to labour that, Justice. Then in

respect of the other relief that we seek, we have pointed out that we submit that the gov– [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Those considerations, I must say, are very helpful.

5**ADV DIRK GROENEWALD:** Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: Of course it is page 30 not paragraph 30.

ADV DIRK GROENEWALD: Ja, my apology.

ARBITRATOR JUSTICE MOSENEKE: They are very valuable guidelines.

10**ADV DIRK GROENEWALD:** Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: As most Canadian judgments in their fundamental rights are. Very well.

ADV DIRK GROENEWALD: Justice, in respect of the other relief that we seek at pages 32, we submit that the government should submit the record of the
15proceedings including but not limited to the transcript and the video recordings of these proceedings to the South African Police Service and the SIU to assist them in their investigation, and we would also like to see that the Gauteng Department of Health makes public a plan or strategy within three months of this award in which they intend to make employees aware of their ethical,
20statutory, and constitutional obligations toward patients and mental healthcare users.

We know that the expert evidence tendered at these proceedings show that there was a lack of ethical consciousness within the Department, and we

thing that such program will go a long way in ensuring that the Department indeed focus and complies with their constitutional obligations and the values set therein.

As a last resort or a last issue, Justice, in respect of cost, we have made the argument of cost. We have referred to the rele– [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Yesterday, just before you leave that part which really is the supervisory end of that, I was debating with your colleagues that perhaps we should ask the Ombud to supervise compliance with each of those subsets of corrective measures. What is your attitude about that?

ADV DIRK GROENEWALD: We fully support that, Justice. We fully support that.

ARBITRATOR JUSTICE MOSENEKE: Ja, and the money donated by the claimants, how do you think it ought to be managed and utilised?

ADV DIRK GROENEWALD: The– our suggestion is that the health Ombud must just make within a years' time, make it public how that money was utilised. So the Ombud must state that this money went for the following investigation or the following projects. And I think it is also important that in the award we must state that the government and the Gauteng Department of Health or the minister cannot deduct that money from any payment or subsidiary made to the offices of the Ombud. This must be seen on top of any subsidiary or payments or funding which they received from the government but all we seek is clarification from the Ombud and an explanation as to how that money was spent and for which complaints or for which project it was spent.

ARBITRATOR JUSTICE MOSENEKE: And limited to mental healthcare, is it not?

ADV DIRK GROENEWALD: Limited to mental healthcare, indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: And how would the reporting– what should I be ordering in relation to the reporting to the family or family committee, because it might be a good that they must be plugged into that fund, at least to get reports on how the Ombud enhances his duties around mental healthcare in particular. How do we get the families to remain plugged in there because they are the donors after all.

10**ADV DIRK GROENEWALD:** Indeed so, Justice. Justice, the– on the family committees that has been established, we can identify contact individuals. In respect of the family members who are not part of the family committee or a group, I submit that those individuals' names and contact details be provided to the Ombud and the Ombud then in respect of the client that we represent, it is 15four family members, that they be informed of it personally but we also submit that it must be made public as well.

So the Ombud must release a statement, indicating that from the donations received from the family members, the following projects was conducted and the following investigations were done and these were the 20outcomes and so on so that we know and the public know how this money was utilised.

ARBITRATOR JUSTICE MOSENEKE: Ja, [indistinct – microphone disturbance] make it public is wonderful. Finding a way to have the families informed over time [indistinct] committee or other appropriate structure, yes,

very good. The report, the record you suggest be send to the police and SIU, the national director of public prosecutions, no, or you assume the police will ultimately [intervenes]

ADV DIRK GROENEWALD: Well, Justice, if we can send it to the national prosecuting authority, we have no difficulty. We will support such action. So that can be included in that award.

ARBITRATOR JUSTICE MOSENEKE: Ja, that might just spring them into action.

ADV DIRK GROENEWALD: Hopefully, Justice. There is much to slip between the cup and the lip. So if we can send it directly to the national prosecuting authority, I think that will in fact be the best way.

ARBITRATOR JUSTICE MOSENEKE: Very well. You were going to move to cost.

ADV DIRK GROENEWALD: Cost, Justice, the constitutional authority, I have quoted it, Justice, we submit that we are dealing here with a constitutional issue. We submit that we have been already partially successful and we submit that cost should follow and that cost should be awarded, including the cost of counsel and subject to any questions from your side, Justice, that is my argument on behalf of my clients.

ARBITRATOR JUSTICE MOSENEKE: Very well. Thank you ever so much, Counsel.

ADV DIRK GROENEWALD: Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: Much appreciated. And thank you for

the heads which are very helpful.

ADV DIRK GROENEWALD: Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: And properly footnoted. I much appreciate that. Adv Hutamo.

5**ADV TEBOGO HUTAMO ADDRESSES ARBITRATOR JUSTICE**

MOSENEKE: Justice, I chose to retain the post which I had previously occupied. I prefer to work within close range of my armoury, and I will address you from where I am seated.

ARBITRATOR JUSTICE MOSENEKE: Okay.

10**ADV TEBOGO HUTAMO:** Thank you.

ARBITRATOR JUSTICE MOSENEKE: [Indistinct] talking about armoury. I hope we will remain alive by the time you are done. Very well, Counsel, you may proceed.

ADV TEBOGO HUTAMO: Justice, I am going to first deal with the submissions
15made by Section 27 and [Indistinct] Spears through their respective counsel on behalf of their claimants.

ARBITRATOR JUSTICE MOSENEKE: Shall we agree the time? It is 10 to 10. That should take you to 10 to 12.

ADV TEBOGO HUTAMO: Justice, in terms of time, [indistinct – microphone
20disturbance] traverse a lot of evidence. I hope that we should be able to complete the argument within the estimated period.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV TEBOGO HUTAMO: But should the argument be longer, it would be as a matter of necessity, given the magnitude of the submissions which have been made by three sets of counsel, and it would be necessary in those circumstances to go beyond the time.

5 ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV TEBOGO HUTAMO: I still mention the submission that after I have dealt with the submissions by the claimants represented by Section 27 and [Indistinct] Spears, I will thereafter deal with the submissions made by Legal Aid South Africa on behalf of their claimants for the obvious reasons that there are two
10 categories of claimants in these proceedings.

Justice, firstly I would like to clarify a few matters. I has already been reported that the issues relating to general damages have been settles, and what the Justice is required to do is to consider the claim by the claimants in respect of constitutional damages. And what needs to be clarified is who are the
15 claimants in relation to this claim? We have heard a lot of evidence about the torture of the mental healthcare users or if I can put it differently, we have heard a lot of evidence about the breaches of constitutional rights of the mental healthcare users who unfortunately passed away.

So what we have to bear in mind is that those breaches cannot be the
20 consideration to be taken into account if the Arbitrator has to consider the claims made by the claimants in their own rights. The claims are not on behalf of the deceased mental healthcare users. The claims are made by the families of those who unfortunately passed away, and if one has regard to the recommendations of the Health Ombud, it is quite clear that the issue relating to

compensation or equitable redress is in relation to the families.

A lot of evidence or a lot of submissions has been canvassed, trying to demonstrate how the rights of the mental healthcare users were breached in order to justify the constitutional claim for damages, and that can be the test. If I can just take Justice to page 59 of File 1, which is the recommendations of the Ombud? In particular, I am going to make reference to recommendation number 17. Recommendation 17 reads that:

"The National Minister of Health must lead and facilitate a process jointly with the premier of the province to contact all affected individuals and families and enter into an alternative resolution process. This recommendation is based on the low trust, anger, frustration, loss of confidence in the current leadership in the Gauteng Department of Health by many stakeholders. The National Department of Health must respond humanely and in the best interest of affected individuals, families, relatives, and the nation.

The process must incorporate and respect the diverse cultures and traditions of those concerned. The response must include an unconditional apology to the families and relatives of the deceased and Life patients who were subjected to this avoidable trauma and as a result, of the emotional and psychological trauma the relatives have endured. Psychological counselling and support must be

provided immediately. The outcome of such process should determine the way forward such as mechanism as redress and compensation.”

From the reading of this recommendation, it becomes quite apparent that the compensation that you as the Arbitrator has to determine, it has to be compensation of those who have been affected by the trauma and the Ombud clearly makes reference to the type of harm that the families have suffered.

ARBITRATOR JUSTICE MOSENEKE: What determines the parameter of an arbitration? Is it not the arbitration agreement?

10 **ADV TEBOGO HUTAMO:** Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: And what does that say?

ADV TEBOGO HUTAMO: If I can take Justice to the terms of reference [intervenes]

ARBITRATOR JUSTICE MOSENEKE: [Indistinct] just a recommendation
15 from the Ombud, a process starts of arbitration [intervenes]

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: ...and that process sets out the terms of the arbitration.

ADV TEBOGO HUTAMO: Indeed.

20 **ARBITRATOR JUSTICE MOSENEKE:** It is an agreement in other words. That is the recommendation. So let us not get tied up in knots.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: What do the parties say, who are entitled to compensation?

ADV TEBOGO HUTAMO: Indeed so, Justice. If I can refer you, Justice, to the terms of reference which constitute the arbitration agreement, and in particular 5[intervenes]

ARBITRATOR JUSTICE MOSENEKE: And is this [indistinct – microphone disturbance] in your heads of arguments?

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: So cannot you not argue now?

10**ADV TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: Which paragraph is it?

ADV TEBOGO HUTAMO: Justice, I was making reference to paragraph 5 of the heads.

ARBITRATOR JUSTICE MOSENEKE: Yes.

15**ADV TEBOGO HUTAMO:** In relations to the recommendations made by the Ombud.

ARBITRATOR JUSTICE MOSENEKE: Yes, I will have a look at that. You may [intervenes]

ADV TEBOGO HUTAMO: And the terms of reference have also been referred 20to in the heads, and I would like to particularly refer you, Justice, to the terms of reference themselves, the arbitration agreement, starting off at paragraph 1.

"The parties indicated below wish to enter into a process

of alternative dispute resolution to provide redress to mental healthcare users and their families who were negatively affected in the Gauteng Health Marathon Project, including the closure of Life Esidimeni Mental Healthcare facilities. The ADR is entered into voluntarily and in line with recommendation 17 of the Health Ombud's report."

Which is the recommendation I was referring Justice to, and if Justice goes to clause 3 of the terms of reference, it requires that:

10 "The government and affected mental healthcare users and families agree to the appointment of Justice Moseneke as the arbitrator to chair the alternative dispute resolution process."

And then it lists the paragraphs, and in particular I would like to make reference 15to paragraph 3.4 which reads that:

"The arbitrator shall oversee the completion of redress outlined in 6.3.1 and 6.3.2 and facility and aid agreement between the parties on the completion and processes related thereto and of redress our client in paragraphs 20 6.3.3 to 6.3.6."

If I can read from 6.3.

ARBITRATOR JUSTICE MOSENEKE: No, before you heap on the detail, can you make the point you make ahead so that we understand how the detail support that point? What is the point you are making? You are saying who is not

entitled to claim what?

ADV TEBOGO HUTAMO: Justice, what we [intervenes]

ARBITRATOR JUSTICE MOSENEKE: So do you understand that? Do you get my point?

5**ADV TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: Once we understand that then we can see how well the details support that proposition.

ADV TEBOGO HUTAMO: The –

ARBITRATOR JUSTICE MOSENEKE: What is the State's attitude? Who
10should not be here?

ADV TEBOGO HUTAMO: The submission is the families of the deceased mental healthcare users are the claimants in these proceedings. In order to determine compensation in terms of this process, then one will have to consider what of their constitutional rights have been breached, not the breach of the
15mental healthcare users who have passed away. That is the point which I submit because the [intervenes]

ARBITRATOR JUSTICE MOSENEKE: You have got to say that again. You have got to say it again. I am sorry, I am slow on the uptake.

ADV TEBOGO HUTAMO: Justice, the parties to these proceedings, in
20particular reference to those who are represented by Section 27 and [Indistinct] Spears, the claimants are the families of those who have died. That is the first part. So what I am trying to draw a distinction is who are the claimants in these proceedings?

ARBITRATOR JUSTICE MOSENEKE: But the agreement tells us there, does it not?

ADV TEBOGO HUTAMO: Yes

ARBITRATOR JUSTICE MOSENEKE: The agreement takes time to identify 5 persons who are entitled to claim. So we know who the claimants are.

ADV TEBOGO HUTAMO: That is correct. So the submission which I am making is which breaches is the Arbitrator is supposed to consider in the determination whether the claimants are entitled to the damages.

ARBITRATOR JUSTICE MOSENEKE: What is your submission?

10 **ADV TEBOGO HUTAMO:** The submission is that the Arbitrator should consider the breaches in relation to the claimants' constitutional rights not the deceased constitutional rights.

ARBITRATOR JUSTICE MOSENEKE: That is a startling proposition, is it not, totally startling proposition. You say I should be considering only breaches 15 against claimants, family members of the mental healthcare users?

ADV TEBOGO HUTAMO: Indeed, by virtue [intervenes]

ARBITRATOR JUSTICE MOSENEKE: And you invite me all the breaches against the deceased. Is that the submission for determining compensation and equitable redress?

20 **ADV TEBOGO HUTAMO:** Indeed.

ARBITRATOR JUSTICE MOSENEKE: Forget of what? Let have— no hackling, please. Let us just try and understand what Counsel is arguing. You

invite me to ignore all the constitutional breaches and torture, the word you used, against the deceased, and consider only how family members have endured breaches. Is that it?

ADV TEBOGO HUTAMO: That is correct. That is the submission, and that is in line with the recommendation number 17, which speaks of the trauma and psychological injuries that the families have suffered. And whilst I am still on that point, I would like to refer you, Justice [intervenes]

ARBITRATOR JUSTICE MOSENEKE: But what should be the guiding document here? Do you say that the agreement ought to be forgotten? In the light of the recommendation, parties went into a huddle and made an agreement to this arbitration.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: But for that agreement, even if recommendation 17 was there, no such process would have happened, is it not? And in it, the parties took a lot of time to identify– look at paragraph 2, “Entitlement criteria.” Are you saying we ought to debate that afresh? 2.1 says family members of MHCUs, 2.2 says family members of 13 MHCUs, 2.3 MHCUs who survived, 2.4 annexures. What are you saying? By “you” I am not being personal, Counsel. I mean, what does the State argue now?

ADV TEBOGO HUTAMO: From what the Justice has referred to, it makes reference 2.2 family members. 2.1 and 2.2 refers to family members.

ARBITRATOR JUSTICE MOSENEKE: It must because others are deceased.

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: Mental healthcare users are deceased.

ADV TEBOGO HUTAMO: Indeed, and if I can refer Justice to [intervenes]

ARBITRATOR JUSTICE MOSENEKE: And 2.3 refers to family members of 5 survivors.

ADV TEBOGO HUTAMO: Indeed so.

ARBITRATOR JUSTICE MOSENEKE: So in either case, whether they are deceased or they are in hospitals, it is the family members who are acting for and on behalf of the claimants but you are making a different proposition. You 10 are saying what? You are saying the mental healthcare users themselves are before me and therefore what? I am quite confused about the argument actually. Just help me understand?

ADV TEBOGO HUTAMO: Justice, what we get from the terms of reference is that there are family member who have been affected by the implementation of 15 the Marathon Project, and which has caused them trauma. So in reference to— if I can take Justice to my heads of argument, page 25 paragraph 45:

20 "The question of remedy can only arise after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed. An inquiry into damages cannot take place in the air. It must be an inquiry into the damages arising from an identified wrong."

So what I am submitting is the wrong should be in relation to the family

members who have suffered trauma subsequent to the implementation of the Marathon Project. That is where we should focus, and we are not for a moment disputing the findings of the Ombud in relation to what the families have went through. So what we submit is we have to consider the trauma that the family had to endure, which will be the basis upon which their claims will be founded.

And then when the Arbitrator [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Where would this trauma– from where would the trauma arise?

ADV TEBOGO HUTAMO: The trauma will arise– the trauma will be as a result of the implementation of the Marathon Project.

ARBITRATOR JUSTICE MOSENEKE: The trauma will arise from the torture, the ill treatment [intervenes]

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: ...the death [intervenes]

15 **ADV TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: Their undignified burial, all of those things, right?

ADV TEBOGO HUTAMO: That is correct, yes.

ARBITRATOR JUSTICE MOSENEKE: So you say family members are
20 entitled to claim only from trauma.

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: But that trauma can only occur from

these horrible deeds, is it not?

ADV TEBOGO HUTAMO: Justice, the *sina qua non* of the trauma is the implementation of the Marathon Project. So they are claiming general damages arising from the implementation of the Marathon Project. Then it would then follow that the families being the claimants who suffered trauma, consideration should be only given to what they have went through, not what the users have went through.

ARBITRATOR JUSTICE MOSENEKE: That is an incredible proposition. It really startles me. Let us see where that gets you to. Do you say I must all the evidence of what happened to the deceased?

ADV TEBOGO HUTAMO: Justice, I have made my submission that we do not dispute the findings of the Ombud in relation of what happened to the mental healthcare users. That is the first point. That is admitted. And what we say is that in order to make a determination for a wrong, in order to make a determination what right has been breach, which is the basis for a claim, then the tribunal will then have to identify that wrong that has been committed in relation to the claimants. The claimants have suffered trauma. We admit that.

ARBITRATOR JUSTICE MOSENEKE: And you say the suffering of the deceased is irrelevant. In essence, that is what you are saying. And you say therefore let us offer them 200,000 and it is all fine. We are really talking about the shock they suffered from. Is that the argument?

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: And you say on that argument, there are no constitutional consequences for all of this breach by the State. That is

essence what you are saying.

ADV TEBOGO HUTAMO: In relation to the families and we make submissions why in this instance they would not be entitled to constitutional damages in the presence of other remedies available at law.

5**ARBITRATOR JUSTICE MOSENEKE:** My goodness. I am going to sit and listen. You go ahead.

ADV TEBOGO HUTAMO: Thank you.

ARBITRATOR JUSTICE MOSENEKE: Because frankly, let me be frank with you, Mr Hutamo. It is nowhere near what the law of this land is and you have to
10persuade me that in fact it is. I am going to sit calmly and listen to you. You say I must disregard all the evidence that we have been about all this time, because all that families can claim, not in the air, is that they were shocked and traumatised. Stop. And the State is liable only for that. Is that it?

ADV TEBOGO HUTAMO: That is correct, Justice.

15**ARBITRATOR JUSTICE MOSENEKE:** And all of this travails we are about are irrelevant in determining an appropriate redress and compensation.

ADV TEBOGO HUTAMO: Justice, what I submit is the trauma that they have suffered resulted from what we have went through, trying to identify the wrongs which were committed against the mental healthcare users.

20**ARBITRATOR JUSTICE MOSENEKE:** Do you have instructions from the State on this argument?

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: Is that their attitude that [intervenes]

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: That all the deaths are fine and they are gone. All we have to look at is how much the families cry, how much were they upset, and that is all that they are liable to compensate on? Because that is in essence what you are telling me.

ADV TEBOGO HUTAMO: If Justice permits me to support that submission in relation to case law, then it will become quite apparent why this submissions are being made in relation to these claimants.

10**ARBITRATOR JUSTICE MOSENEKE:** We will get to case law. We will get to case law. I want to understand the basic submissions and then you can support them with whatever support you require but I mean the basic reasoning of the argument that the State is advancing now is the one I want to grapple with and hear, and then you can say the submission is correct because it is what the law
15says. Ultimately, we have to get there. And for the other category of claimants, who do you say about them? What do I have to consider? Which breaches do I consider in relation to survivors?

ADV TEBOGO HUTAMO: Well, like have said at the outset that the submissions which I am making are in relation to the other category.

20**ARBITRATOR JUSTICE MOSENEKE:** I understand but what do you say, what is the argument? I want to get argument in full. In relation to the survivors, what do you say? What are they entitled to?

ADV TEBOGO HUTAMO: When I get to that stage it will become apparent

that in respect of those they are well entitled and they fall within the terms of reference in terms of being part to these proceedings and the issues of equitable redress and compensation is equally applicable to them.

ARBITRATOR JUSTICE MOSENEKE: Well, look at clause 2 of the arbitration agreement. Does that support what you say now, because that is the starting point, is it not, even before we get to any law. The agreement directs me to grant compensation to certain categories of people, and it tells me who those categories are. This is an agreement signed by the parties, not by me, the State amongst them foremost, and it directs and says:

10 "The following groups will be entitled to equitable redress arising from the ADR: family members of MHCUs who were moved from Life Esidimeni on that date and who subsequently died.

2.2 Family members of the 13 ...

15 2.3 MCU from Life Esidimeni and their families who survived."

Now who do you— and you say the latter are entitled to full compensation and so the former are entitled only to trauma and shock damages. Is that the argument? I just want to get my— to understand what you are saying.

20 **ADV TEBOGO HUTAMO:** Justice, with regards to the survivors, they are entitled to redress and compensation. That is the submission [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Of which category?

ADV TEBOGO HUTAMO: The second category which I said I will deal with

them later.

ARBITRATOR JUSTICE MOSENEKE: [Indistinct] help me now. In one sentence tell me what will you argue so I understand the distinction you are seeking to make. What do you say the survivors claimants are entitled to?

5**ADV TEBOGO HUTAMO:** They [intervenes]

ARBITRATOR JUSTICE MOSENEKE: The deceased's claimants, I will call them that for convenience, are not entitled. Just [indistinct – microphone disturbance] that distinction and then you can argue for as long as you like thereafter.

10**ADV TEBOGO HUTAMO:** Justice, the survivors would be entitled to redress and compensation, and what we will debate is whether over and above common law damagers, are they entitled to constitutional damages. That is where our argument is.

ARBITRATOR JUSTICE MOSENEKE: And the first category?

15**ADV TEBOGO HUTAMO:** The first category, Justice, as I say, will be the family members of those who have passed on and their entitlement for redress and compensation, it is insofar as it relates to the trauma that is referred to at paragraph 2.3 of the terms of reference.

ARBITRATOR JUSTICE MOSENEKE: And when one considers what they
20are entitled to, would one have regard to the constitutional breaches in relation to the deceased on your argument?

ADV TEBOGO HUTAMO: What is submit is those breaches are the basis of their entitlement but it should not be a factor in the determination of the

quantum.

ARBITRATOR JUSTICE MOSENEKE: Why not?

ADV TEBOGO HUTAMO: For the simple reason that purpose of compensation is for the reparation of the harm that has been caused to the victim or the plaintiff. So in this instance, the claimants having endured the harm, in order to restore reparation to their feeling, then compensation is necessary. That is why I submit that consideration should only be made in reference to what they have gone through.

ARBITRATOR JUSTICE MOSENEKE: So all evidence about the lot of the deceased in relation to claimants in respect of the deceased on your argument is irrelevant [intervenes]

ADV TEBOGO HUTAMO: For [intervenes]

ARBITRATOR JUSTICE MOSENEKE: ...for purposes of damages.

ADV TEBOGO HUTAMO: Of determination of quantum, that is correct.

15 **ARBITRATOR JUSTICE MOSENEKE:** Incredible submission.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Very well, you continue.

ADV TEBOGO HUTAMO: Thank you.

ARBITRATOR JUSTICE MOSENEKE: And you say the State is obviously *au fait* with this argument and that is the attitude of the State on this matter.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Very well.

ADV TEBOGO HUTAMO: Justice, what we submit is that these proceedings will have to identify which right of the claimant has been breached and as it was decided in the case of *Mboweni* referred to in the heads of argument at paragraph 47, the court said that:

5 "The proper starting point for the inquiry was to consider whether the existing remedy by way of damages for loss of support was an appropriate remedy for any breach of the children's constitutional rights."

And I have made the submission that [intervenes]

10 **ARBITRATOR JUSTICE MOSENEKE:** Why is that case on point, a dependence claim, why is it relevant to what we are doing now?

ADV TEBOGO HUTAMO: The point which I am submitting is that when the arbitrator has to consider the relief sought in relation to constitutional damages, there has to be consideration whether is there no existing remedy under
15 common law which could vindicate any of the rights alleged to have been breached. And my submission is that if there is such a remedy under common law, then the claimant will not be entitled to claim additional damages.

ARBITRATOR JUSTICE MOSENEKE: From when could the common law ever exclude a supreme law? Let us just get to basics.

20 **ADV TEBOGO HUTAMO:** Yes

ARBITRATOR JUSTICE MOSENEKE: From when? How could customary law, common law exclude the dictates of the supreme law?

ADV TEBOGO HUTAMO: Justice, allow me to refer you to the case of the

Law Society of South Africa AO vs. the Minister of Transport And Another.

ARBITRATOR JUSTICE MOSENEKE: And it is [indistinct] by somebody I have presumably met before, is it not?

ADV TEBOGO HUTAMO: Indeed, Justice.

5ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV TEBOGO HUTAMO: Where is it? If you can just bear with me, Justice, I just need to... the judgment of the highest court of the land and the judgment was written by Moseneke DC J. In that judgment, I am going to make reference to what was held in order to demonstrate the point which I am making that if one
10has remedy under common law, that should be sufficient to vindicate a constitutional right that has been breached. Justice, if I can refer to paragraph 72 of Moseneke DC J, which records that:

15 "It bears repeating that the common law provides a claimant with a delictual remedy to recover from a wrongdoer, damages arising from bodily injury or the death of a breadwinner caused by the unlawful and negligent driving of a motor vehicle.

The delictual remedy vindicates the right to bodily integrity. The question whether the common law delictual remedy
20 also protects and enforces in the language of section 12(1)c of the Constitution, the right to the security of the person which includes the entitlement to be free from all forms of violence from either public or private sources."

And Moseneke DC J made reference to the case in *Foce vs. Minister of Safety and Security* in paragraph 73.

"This court had to decide whether a breach of a constitutionally entrenched fundamental right may be vindicated by a delictual remedy such as an award of damages."

In that case, the applicant contended that he was entitled to a public law remedy of constitutional damages and not to a private law remedy of delictual damages. The contention was that any person who applied to a court for appropriate relief for an infringement of a fundamental right under the interim constitution may not resort to a delictual remedy because the claimant was entitled only to a constitutional remedy.

The court held that in principle, appropriate relief was relief that was required to protect and enforce the interim constitution and that there was no reason in principle why appropriate relieve should not include an award of damages where such an award was necessary to protect and enforce constitutionally recognised fundamental rights.

ARBITRATOR JUSTICE MOSENEKE: That propositions stands dead against your position.

ADV TEBOGO HUTAMO: And if I can proceed, the court observed that our private law of delict was flexible and that in many cased, the common law will be broad enough to provide all the relief that would be appropriate for a breach of constitutional rights. In the result, the court declined to grant constitutional damages and that was in reference to the case in *Foce* but the last paragraph

which I would like to read from this judgment is paragraph 74.

"It seems clear that in an appropriate case, a private law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking appropriate relief to which it is entitled, may properly resort to common law remedy in order to vindicate a constitutional right. It seems obvious that the delictual remedy resorted to must be capable of protecting and enforcing the constitutional right breached."

And in that regard, we submit that the claimants, having made their claim under the common law, they cannot over and above those damages, seek constitutional damages, and I want to be [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Where does the passage say so? Where does the passage say what you say now? Let us take it step by step.

ADV TEBOGO HUTAMO: Yes

ARBITRATOR JUSTICE MOSENEKE: In an appropriate case where the common law gives relief sufficient to vindicate a constitutional protection, that is enough. You can resort to the common law.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: No, it does not. Let us debate here.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: What is the common law protection for failure to access record kept by the State? What is the common law protection

for that? What is the common law protection for frustrating access to healthcare or to education? What is the common law protection to failure by the State to keep proper medical records? What is the common law protection for being transported on the back of a bakkie being a mental healthcare user, and dumped in a place which has got no facilities?

So just go back and look at the authority quite carefully. I happen to be the person who wrote it but go carefully and go and read it. In appropriate cases, you use a common law it is fine. Defamation, you sue in terms of the common law. It would vindicate the right to dignity. All that the judgements says that is in order. Where does it cover common law protection? You resort to the Constitution itself, okay. So there is no dicta that says once you have sued in the common law that is the end of the inquiry.

But where still, Counsel, so plainly so, the constitutional violations here, certainly 80% of them cannot be covered by the common law. You cannot sue under the common law about falsified licences, about NGOs which are not licenced properly and authorised, about breaches of the medical and healthcare, about name it. The whole setting tells you that you cannot use the common law only to vindicate constitutional rights, but where, there is personal injury, for instance and the common law can deal with that. That is what your judgment tells you.

Then it is in order. In *Foce* there was the common law could protect the interest at stake then that is in order but where it cannot and where it falls short, the parties never ever precluded from making claims. I think that is how I understand. Of course, you are open to persuade me that I misunderstand the

judgment wrongly.

ADV TEBOGO HUTAMO: If Justice has regard to the statements of claim on behalf of the claimants, I will start off with Section 27.

ARBITRATOR JUSTICE MOSENEKE: Yes, so do it. Proceed, Counsel.

5**ADV TEBOGO HUTAMO:** The claim is framed as follows:

"As a result of the emotional shock and psychological injury, the claimants have suffered and on the basis of common law, the claimants claim damages in the amount of 200,000."

10And my submission is that it is well and good for them to have made that election to sue under common law as they are entitled to do so. And Justice will recall the submission which was made on behalf of the claimants, it was that common law is not sufficient to vindicate the breach alleged to have been suffered by the claimants.

15 What I submit is [indistinct – microphone disturbance] remedy under common law, then the claimants cannot over and above what he may be entitled to under common law, claim additional damages under constitutional claim.

ARBITRATOR JUSTICE MOSENEKE: Well, the remedy of the common law
20should be complete, is it not? It should give full vindication of constitutional breaches as a bare minimum, is it not so?

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: The first part as I read the statement

of claims before me, why can the claimants not claim under B and then claim under C? What in law precludes them from doing so? Constitutional damages as a result of the deaths and the circumstances of the death in the context of constitutional obligations owed to the deceased and the claimants, the claimants claim R1.5 million, clearly constitutional damages. Why are they not entitled to do that?

ADV TEBOGO HUTAMO: What is being sought is a claim which comes as result of the death of the mental healthcare users, which subjected them to the trauma and psychological injury which I have made mention of, and which injury they have a remedy under common law.

ARBITRATOR JUSTICE MOSENEKE: Why do they not have claim that relates to the circumstances under which the deceased died? What law precludes them from making that claim, beside the first part? I feel terrible. It was painful. I got trauma. Stop. And then thereafter because of the death, but also look at the circumstances under which they died, and I think here too there should be compensation. There should be retribution. There should be vindication, in other words, you know? And there should be prevention. Why can the not claim in the alternative or both claims? What is the legal proposition for them being prevented, provided they do not double dip, they do not claim for the same thing twice. They are entitled, are they not?

ADV TEBOGO HUTAMO: Well, Justice, which is the point which I was making the submission that they cannot over and above damages granted under common law and seek to recover damages under constitutional claim and

[intervenes]

ARBITRATOR JUSTICE MOSENEKE: Is that why you quickly wanted them to settle the damages claim, was it?

ADV TEBOGO HUTAMO: No, Justice.

ARBITRATOR JUSTICE MOSENEKE: Okay.

5**ADV TEBOGO HUTAMO:** It was in the interest of complying with the recommendations of the Health Ombud. The settlement was done purely in that spirit.

ARBITRATOR JUSTICE MOSENEKE: You see, the mountain you have got to climb is to show that they are not entitled to claim for constitutional damages. In 10others words, you have got to show me that their claim is so circumscribed that the common law satisfies the claim fully. Let me put it the other way around, Adv Hutamo, you have got to persuade me that all the circumstances under which the deceased died do not attract constitutional relief. That is the hurdle you have got to go over. By you I mean the State.

15**ADV TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: You have got to say, "Forget about how they died. There are no consequences. Forget about the breaches of the constitution. Ignore the fraud, improper licencing, the improper treatment, absence of medication, absence of care. Forget about those things. You now 20why? You are entitled only to the pain you felt when they died. As for the rest, it is none of your business, and none of the constitution's business." How could that ever be? And that is what you have really have got to argue and persuade me on.

ADV TEBOGO HUTAMO: Well, Justice, if I can refer you to the [intervenes]

ARBITRATOR JUSTICE MOSENEKE: In other words, you really say this is not a constitutional matter. It is a common law claim. That is really what you are telling me.

5**ADV TEBOGO HUTAMO:** Dealing with the issue relating to appropriate relief in terms of section 38, the case in *Foce* dealt with that aspect to say that one would then have to consider if common law vindicates your constitutional right. That is the first step and then it is on that basis that the courts have the power to develop the common law if it does not suit the circumstances to craft a
10remedy which will suit the circumstances.

ARBITRATOR JUSTICE MOSENEKE: If the claim is only a common law claim, then development might arise. If a claim purports to be a common law claim A, B constitutional damages claim, [indistinct] develop the common law to adjudicate the constitutional damages claim. If so why so?

15**ADV TEBOGO HUTAMO:** One would then have to determine whether claim B is it one which can be remedied by the common law before you could design any other remedy.

ARBITRATOR JUSTICE MOSENEKE: No, why so? Why is it so? Are all claimants obliged to bring claims only under the common law? How do you
20vindicate the right of access to education under the common law or right of access to healthcare or right of access to information held by the state, a right to administrative justice? How do you vindicate that through the common law?

ADV TEBOGO HUTAMO: One would then have to look into the relevant facts in order to make that determination, whether is it a matter which cannot be

addressed by the common law.

ARBITRATOR JUSTICE MOSENEKE: Show me on authority that precludes a party from making a constitutional claim [intervenes]

ADV TEBOGO HUTAMO: If you can allow [intervenes]

5**ARBITRATOR JUSTICE MOSENEKE:** ...and that restricts all claims through the common law only.

ADV TEBOGO HUTAMO: There is another judgment, Justice [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Besides the one you have cited?

ADV TEBOGO HUTAMO: Beside the one that I have cited [intervenes]

10**ARBITRATOR JUSTICE MOSENEKE:** And read *Foce* again quite carefully. Not even *Foce* precludes constitutional damages. It just says we did not have to reach them because the claim can be vindicated under the common law. In other words, you already have a remedy somewhere else so we do not have to reach constitutional damages and *Foce* goes on, Justice Ackerman and to
15Justice Kriegler to make it plain that cost have to be innovative. In appropriate cases they will have to find appropriate relief that includes, the may include constitutional damages. So I do not know of a judgement that would ever preclude a court from vindicating constitutional transgressions.

ADV TEBOGO HUTAMO: May I refer Justice to the judgment of the
20constitutional court, the judgment which was also written Moseneke DC J. It is the judgment in the matter of *Dikoko vs. Moghatla*.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV TEBOGO HUTAMO: Paragraph 90 of the judgment:

5 "It seems to me that the delict of defamation implicates human dignity, which includes reputation on the one side and freedom of expression on the other. Both are protected in our Bill of Rights. It may be that it is a constitutional matter because although the remedy of sentimental damages is located within the common law, it is nonetheless appropriate relief within the meaning of section 38 of the Constitution."

10 Going back to *Foce*, [indistinct – microphone disturbance] reference to *Foce* where the Justice quoted the judgement in *Foce*.

15 "In *Foce* the court assumed but stopped short of deciding whether appropriate relief in section 7(4)(a) of the interim Constitution includes an award of damages where the award is required to enforce or protect rights in the Bill of Rights. The court, however, made it clear..."

And in this case reference is made to the *Foce* judgment:

20 "...there is no reason in principle why appropriate relief should not include an award of damages where such an award is necessary to protect and enforce chapter 3 [indistinct]. Such awards are made to compensate persons who have suffered loss as a result of a breach of statutory right if, on a proper construction of the statute in question, it was the legislator's intention that such damages should

be payable and it will be strange if damages could not be claimed for and..."

If this can be underlined:

5 "...at least [indistinct – microphone disturbance] occasioned by the breach of the right vested in the claimant by the supreme law, when it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed."

10 Before like I can proceed to paragraph 91 [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Well, let us– the passages you would accept I know it well, having written then.

ADV TEBOGO HUTAMO: Yes.

15 **ARBITRATOR JUSTICE MOSENEKE:** But let me make this point. Does the teacher not make it quite plain that– can you take a step back? [Indistinct] Dikoko was whether or not it was a constitutional matter that arose in a defamation claim, and that passage shows you that yes, it was a constitutional matter.

ADV TEBOGO HUTAMO: Yes.

20 **ARBITRATOR JUSTICE MOSENEKE:** Because [indistinct - microphone disturbance] is protected also by the constitution. So the question was whether or not the court ought to hear the matter and it was shown that yes, of course a constitutional matter even though it is couched in common law terms. Now,

Counsel, just think for a moment about this. [Indistinct - microphone disturbance] happened to be cases like personal injury, why defamation which [indistinct] coincide with chapter 2 projections.

There are many other transcription which you will never find, they were never dreamt of in common law which was fashioned in the 15th, 14th and 13th century. There are many of them so chapter 2 is much, much wider than the delicts which were known under the common law. You understand that as a matter of principle.

ADV TEBOGO HUTAMO: Yes.

10 **ARBITRATOR JUSTICE MOSENEKE:** So those dicta pains to tell you there is nothing wrong in principle in awarding damages if there is an infraction or transgression of fundamental rights and [indistinct]. Similarly, if you choose to do that under the common law you will not be non-suited. You will not be thrown out of court only because you have chosen the common law. You need 15 to go past that basic fundamental understanding, otherwise you're going to quote very many passages which may not support the proposition you contend for.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: What is your attitude about that? As a 20 matter of law I want to hear your submissions on that.

ADV TEBOGO HUTAMO: Justice, my submissions are in relation to the nature of the damages which are being sought as outlined in the statements of claim, and what I wanted to point out to the Justice, it is the last paragraph which deals with how should the court consider those types of claims. And it

has been properly set out in paragraph 91 of the judgement of [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Which you want me to hear now?

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Okay, I will listen.

5**ADV TEBOGO HUTAMO:** It says:

10 “Although this remarks in *Foce* were directed at the
remedy provision of the interim Constitution, it seems to
me that the same considerations apply to the appropriate
relief envisaged in section 38 of the Constitution when an
award of damages is necessary to vindicate, that is to
protect and in corners, rights which aside the common law
pedigree are all enshrined in the Bill of Rights.”

And what is of importance it is the last sentence.

15**ARBITRATOR JUSTICE MOSENEKE:** [Indistinct - cross-talking] standby
besides the common law pedigree are also to be found enshrined in the Bill of
Rights. What do you understand that to mean?

ADV TEBOGO HUTAMO: My understanding, Justice, is that to the extend that
one would be entitled to a remedy under common law in relation to the breach
of a right which one would ordinarily have, I right which is also enshrined in the
20constitution, that is how [indistinct]

ARBITRATOR JUSTICE MOSENEKE: You are spot on, Counsel. You are
correct and therefore– so if let’s say a child died in a village because of the
thirst and it is shown that the State did not fulfil its constitutional obligation to

provide access to water, could you file a claim under the common law?

ADV TEBOGO HUTAMO: Justice, in that regard like there might not be an immediate remedy available and [indistinct]

ARBITRATOR JUSTICE MOSENEKE: There might be no remedy available.

5**ADV TEBOGO HUTAMO:** Under the common law, like if I understand the [indistinct]

ARBITRATOR JUSTICE MOSENEKE: No, under our law, under our Constitution, under our jurisdiction, will there be no remedy? Let me try again. Mrs Grootboom dies. The law requiring and the court having directed that she
10 must get a home and the State does not fulfil its obligations. How do you couch that in the common law? Is there such a claim under the common law?

ADV TEBOGO HUTAMO: Justice, I think I should make it clear that I accepted that the courts have the inherent power to design a relief which will suit the circumstances of the case in the event that there is no remedy under
15 common law. I do not dispute that principle of the law. So [indistinct]

ARBITRATOR JUSTICE MOSENEKE: *Metro Rail* is such an example, *Kate* is another, *Motahau* yet another, *Modderklip* yet another.

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: The common law, valuable is it might
20 be, has limitations.

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: They are historic limitations. It is a law

of yesterday and the constitution is the law of today [indistinct - cross-talking] preserve the common law, we preserve customary law, indigenous law and all other laws that existed with the induction of the constitution. So it is inevitable, counsel, that they would be a wide birth between what the constitution gives, 5which is much, much more and what indigenous law or the common law can give. Let us just get that commonsensical platform first.

So it is quite clear that many of the fractions of the Bill of Rights were not even contemplated by the common law at its time and age and place when it was formulated. Others were contemplated by the common law like dignity, 10protection of the person, the whole range of them which you find in the common law. So all that the courts are saying in all of this complexity is that if you brought a claim under the common law, you are entitled to do so. It is a vehicle to vindicate constitutional protections. You are also entitled to bring claims under the constitutional law, particularly with the common law is unavailable. 15That is a legal position. It is not any more complicated than that.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: So here you have to persuade me, let us come back here, that all these deaths and infractions should have been couched under the common law only and if so, why so?

20**ADV TEBOGO HUTAMO:** Well, I do not quite follow the question of the Justice in relation to the deaths or is it in relation to the claims by the claimants?

ARBITRATOR JUSTICE MOSENEKE: The claims. The claims founded on the deaths.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: All these claims arise only because it was death.

ADV TEBOGO HUTAMO: Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: In the first category.

5**ADV TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: Okay, yes, all these claims. I am saying to you what [indistinct] the claimants to claim under the common law pain, shock, and suffering and trauma and under another head of claim, constitutional damages. That is what you have got to climb over frankly.

10**ADV TEBOGO HUTAMO:** In response to that question, Justice, if I can just complete the paragraph, it will basically like a dress that question.

ARBITRATOR JUSTICE MOSENEKE: Are you going back to the same judgement? Do you want to read another paragraph? Okay, I will listen.

ADV TEBOGO HUTAMO: Yes. It says, at paragraph 91 it says that:

15 “There appears to be no sound reason why common law remedies which vindicate constitutionally entrenched rights should not pass for appropriate relief within the reach of section 37.”

ARBITRATOR JUSTICE MOSENEKE: Section 38 [indistinct - cross-talking]

20**ADV TEBOGO HUTAMO:** Section 38. I beg your pardon.

ARBITRATOR JUSTICE MOSENEKE: Ja.

ADV TEBOGO HUTAMO: So my submission is that the claimants are

debarred from pursuing the constitutional claim damages.

ARBITRATOR JUSTICE MOSENEKE: But is that what that passage says? In principle there is no reason. Read it again.

ADV TEBOGO HUTAMO:

5 “There appears to be no sound reason why common law remedies which vindicate constitutionally entrenched rights should not pass for appropriate relief within the reach of section 38.”

ARBITRATOR JUSTICE MOSENEKE: Yes, section 38 promote appropriate
10relief.

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: If you beat me up now, you said you had armoury with you, and I can go to court and say, “I have been beaten up and I would like you to give me damages,” and the courts says, “Why?” You
15said, “Because the common law has been invaded but at the same time, my right to bodily integrity has been invaded and therefore, I am entitled to the appropriate relief under section 38.”

You can see that coincidence. It is obvious. So this passage just tells you in principle there is no reason why, in short, there is no reason why you
20cannot use the common law to vindicate a constitutional right. It says no more no less than that but it does not say, “You are debarred from bringing a constitutional claim.”

ADV TEBOGO HUTAMO: Justice, what I submit is that from the reading of

this passage, what it says is that common law in this present case [intervenes]

ARBITRATOR JUSTICE MOSENEKE: In this present case?

ADV TEBOGO HUTAMO: Yes, will be sufficient— common law remedy will be sufficient to deal with a claim for pain and suffering. And that, in my view of this judgement, will pass the test for appropriate relief as contemplated in section 38.

ARBITRATOR JUSTICE MOSENEKE: [Indistinct - cross-talking] you may proceed. Proceed.

ADV TEBOGO HUTAMO: And if I can refer to once again the judgement of the *Law Society* paragraph 22, I am just going to read from the middle of the paragraph with the court held that:

“The court should have first considered the adequacy of the existing remedy. If it were inadequate, then it should have considered whether the deficiency could be remedied by a development of the common law to accommodate a claim more expensive than the one for [indistinct - microphone disturbance].”

And what I submit in that regard is that common law can only be developed in the absence. So what the court says, “You must first consider all the existing remedy is whether your right can be vindicated.” And what I submit is that common law remedy is sufficient in this instance to vindicate the claim for pain and suffering.

From the submissions which I have made, justice, is that in the present

set of facts, the claimants are they base their claim for pain and suffering emanating from the shock and trauma which they had endured subsequent to the implementation of the Marathon Project.

ARBITRATOR JUSTICE MOSENEKE: That is one part of their claim, is not it?

5 That is claim B.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: But they have another claim in claim C.

ADV TEBOGO HUTAMO: Claim C, if I can... in claim C it is recorded that as a result of the death and circumstances of the death in context of constitutional
10 obligations owed to the deceased and the claimants, the claimants claim an amount of R1.5 million, and paragraph 8 deals with that amount is to be allocated. And the constitutional obligations referred to in paragraph 7 is those obligations which were owed to the deceased and the obligations which were breached, resulting in death.

15 And what we know is that because of that, of the death or the deaths, the claimants suffered trauma, and which is essentially the basis of their claim.

ARBITRATOR JUSTICE MOSENEKE: No, which is essentially what you want to limit the claim to. I understand that. I mean the statement of claims is clear. It has got two parts to it. The claim may be good or bad and I understand you
20 prefer they have one claim under the common law. They set out two claims, and you have got to persuade me that nothing of the evidence gets them to claim C.

And that [indistinct] by law is precluded to— and for you to move their

claim to a common law claim, you must as you have done invite me to ignore all the evidence about the torture and death of the deceased. It is in essence what you are inviting me. You say look only at the pain that the death caused in the hearts of the family members but do not look at any of the constitutional transgressions, is it not?

ADV TEBOGO HUTAMO: Yes. Well, the Justice will have to consider what would be appropriate relief in the circumstances of this case and [intervenes]

ARBITRATOR JUSTICE MOSENEKE: I have given you an example of a child who dies in a village without access to water. How would you couch that claim?

10 And it is shown that it is because the government did not fulfil its obligation towards the child and her family on access to water. Would you throw them out of court?

ADV TEBOGO HUTAMO: Justice, if I can refer you to a decision [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Because it is not a common law claim, 15 is that what you do?

ADV TEBOGO HUTAMO: If I can refer you to the decision of *Mboweni*, Justice [intervenes]

ARBITRATOR JUSTICE MOSENEKE: You can help with your answers first, counsel. Let us debate the law and take me to what other people say. Can you 20 give me an answer to that? How would you deal with that?

ADV TEBOGO HUTAMO: Well, the short answer is that, Justice, is that the right which a person has as an individual, that right cannot be transferred to another person. That is the short answer to that.

ARBITRATOR JUSTICE MOSENEKE: What you mean now?

ADV TEBOGO HUTAMO: What I wanted to do is to refer to the case of *Mboweni* where he was arrested and assaulted whilst in police custody and subsequently died. And what was said is that it is indeed correct that they were human rights that were breached in relation to the deceased but those breaches [indistinct - microphone disturbance] with the basis of a claim by another person, and it is the point which I am making you, Justice, that in those circumstances the right cannot be transferable.

ARBITRATOR JUSTICE MOSENEKE: And this was known to the statement they formulated paragraph 2 of the arbitration agreement, is not? It should have been known.

ADV TEBOGO HUTAMO: Well, Justice, the focus on the crafting of the terms of reference was to implement recommendation 17 of the [intervenes]

ARBITRATOR JUSTICE MOSENEKE: You cannot change terms of the arbitration agreement by argument, can you? You cannot say to parties on the other end, "I confirm that you are entitled to claim as a result of the death of the deceased," and then come on argument day and say, "In fact, you are not entitled to claim on account of the death of the deceased."

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Can you do that?

ADV TEBOGO HUTAMO: From what appears from the terms of reference, the arbitration agreement, is that the claim emanates from the trauma that they had suffered. And I just wanted to take Justice the same judgement which I had

referred you to but the portion which was written by Mogoro J, and in that regard I refer to paragraph 69 of that judgement.

ARBITRATOR JUSTICE MOSENEKE: That is *Dikoko*.

ADV TEBOGO HUTAMO: That is *Dikoko* where Justice also penned down a judgement which passages I have made reference to.

ARBITRATOR JUSTICE MOSENEKE: Yes, indeed. Thank you.

ADV TEBOGO HUTAMO: Paragraph 69 reads that:

10 “The focus on monetary compensation divert attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially to the injury to ones honour, dignity, and reputation and not to ones pocket. The second is that courts should attempt wherever feasible to re-establish a dignified and respectful relationship between the parties.

15 Because an apology serves to recognise the human dignity of the plaintive, thus acknowledging in the true sense of *ubuntu* he is or her inner humanity, the resultant harmony will serve the good for both the plaintive and the defendant. Whether the amende honourable is part of our

20 law not, our law in this area should be developed in the light of the values of *ubuntu*, emphasising restorative rather than retributive justice. The goal should be to meet together shattered relationships in the community and encourage across the board respect for the basic norms of

human and social independence. It is an area where a court be proactive, encouraging apology understanding wherever possible.”

And Justice, as I wanted to address you on the issue of appropriate remedy the 5circumstances, it will be quite relevant or this passage is quite relevant to the set of facts which we have. The Ombud has already reported that there is a low trust which resulted from the implementation of the Marathon Project. Then we then have to consider in order to fix that in line with the passage that I have read, what with the Ombud recommend? And the recommendation by the 10Ombud was that the government should take responsibility to engage all those who have been affected. And the focus they are you become, I mean, it is quite common cause that among other things the families were afforded an opportunity to give their account of the experience, and which is part of the healing process which was necessary in the circumstances of this case. And 15further, the terms of reference it goes the recommendation of the with regards to the engagement by the government with the families or all those who were affected to find redress and closure and also an aspect relating to compensation. And further, Justice [intervenes]

ARBITRATOR JUSTICE MOSENEKE: This speaks to what now, to general 20damages or to constitutional damages?

ADV TEBOGO HUTAMO: To constitutional damages which like I am making reference to, in reference to the debate about what should be an appropriate relief in this [indistinct] of facts. So that has to be taken into account. In terms of the terms of reference, the parties have agreed on the manner in which the

proceedings had to be conducted. The first part as we know was to allow the families to tell the story and secondly, to get government officials to answer to pertinent questions.

I know, Justice, that on that aspect I will have difficulties to anticipated questions about the outcome of the cross-examination in relation to those witnesses but I just want to highlight that in line with this paragraph 69, what is that will be appropriate? And the third phase of this arbitration process was to get senior government officials to apologise to the families and everyone who has been affected. And what the court in *Dikoko* says is that apology should be given a greater value as a part of appropriate relief in the circumstances. So if one considers this, then the tribunal should be able to come to a conclusion that its object should not be seen to be retributive of what had occurred. So [intervenes]

ARBITRATOR JUSTICE MOSENEKE: So you really say because there were apologies, they should be little money by way of compensation, is not? You are really saying that and it is not a point without some merit that they were apologies and they were anticipated to be an important part. You heard me debate that with Adv Groenewald.

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: And Adv Hassim. Yes, that is a very important part of this process and that one, should not one way that also against this failure to get to the truth?

ADV TEBOGO HUTAMO: Yes. Justice, there are many factors that will have to be taken into account. From this judgement, all that it says is it is just not

about the money. It is just not about the money. It is how do we fix, how do we repair where things have gone wrong? And what transpired resulting from the implementation of the Marathon Project, there has been evidence which was given which demonstrated what steps the government has taken, and I must say before I can give detail, this part of the proceedings is one of the factors that has to be taken into account for the government to take responsibility to ensure that this process is set up to allow the families to ventilate what they [intervenes]

ARBITRATOR JUSTICE MOSENEKE: I agree, it is a relevant consideration, an important one. It is a basket, is not? You through all of them into the basket [intervenes]

ADV TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: ...and then start weighing but that is a relevant consideration and the conduct of the State pose the tragedy is a relevant consideration. So I agree with you. And the way the State has helped construct this arbitration process, it is a relevant consideration in weighing up the amount. [Indistinct - cross-talking] other types of redress.

ADV TEBOGO HUTAMO: Yes. So the submissions made that the government should be punished does not go well with what the court has pronounced on because there is a submission, in particular the submission made by my learned colleague, Adv Groenewald, who submits that there is a need for punishment which should take cue from what Justice Mogoro has said with regard to the principle of *Ubuntu*.

It is about the future. We all know that they are those who had an

unfortunate tragedy, and measures have to be taken to ensure the protection of their rights. Proper facilities have to be made available to them, and those relationships has to be fixed. The evidence which has been before these proceedings is that as part of an indication of the part of the government being remorseful and wanting to be accountable for the future, one of the family members who is in the family committee has been co-opted in the Mental Health Review Board, overseeing the rights and interests of these users. So it is quite important that relationships should be restored rather than to look forward to punish the government. And [intervenes]

10 **ARBITRATOR JUSTICE MOSENEKE:** But is it not a legitimate consideration in constitutional damages on how best to show that infringements do not occur again? That is a legitimate consideration, is not?

ADV TEBOGO HUTAMO: I beg your pardon, Justice, I did not follow that.

ARBITRATOR JUSTICE MOSENEKE: In considering whether or not to grant 15 constitutional damages, what other things I should take into consideration? What are the principles that will do government that decision?

ADV TEBOGO HUTAMO: On the issue of appropriate relief, and what I was trying to demonstrate is that appropriate relief is not only about money.

ARBITRATOR JUSTICE MOSENEKE: But surely it is about vindicating a right 20 also, is it not?

ADV TEBOGO HUTAMO: Indeed so. Indeed.

ARBITRATOR JUSTICE MOSENEKE: It is about deterrence. You do not want this to happen again, do you?

ADV TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: And it is preventing future infringements. So those are relevant considerations. They are not the only consideration but you find wrong in that submission?

5**ADV TEBOGO HUTAMO:** Well, I cannot disagree except that, Justice, what I want to highlight is that these proceedings touches many emotions, and it is quite unfortunate that things occurred in the manner that they did. And the object is to try and really how things can be sorted. In the same judgement, Mogoro at paragraph 75 held that [intervenes]

10**ARBITRATOR JUSTICE MOSENEKE:** I think you have to continue to say Mogoro J, Justice Mogoro.

ADV TEBOGO HUTAMO: Yes. I beg your pardon, Justice.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV TEBOGO HUTAMO: I wanted to say Justice Mogoro at paragraph 75
15wrote:

“Equity in determining a damages award for defamation is therefore important consideration in the context of the purpose of a damages award, aptly expressed in [indistinct] as though less to a plaintiff’s wounded feelings
20 and not to penalise or deter people from doing what the defendant has done. Even if a compensatory award they have a deterrent effect, its purpose is not to punish.”

Clearly, punishment and deterrence are functions of the criminal law, not the

law of delict. And, Justice, you are called upon to deal with issues relating to equitable redress and compensation not matters falling within the functions of criminal law. There has been submissions made in that regard, and which matter the Ombud has also made a recommendation relating to criminal aspects, and we should not lose sight of the objectives in which we seek for achieving this process. And therefore, like the submission that the government should be punished goes against the very object of these proceedings. Justice, through you, I will request that we take a break.

ARBITRATOR JUSTICE MOSENEKE: Oh, is at that time already?

10 **ADV TEBOGO HUTAMO:** Indeed.

ARBITRATOR JUSTICE MOSENEKE: And how much more time would you need after the tea breaks? It is 11:30. So you have been at it for some time. So you will have to [indistinct] your artillery or did you say arsenal in such a way that you get the job done. Shall we say not more than an hour after 12 o'clock.

15 **ADV TEBOGO HUTAMO:** That should be in order, Justice.

ARBITRATOR JUSTICE MOSENEKE: I think we should finish at one o'clock at the latest and then have most of the replies coming in from that point but just keep in mind you have two plunks [?] To your argument and let us get to that and wrap them up by one p.m. I would much appreciate that [indistinct - cross-
20 talking] you at all, Counsel.

ADV TEBOGO HUTAMO: Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: Thank you. We are adjourned until 12 o'clock.

5

SESSION 2

ARBITRATOR JUSTICE MOSENEKE: Thank you so much, you may be seated. Counsel, we have an hour stretch from now on. Let us try and do it within the time.

5**ADV. TEBOGO HUTAMO:** Thank you Justice. Justice, I am going to move on from, to a new topic. I have dealt with the issues relating to the claimants claim for constitutional damages.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. TEBOGO HUTAMO: And I just want now to deal with matters relating to
10the quantum that they seek.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. TEBOGO HUTAMO: Justice, in terms of the statements of claim, and the claimants represented by Hurter Speers, they claim one million five hundred thousand.

15**ARBITRATOR JUSTICE MOSENEKE:** I know that last word we have always called it for all these months Speers. Speers, it is Spies.

ADV. TEBOGO HUTAMO: Spies.

ARBITRATOR JUSTICE MOSENEKE: Thank you.

ADV. TEBOGO HUTAMO: Thank you for the correction Justice, and ...
20[interjects]

ARBITRATOR JUSTICE MOSENEKE: Speers mean more closer to your armoury and artillery.

ADV. TEBOGO HUTAMO: And the same amount of 1.5 million is sought by the claimants represented by Section 27, and from the evidence that we or the submissions which has been made by Section 27, they sought to rely on the calculations made by Mr Whitaker who was called as an expert, the actuary
5 who made the calculations of what, who have been paid to the mental health care users had they not died. Justice, what we submit is that his evidence was not of assistance to these proceedings. All what we submitted in our heads, we say that he was engaged ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: In an exercise in futility.

10 **ADV. TEBOGO HUTAMO:** In an exercise in futility.

ARBITRATOR JUSTICE MOSENEKE: You see, I remember your words.

ADV. TEBOGO HUTAMO: For the simple reasons that Mr Whitaker was not appraised of what the claimants were seeking in terms of the amounts and in respect of what claim. So the exercise really like was addressing issues not
15 relevant to the determination of the claim sought by the claimants, and I do not want to deliberate on this aspect any longer. The Justice has already raised concerns about the report. All that I just want to submit is that this tribunal should reject his evidence in its entirety as of no value to these proceedings, and I say so on the principles laid in the case of Price Waterhouse Coopers
20 Incorporated and others, and the National Potato Cooperative Ltd IMF, sorry National Potato Cooperative Ltd and another. Where the court held at paragraph 99 that or set out the legal principles and choose to assess credibility and reliability of experts.

ARBITRATOR JUSTICE MOSENEKE: Ja, but just before you read the passage, let us just get something clear. We are not attacking the competence of Mr Whitaker are we?

ADV. TEBOGO HUTAMO: No.

5**ARBITRATOR JUSTICE MOSENEKE:** Certainly not, and we are not attacking the fact that on the mandate given to him he executed the mandate. What is debatable is whether in fact the calculations were useful to determine constitutional damages.

ADV. TEBOGO HUTAMO: Indeed so.

10**ARBITRATOR JUSTICE MOSENEKE:** So we must just get that clear. He is a professional person who has come and done his work properly.

ADV. TEBOGO HUTAMO: Indeed, indeed.

ARBITRATOR JUSTICE MOSENEKE: So I do not want any aspersions on the integrity and the quality of the work.

15**ADV. TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: But the question is, is it useful to the Arbitrator ... [interjects]

ADV. TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: In determining quantum of damages.

20**ADV. TEBOGO HUTAMO:** Yes. Like he actually made it clear even during cross-examination, that what he testified on was in relation to the brief that was

given to him, and the brief was nothing else than to calculate what would have been paid to the mental health care users.

ARBITRATOR JUSTICE MOSENEKE: Sure.

ADV. TEBOGO HUTAMO: The submission which I am making is that that report in its entirety together with his evidence does not assist this proceedings.

ARBITRATOR JUSTICE MOSENEKE: Yes, I am alive to Price Waterhouse Coopers.

ADV. TEBOGO HUTAMO: Thank you.

ARBITRATOR JUSTICE MOSENEKE: Expert testimony, so you do not have to read the passage to me.

ADV. TEBOGO HUTAMO: Thank you, yes. So that ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: But you are not inviting me to make a credibility finding, certainly not.

ADV. TEBOGO HUTAMO: Well Justice, the submission ... [interjects]

15**ARBITRATOR JUSTICE MOSENEKE:** You are inviting me to find that it is not relevant to ... [interjects]

ADV. TEBOGO HUTAMO: That is correct.

ARBITRATOR JUSTICE MOSENEKE: To the computation.

ADV. TEBOGO HUTAMO: That is correct.

20**ARBITRATOR JUSTICE MOSENEKE:** Very well.

ADV. TEBOGO HUTAMO: Yes, yes and that is to illustrate the point that so much argument was made by the claimants, when they sought to rely on the two cases which granted constitutional damages, and in that regard they relied on the cases of Kathe as well as Modderklip. But what we know about those 5cases, is that they are distinct to the facts in issue. In a sense that those two cases dealt with quantifiable or determinable amounts which the parties sought assistance from, and it was the damages were granted on the basis that there was nothing under common law, which could come to their assistance, and it was on that basis that the courts then reshaped or broadened the issue relating 10to appropriate relief.

ARBITRATOR JUSTICE MOSENEKE: Modderklip had nothing to do with the common law.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Just unlawful occupation of premises.

15**ADV. TEBOGO HUTAMO:** Yes, so ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Unlawful occupiers and the state never intervened to protect his right to property.

ADV. TEBOGO HUTAMO: So the relief was given pursuant to the powers given to the court in terms of Section 38 of the constitution.

20**ARBITRATOR JUSTICE MOSENEKE:** Yes.

ADV. TEBOGO HUTAMO: Which allows the court to make any appropriate relief.

UNKNOWN: [inaudible]

ARBITRATOR JUSTICE MOSENEKE: You could have filed a claim in Modderklip under the common law.

ADV. TEBOGO HUTAMO: Indeed, yes. Well, the problem which I am trying to say is that those cases are not of assistance to the claimants, because the facts are different.

ARBITRATOR JUSTICE MOSENEKE: No, but ja. The facts are different, but the principle of law I think remains quite important is it not? Section 38 permits a court to grant appropriate relief.

ADV. TEBOGO HUTAMO: Indeed.

10 **ARBITRATOR JUSTICE MOSENEKE:** And you do not need to get the common law behind the mountain.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: In order to be able to do that.

ADV. TEBOGO HUTAMO: Yes.

15 **ARBITRATOR JUSTICE MOSENEKE:** I think that is the take away from those cases. Ja, in other words it does not mean if there is no common law courts have no power to grant relief.

ADV. TEBOGO HUTAMO: Well, the most important aspect in those cases is that like as I have submitted that they were decided on quantifiable amounts.

20 **ARBITRATOR JUSTICE MOSENEKE:** Yes.

ADV. TEBOGO HUTAMO: Because they have proved loss.

ARBITRATOR JUSTICE MOSENEKE: But you cannot, are you arguing that if the laws are not quantifiable, Section 38 is not available to claimants?

ADV. TEBOGO HUTAMO: Well, I am making the submission in relation to what was sought to be relied on. The quantification of those damages through the use of an actuarial expert. Then Justice, if I can move on to the other aspect of my submissions in relation to claimants represented by the Legal Aid.

ARBITRATOR JUSTICE MOSENEKE: No, before you move away, what do you say about that quantum? Why is it inappropriate? Assuming constitutional damages are within the gift of this tribunal, what amount is appropriate? Are you going to debate that or not?

ADV. TEBOGO HUTAMO: Justice ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: I know what your argument is.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: But you know, quite often in the courts assuming your submission is not good, what amount should I grant?

ADV. TEBOGO HUTAMO: Yes. Justice, in the unlikely event of the tribunal finding that indeed there is a claim ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Unlikely event. That is what pilots say in an aeroplane. I do not know here, but yes. You go ahead.

ADV. TEBOGO HUTAMO: Yes. What I submit is that this tribunal should follow the principles which have been laid out by Justice Mokgoro, in the Dikoko case at paragraph 69. I have addressed that aspect and ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You know, I did not want to interrupt you. In Dikoko the one part of the court took the view that there should be [inaudible] something. It is an apology. In other part of the court. I think incidentally the majority held that whilst apology is wonderful, they should be placed also for compensation. I do not want to debate that, because it was a split court. I do not want to get back to Dikoko. I wrote in the judgment for, if I remember well, the majority. But that is neither here nor there. I want to know from you what amount and I agree with the sentiment, I agree with Justice Mokgoro. Money does not [inaudible], does not heal everything.

10 **ADV. TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: Certainly not.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: In our own languages, you know how often in African languages there are idiomatic expressions about money will not wake up the deceased. Money will not wipe our tears. Money will not, so it is quite well known in certain cultures, in most cultures. I will not say all, but that money is not a balm for every wound. So I take the point, and I think it is a good point, and I agree with my learned sister and colleague Justice Mokgoro. Courts none the less are called upon to make redress. The constitution requires court to give appropriate relief, and I have the obligation to do so, assuming I hold the view that I should grant constitutional damages, in what amount? We know what the claimant says.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: We know the state says no, the relief should not be granted. If i [inaudible] you are entitled to make submissions on how much it should be.

ADV. TEBOGO HUTAMO: Yes. Justice, what we submit is that there should not be any amount in that regard, taking into account first what Justice Mokgoro has said and secondly in light of the outcome of the common law damages which has been settled between the parties. So ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: So you have no submissions on the quantum of constitutional damages?

10**ADV. TEBOGO HUTAMO:** Indeed so and then other than that, as is a known principle the ultimate decision will lie in the discession of you, the Arbitrator.

ARBITRATOR JUSTICE MOSENEKE: Yes, very well. You may proceed.

ADV. TEBOGO HUTAMO: Justice, I wanted to start off with the claimants represented by ... [interjects]

15**ARBITRATOR JUSTICE MOSENEKE:** Before you walk away from that point, the award of compensation arising from very egregious conduct, if not [inaudible] with the facts and circumstances, does it not sometimes lead to even further insult over the injury? Is that a relevant consideration? Should the court be carefully weighing, is this a case of a slap on the wrist or is it a case where I
20am required to keep in mind that it ought not to be an award that will insult the aggrieved and the berieved?

ADV. TEBOGO HUTAMO: Well Justice, in making the award for damages, any amount awarded should be fair for both sides, and my submission is that

taking into account the two aspects which I have related to, the quantum in relation to general damages as well as the principles laid out in the Dikoko case, that should achieve the purpose and it should be fair on the part of the claimants, and at the same time on the part of the respondents.

5 **ARBITRATOR JUSTICE MOSENEKE:** Let me tell you a little story of me as a young man. You know, when you get older you have a lot of stories to tell. You know, you will discover there is, we had a guy who was a bully who lived in my neighbourhood. He would beat you up, beat you up. You cry and he walks up to you and says I apologise. [Vernacular 00:18:49]. I apologise. He says it for 10 the third time and you do not say I accept your apology, he beats you up again.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: In other words the apology becomes everything for him.

ADV. TEBOGO HUTAMO: Yes.

15 **ARBITRATOR JUSTICE MOSENEKE:** And he wants the apology to be sufficient, but above all to compel you to accept the apology however painful you might be feeling. So maybe apologies are very important in life, but certainly not something you can impose on others.

ADV. TEBOGO HUTAMO: Yes.

20 **ARBITRATOR JUSTICE MOSENEKE:** I have apologised. Why do you not accept my apology? So one is, should I not make allowance for that also?

ADV. TEBOGO HUTAMO: Justice is indeed correct that that has to be taken into account, but if we have regard to the present case, and the example that

Justice has given, just reminded me of the decision in Kathe, where the court said this problem has been endemic, and which was the reason why such a claim was granted. In the present case, it is indeed regrettable and unfortunate, but like this is one incident which had occurred. It is not a case where it is a repetitive breach on the part of the government. So on that basis Justice, I want to submit that in making that consideration, the Justice should not equate the apologies given in these proceedings the same way as the apology given by the bully.

ARBITRATOR JUSTICE MOSENEKE: No, I understand. You have made your point and I have heard it. You can proceed with your next point.

ADV. TEBOGO HUTAMO: Thank you. The claimants in this instance they are in two categories. The one category is the survivors and the survivors being defined as those mental health care users who survived the marathon project, and on the other hand there is a claim by the families of those mental health care users. On their behalf, a statement of claim has been prepared in which at paragraph 4, I beg your pardon Justice. I pulled the wrong document in the statement of claim by Harter Spies.

ARBITRATOR JUSTICE MOSENEKE: It should be LSSA statement of claim surely that we are looking at now.

ADV. TEBOGO HUTAMO: Yes. What the claimants seek is the following. Still on paragraph 4 of the statement of claim of the survivors. In so far as compensation for the mental health care users and their families 4.1:

“Our clients seek an amount of one million rands in respect of general damages. For shock pain and suffering for each of the said mental health care users as identified in the Mental Health Care Act.”

And then 4.2 reads that:

5 *“In respect of the family of each mental health care user, they claim an amount of R5 000-00 specific damages, R50 000-00 future medical expenses, R1 000-00 in respect of costs incurred to locate the mental health care users.”*

And then at 4.2.5:

“An amount of one million rands for constitutional damages.”

10 And the point which I am trying to highlight in this statement is that what appears is that constitutional damages are being sought on behalf of the family members of the mental health care users, whereas the mental health care users themselves, they only claim for general damages for shock, pain and suffering. That being said, Justice ... [interjects]

15 **ARBITRATOR JUSTICE MOSENEKE:** Yes.

ADV. TEBOGO HUTAMO: I do not want to dwell much on the legal principles for the determination of what is fair and reasonable compensation in relation to the claims. If I can just deal with the amount of one million rands in respect of general damages for shock and pain. In my heads Justice I refer to, I deal with
20 these principles at page 11. At paragraph 20 I submit that the primary issues for determination by the Aribtrator are restricted to an amount, are restricted to an assessment of what would constitute equitable redress and the quantum of compensation to be awarded to the claimants, and paragraph 21, I am going to

proceed to paragraph 23 at page 12, where I submit that an award of general damages seeks to compensate the plaintiffs for loss suffered in respect of the plaintiff's personality interests, it seeks therefore to compensate the plaintiff for pain and suffering occasioned by the loss causing event, physical and other trauma and loss of amenities of life.

Justice, right at the beginning I did indicate that the state does not dispute the contents of the Ombud's report in relation to the merits. So I will not debate the entitlement to the relief sought, but what I seek to do is to assist you Justice, to consider previous cases where awards have been made, so that you will be able to arrive at a fair amount.

ARBITRATOR JUSTICE MOSENEKE: Yes, I am grateful for that collection of cases. They are helpful, thank you very much. I want you to point me to one that points to the same intensity, in the same level of [inaudible].

ADV. TEBOGO HUTAMO: Ja.

15 **ARBITRATOR JUSTICE MOSENEKE:** In a collective endeavour by the state. I looked at them, and I did not find any. Which one do you say would be the closest?

ADV. TEBOGO HUTAMO: Justice, I want to refer to one or two cases which deals with death or someone has died, and consider what it is that the court had arrived at as a reasonable amount for compensation, and I say so regard being heard to the fact that in this category of the claimants, the issue of death does not arise. Firstly I deal with the case of Majiti versus Santam where the plaintiff claimed for damages for emotional or nervous shock sustained as a result of her coming upon the body of her nine year old, shortly after the accident, and all

that I want to submit is that the circumstances were so dire that the plaintiff suffered major depressive disorder, subsequent to the death of her son.

It was recorded that the plaintiff became hysterical and collapsed at the road side with shock causing a period of psychogenic amnesia to set in, followed by ongoing major depression disorder of moderate severity. This being a serious psychiatric illness, still evident six years after the accident, and in this case the plaintiff called two experts to demonstrate the nature and the extent of trauma.

ARBITRATOR JUSTICE MOSENEKE: Yes, you can accept that [inaudible] your heads and the descriptions there.

10 **ADV. TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: So we have to move a little faster. I accept those.

ADV. TEBOGO HUTAMO: Yes, and ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: I am familiar with the circumstances of
15 the cases you sight, yes.

ADV. TEBOGO HUTAMO: In that regard the court awarded an amount of R35
000-00.

ARBITRATOR JUSTICE MOSENEKE: Yes, nearly ten years ago.

ADV. TEBOGO HUTAMO: Yes.

20 **ARBITRATOR JUSTICE MOSENEKE:** Okay.

ADV. TEBOGO HUTAMO: Justice, I just want to make reference to the current value of the monetary award.

ARBITRATOR JUSTICE MOSENEKE: Yes, certainly. Certainly.

ADV. TEBOGO HUTAMO: That has been given so that like it could be of relevance. If I can just be given a minute.

ARBITRATOR JUSTICE MOSENEKE: Yes.

5**ADV. TEBOGO HUTAMO:** Justice, my instructing attorneys are assisting me in this regard. The amount in Majiti case is in current value in terms of the quantum year book by Robert Koch 2018, the current value is 115.

ARBITRATOR JUSTICE MOSENEKE: Yes. Money doubles every five years. That is correct ja, that is what it will be.

10**ADV. TEBOGO HUTAMO:** Yes, and then the other case is Kritzinger ...
[interjects]

ARBITRATOR JUSTICE MOSENEKE: Also R200 000-00 ten years ago.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Right.

15**ADV. TEBOGO HUTAMO:** And the point which like I want to make is that the circumstances where all of them involved the death of people, and therefore any amount which will be reasonable, cannot be the equivalent of what the court had granted in those judgments or even bemire. So in the exercise of your discession Justice, I will submit that a reasonable amount should be in the
20region of between R80 000-00 and R100 000-00.

ARBITRATOR JUSTICE MOSENEKE: That is in relation to general damages, right?

ADV. TEBOGO HUTAMO: Indeed. So those are my submissions. The point which I am trying to emphasise is that in all the cases that I have made reference, people have died and the level of trauma and shock will obviously be different to cases where death did not ensue.

5 ARBITRATOR JUSTICE MOSENEKE: Yes. In paragraph 40 you suggest R80 000-00.

ADV. TEBOGO HUTAMO: Yes. Justice, you will have noted at paragraph 41 of the heads, I have quite extensively quoted the judgment of Mabuse J in the Pretoria high court, the North Gauteng high court, in the case of MJJ Webb
10 versus Road Accident Fund, where the court dealt with considerations that the court should take into account in the determination of an amount of damages. I take it that the Justice has read the heads, but the point which I want to emphasise, is that on page 21 I submit that the court said this means that in general a court should not merely out of sympathy with the plaintiff award a
15 huge amount of money at the expense of the defendant, and ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Do you think giving a million rand to a claimant in a case of these circumstances is burdening the defendant?

ADV. TEBOGO HUTAMO: I submit so in light of what the respondents has been put through in order to deal with these issues emanating from the
20 marathon project. I should indicate that this arbitration on its own comes at a huge cost and for good reasons. For good reasons and what MEC Crissi testified during cross-examination about the expense which were spent in these proceedings, she clearly indicated that the most important thing is to respond humanly to the families, and therefore it is quite important. The point which I

am trying to say is that regard being heard to the costs which the respondents incur in order to address the difficulties that the families have went through should be taken into account.

ARBITRATOR JUSTICE MOSENEKE: Well, who started the difficulties? How were they caused? Why are we here? Let us just be careful. Remember the story of the bully.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Look what I have done for you after beating you up? I have said sorry, so shut up. You know, it is let us just be careful. I mean, we are here precisely because there was this [inaudible], horrendous devastation of human life. So we cannot now say look how good we were. Look how we set up, it is a relevant consideration.

ADV. TEBOGO HUTAMO: Yes

ARBITRATOR JUSTICE MOSENEKE: And I will keep it in mind.

15 **ADV. TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: But you must just be careful.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Talking about MEC Crissi, her evidence also disclosed amazing levels of waste, not so? Amazing levels of disregard for public funds. 6.8 billion of unaccounted expenditure. I mean, expenditure on consultants. 1.6 of that was referred to the ICU, we are still waiting for outcomes. So you take that and you look at it and see the readiness and the level of wastage on the one side, and I am open to be persuaded that

one million rand to a claimant is wasteful, is burdensome on the state, and if so tell me why it is. When there is such high levels of wastage on public money that ought to be protected as against very, very poor people who have gone through immense trauma. Why is a million rand too much?

5 **ADV. TEBOGO HUTAMO:** Well Justice, issues relating to wasteful expenditure, it is indeed correct evidence was led in regard to that. But what has to be considered is what measures are being taken to deal with those aspects, and what has come out from the evidence was that investigations are being conducted pursuant to those expenditure, and those matters fall within
10 the loss regulating the use or the use of funds in government. So if we have regards to that and the purpose sought to be achieved, then I will submit that the tribunal should not overburden the respondents.

ARBITRATOR JUSTICE MOSENEKE: If you just cut the costs of the consultants alone, there might be enough money to be able to find appropriate
15 relief. Let us just be a little sensitive about this.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: Complain about being burdened in these circumstances, it is a bit rich. Anyway, I am listening to your further submissions.

20 **ADV. TEBOGO HUTAMO:** Thank you, and Justice, the other claim which had been advanced on behalf of the family members of the mental health care users is in respect of constitutional damages, which is set in the amount of one million rands. Justice, I would not want to repeat the same submissions which I have made in this regard.

ARBITRATOR JUSTICE MOSENEKE: The point that you may have is that it may lead to double dipping. You may have, and I think any Arbitrator would have to keep that in mind.

ADV. TEBOGO HUTAMO: Yes.

5**ARBITRATOR JUSTICE MOSENEKE:** Whether the claimant is entitled to a million in general damages and a million in constitutional damages.

ADV. TEBOGO HUTAMO: That is correct yes.

ARBITRATOR JUSTICE MOSENEKE: That is a legitimate complaint to make and say well, this might amount to doable compensation.

10**ADV. TEBOGO HUTAMO:** Yes.

ARBITRATOR JUSTICE MOSENEKE: But quite another to say they should get nothing.

ADV. TEBOGO HUTAMO: Yes. Those are my submissions ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: How much in general damages do you
15think the survivors should be getting, because as I understand you have no agreement with the Law Society. In your view how much should they be getting on general damages, on your argument?

ADV. TEBOGO HUTAMO: Justice, in respect of both the mental health care
users and the families, I submit that an amount of R200 000-00 should fairly
20compensate the hurt that they had endured, and without wanting to be seen to be imposing on you Justice, I will recommend that that should be the amount that should be made, and from what we have debated earlier on and in regard to what you have just said Justice, let us avoid double dipping in relation to the

claim for constitutional damages. It should be sufficient for general damages and other measures which the government has agreed to put in place as a form of appropriate and effective remedy. The remedy is not only in monetary terms. There are other issues which the Justice ... [interjects]

5 **ARBITRATOR JUSTICE MOSENEKE:** Shall we go to those quickly? Shall we talk about them? What do you think they should be? You have heard the submissions from your colleagues.

ADV. TEBOGO HUTAMO: Yes. The issues relate to counselling.

ARBITRATOR JUSTICE MOSENEKE: Who should do the counselling?

10 **ADV. TEBOGO HUTAMO:** The respondents in this regard. The government should offer that to the ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: And how would the claimants access counselling by the respondent? What should I, what award should I make?

ADV. TEBOGO HUTAMO: Justice, if an arrangement can be made with the
15 department to put in place, the award should direct the department to put a mechanism in place for your approval, and the other aspect relate to a place of memorial in which the state ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: And you do not contest the suggested frequency of the counselling and so on, to be found in other heads?

20 **ADV. TEBOGO HUTAMO:** Well ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: And the number of family members who may receive counselling.

ADV. TEBOGO HUTAMO: Justice, I will not be able to commit to that from my submission that the department should be able to formulate a model with your approval then like that can form the basis upon which such service can be used. I have just been assisted Justice, that on that aspect of counselling going back to the statement of claim by Section 27 paragraph 10.1 where the suggestion is that an individual and or family assessment by a psychologist to determine the extent and the nature of counselling and support services required by each claimant and their family, so that those are the matters which will be dealt with in order to cater for that.

10 **ARBITRATOR JUSTICE MOSENEKE:** Okay.

ADV. TEBOGO HUTAMO: And the other aspect that like I have mentioned, is with regard to the place of memoranda which was in fact proposed by the Ombud in his recommendations.

ARBITRATOR JUSTICE MOSENEKE: What order should I make?

15 **ADV. TEBOGO HUTAMO:** That in consultation, that the department in consultation with the claimants should agree on the place, the site where it is supposed to be put.

ARBITRATOR JUSTICE MOSENEKE: Place, site and I suppose the nature or character of the memorial.

20 **ADV. TEBOGO HUTAMO:** Indeed.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. TEBOGO HUTAMO: Justice, the other aspect as a way of demonstrating the government's willingness to correct itself in response to what

had occurred, I submit that a declaration of rights and corrective measures can be made and I say so in regard to those who have survived the marathon project that proper measures should be taken to ensure that they receive proper care and treatment in order to avoid what had actually happened, and the other
5 aspect can be a directive to the department itself in the form of [inaudible] and I must say that this is an aspect that the government has already undertaken in pursuant to what the Ombud has recommended at recommendation 14, which deals with the review of legislation which is relevant for the care of mental health care users.

10 The government has already embarked on that process as another way of ensuring that the issues are dealt with. Yes, and the other aspect Justice relates to the concern which has been raised during the testimony that what assurance do the mental health care users have that history will not repeat itself, and in this regard what has been suggested and as recommended by the
15 health Ombud, was that should there be any reason which requires the mental health care users to be moved, such decision has to be taken in conjunction with the National Minister of Health, just to be sure that the process is overseen properly and implemented in accordance with the law, avoiding prejudice and suffering to the mental health care users.

20 So those are the factors that needs to be taken ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: And in consultation with the family members of the persons who are to be moved, not so?

ADV. TEBOGO HUTAMO: Indeed, indeed, indeed and that will be in line with what has already been arranged with regard to the position made available to a member of the family committee in the review board.

ARBITRATOR JUSTICE MOSENEKE: Yes.

5**ADV. TEBOGO HUTAMO:** Because in this ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: The Mental Health Care Act regulates that in any event, not so?

ADV. TEBOGO HUTAMO: Indeed.

ARBITRATOR JUSTICE MOSENEKE: That is the definition of mental health
10care user which includes the family and it prescribes consultation which is
mandatory, not so?

ADV. TEBOGO HUTAMO: Yes, but the point which I am trying to say is that
apart from those statutory requirements, there is a special, well there is a
position given to a member of the family committee to sit in the board over and
15above the required consultations and that person is there to generally look at
the interest of the mental health care users, not only during their transfer, but
during the continued period of them being cared for. Anything else?

ARBITRATOR JUSTICE MOSENEKE: What about a written apology
published to all in [inaudible]? In writing, not just here before us, within a
20specified number of days after the award?

ADV. TEBOGO HUTAMO: Justice, I understand that there is in fact a pledge
that the Department of Health has prepared, as a form of acknowledging of
what have occurred, and tendering its apology to everyone who is affected.

ARBITRATOR JUSTICE MOSENEKE: Can I have a copy of the pledge and see whether I would want to include that in the award in those terms?

ADV. TEBOGO HUTAMO: Certainly Justice, if we can be allowed to make it available?

5**ARBITRATOR JUSTICE MOSENEKE:** Yes.

ADV. TEBOGO HUTAMO: Thank you.

ARBITRATOR JUSTICE MOSENEKE: Yes, it can be copied and made available to everybody and to me.

ADV. TEBOGO HUTAMO: Yes.

10**ARBITRATOR JUSTICE MOSENEKE:** I would like to look at his terms.

ADV. TEBOGO HUTAMO: Indeed we do have a copy of that pledge.

ARBITRATOR JUSTICE MOSENEKE: Ja, we need to memorialise the apology.

ADV. TEBOGO HUTAMO: Yes.

15**ARBITRATOR JUSTICE MOSENEKE:** As we memorialise in stone and in brick and in concrete, we need to memorialise in words so that we can be able to show prosterity and say look, we messed up once and look the state apologised.

ADV. TEBOGO HUTAMO: Indeed so Justice, a copy would be made available
20to all the parties, and we will make it available to you.

ARBITRATOR JUSTICE MOSENEKE: Yes, thank you.

ADV. TEBOGO HUTAMO: Yes.

ARBITRATOR JUSTICE MOSENEKE: The other element of the award, if I were to find that there are indeed constitutional damages that ought to be awarded, and are awarded in a particular amount, let us for argument's sake as the heads suggest 1.5 million and five hundred thousand is donated by the 5claimants into a fund, and I am inclined to go along with that particular submission, who should manage the fund and who should oversee the fund?

ADV. TEBOGO HUTAMO: Well, Justice the issues relating to expenditure on the part of government as I have said is regulated by the laws of the country, and I will be reluctant to agree that there should be a special fund created for 10the mental health care users. The government has taken up its responsibility and budgets will have to be made in accordance with processes of government, where there will be accountability and to want to make certain funds available outside that scheme might create problems. So my submission is that the government should be left with that task of ensuring that proper budget in terms 15of the law is being made available.

ARBITRATOR JUSTICE MOSENEKE: So you are really saying if the mental health care claimants want to set up a fund and use it the way they want to, that is their business.

ADV. TEBOGO HUTAMO: If an award is being made in their favour, certainly 20it is not for the government to dictate how and for what should they make use of the amount of damages awarded to them.

ARBITRATOR JUSTICE MOSENEKE: I get the submission.

ADV. TEBOGO HUTAMO: Those are our submissions Justice.

ARBITRATOR JUSTICE MOSENEKE: Costs?

ADV. TEBOGO HUTAMO: Justice, it appears that the costs will have to follow the ordinary rules. Costs should follow the event.

ARBITRATOR JUSTICE MOSENEKE: A wise submission indeed. Costs will follow the event. Very well, thank you. Counsel, thank you and I would like to thank you for raising the issues you have and indeed [inaudible] submissions will be used in these considerations and thank you for the heads of argument which are detailed and well worked and much appreciated. You have raised the matter which I will have to address in the award about the rigging relationship between the common law and the constitution. So I just want to be grateful to you and your team for the work you have done.

ADV. TEBOGO HUTAMO: Thank you Justice.

ARBITRATOR JUSTICE MOSENEKE: Yes, we have come to the time for replies. It is one o'clock. I would like to be done by two o'clock. The outer limit two thirty and people can eat for as long as they want to thereafter. I am inclined to go ahead. I do not know why the replies should not be contained within the hour, with outer limit one and a half hours. Is it okay that I proceed Counsel? I would like to, for reasons that you all are aware of but also in the interest of finality.

ADV ADILA HASSIM: Thank you Justice. We would have no objection and we will try to adhere to the times given.

ARBITRATOR JUSTICE MOSENEKE: To push to the end and adhere to some time. We have basically one and a half hours in which to do and a reply is a reply. It means you go to those issues raised in the argument by your

colleague, not to repeat ones argument unduly. That is what it is there for. So it is a rethought rather than fresh argument. Counsel.

ADV ADILA HASSIM: Thank you Justice. Justice, before I begin with the reply, when we, when I ended my submissions yesterday I owed you a reference to the record in relation to the SAPS investigations of a range of potential criminal charges.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And that can be found in file 3 at page 1171.

ARBITRATOR JUSTICE MOSENEKE: Thank you.

10**ADV ADILA HASSIM:** And the second thing is we spoke about crafting the relief in a way that would assist the Arbitrator in preparing the award, and I request that we are permitted to circulate and submit to you a draft of the terms of our relief in order to assist with crafting the remedy.

ARBITRATOR JUSTICE MOSENEKE: Oh yes, you are entitled to do that. To
15propose a draft award.

ADV ADILA HASSIM: Thank you Justice. We are not able to do so today, but we will do so next week.

ARBITRATOR JUSTICE MOSENEKE: You have to serve it on your colleagues first.

20**ADV ADILA HASSIM:** Yes.

ARBITRATOR JUSTICE MOSENEKE: All of them, and the entitled intent to propose alternative drafts as always.

ADV ADILA HASSIM: Yes.

ARBITRATOR JUSTICE MOSENEKE: So once they get your draft award, circulate it to them and then they are entitled to propose before the time an award to me. You can have a look at that.

5**ADV ADILA HASSIM:** Thank you Justice. I want to turn to my reply. I have to say that I cannot resist the temptation to refer to a quotation from Shakespear that comes to mind when I was hearing the argument on behalf of the state, and it is from Hamlet, and it is the quotation in which Hamlet says:

*“There are more things in heaven and earth per ratio that I dreamt of in your
10philosophy.”*

And I think the arguments that have been advanced by the state in relation to the common law damages and the need to, I will now argue in a moment unsuit us in relation to constitutional damages, that quote is quite pertinent. Our statement of claim is really where we begin. The terms of reference and of
15course the statement of claim. The terms of reference we have been through and it is clear that it involves an award of compensation to affected families. The statement of claim in claim C, refers to a claim for constitutional damages arising from not just the deaths, but the circumstances of the deaths, and that claim is made by each of the affected families, and that is important, because
20the precise reason that it was necessary to formulae claim C is because there is nothing in the common law that comes to our assistance for the deaths that have occurred under these circumstances, and there is also nothing in the common law that can assist the families in relation to the circumstances of the deaths.

In other words the violations of the rights. What is startling is that ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: [inaudible] to push you into that very corner and say that this in so many words, death has no consequences under the common law. Yours is to cry and express your shock and trauma. That is all that the law can help you on. But in effect, and it is not far from the truth. The common law did not recognise death, did not reward death or compensate for death only. So that is really the essence of that argument.

ADV ADILA HASSIM: But ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You claim merely for dying. You claim for the shock as a result of the death of another.

ADV ADILA HASSIM: And we spent much time in our written submissions and in our oral submissions explaining why the common law is deficient, which is what necessitated our claim C. So we find it startling that the state persists and seeks to argue that the breaches of the rights of the mental health care users are not relevant. They ask you to close your eyes to it. That the families are not affected. That they have suffered from some trauma, but that is it as you say Justice, and that the common law in relation to trauma suffices. Now our submission is that even the common law in relation to trauma is deficient. There is no precedent in our common law that comes close to the facts that pertain in the matter before us.

We are not talking about one death. We are not talking about some desperate deaths that take place unconnected with one another. We are talking about an atrocity. Reliance on the common law alone would not bring an appropriate remedy and relief to the families. The incredible argument by the state, I am

afraid to say undermines a lot that has been done in this arbitration thus far. It is treating the families as if they were bystanders. They are not claimants of rights in their own regard. They were bystanders, but as we said in our submissions, they were much more than that. The families were much more than that over many months they endured a parallel process of suffering and anxiety.

One, that tract that of their relatives now deceased, whose interests they were trying to protect. The [inaudible] of the argument of the state is that we have paid for the arbitration process, and now we can pat the families on their head and send them off. In other words the state has not met our argument regarding the insufficiency of the common law. Has not met our arguments in relation to the extraordinary circumstances of the case, their [inaudible] and wanting nature of the violations, the vindicatory aspect of constitutional damages by an award that we submit is intended to be signal. It is intended to be an award that affirms the core values of the constitution, the social pact that we have all agreed upon and that the constitution represents.

ARBITRATOR JUSTICE MOSENEKE: Well, the argument seems to say you are locked into the common law. You may not formulate claims or seek relief outside the four corners of the common law. Is that an accurate representation of our constitutional arrangements?

ADV ADILA HASSIM: Well Justice, there is certainly no case that I am aware of in which that has been held, that one has to stick to the common law and not go beyond it, and if that were so, it would make the ability to vindicate rights directly, to enforce rights directly through Section 38. It would hinder the ability

to do so. It would be in fact more than hinder. It would debilitate. In relation to the Mental Health Review Board, I would like to just point out Justice that Section 20 of the Mental Health Care Act 17 of 2002, concerns a composition of the Mental Health Review Board, and it requires that it must include a member of the community concerned.

So we are pleased to hear that the department has now chosen to include a community member, but that is in any event the department's statutory obligation. Justice, those are my submissions in reply. I did indicate at the end of my submissions yesterday and I feel even more strongly about it now in the light of the argument we have just heard from the state, that it is important to remember and it is important for all of us, it is important for the families and we submit it is important for you Justice, to remember who are the people and what is the humanity behind the names. The people who have died in the process and that are being represented by Section 27 in these proceedings.

It will not take an undue amount of time. As I recall Justice, you did indicate that I would be able to do so.

ARBITRATOR JUSTICE MOSENEKE: Yes, please proceed. I think the circumstances of this proceedings that is not unreasonable.

ADV ADILA HASSIM: Thank you Justice. I begin with the clients who testified. There were 17 of them and then I will turn to all of the other deceased and all of the information is in the affidavit in the record and the references to the record are in Annexure A. I begin with Billy Mabwe.

ARBITRATOR JUSTICE MOSENEKE: But you are reading, I am not going to have to hurriedly write down. You are going to give us a list of what you are reading, is it?

ADV ADILA HASSIM: Justice, I am not sure whether there are extra copies, 5but ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Not immediately, but I am certainly ... [interjects]

ADV ADILA HASSIM: It does not require you to take any notes.

ARBITRATOR JUSTICE MOSENEKE: Ja. Very well.

10**ADV ADILA HASSIM:** Billy Mabwe's father is Reverent Mabwe. He described Billy as always jolly when he was at Life Esidimeni. When Reverent went to visit Billy at Bopelong and took him some food, Billy was so hungry that he licked the chip packet clean. Daniel Josiah was a beloved brother. He liked it when his sister Wilhemina spoke to him, even though he could not answer her. 15Solly Mashego was a beloved brother. He carried his sister Pumzile on his back to school when she was young. Freddie Collitz liked sweets. He was a husband and a father. Masweet Kozwale was a beloved daughter and a niece. She stopped talking when she was transferred to Takalane. Virginia Magapela was a beloved mother and sister.

20When Virginia had to be admitted to Life Esidimeni her daughter, Shanees, lived with Virginia's sister, Christine. Her death caused heartbreak to Shanees who passed away in October 2017 just at the beginning of the arbitration. Sophia Molefe was a beloved daughter and sister. Sophia overdosed on her medication. Vuyo Kondwane was a loved son and brother with a broad smile.

He liked meat. Lucas Mogwarane described his brother Christopher as a piece of me. Lucas showed the arbitrator a picture of Christopher at his son's wedding. Christopher died after he fell in the bathroom in the middle of the night.

5 Motafela Legwabe was the youngest brother of Lesiba Legwabe. After a long search he was found at Cullinan with a broken ankle. Joseph Gumede was Ntombiduthi's Dladla's older brother. He enjoyed spending Christmas and New Year with his family. When Joseph's body was found it was riddled with worms. Christopher Makoba was a loved younger brother. He died at Precious Angels
10 in July 2016. When his family went to collect his body, the undertaker had left it at the door for collection.

Charity Ratsoso was a happy member of the family. His sister could not find him after the move and after a long search was told that he had died months earlier. His family collected his decomposed body. Debra petal was the
15 beloved daughter of Maria. Her post mortem report found that there was a plastic and brown paper in her stomach. Moreen Kunjwa was a beloved sister. She enjoyed the birthday parties her family would arrange for her. She wasted away at Takalane. The Arbitrator saw pictures of her. Sizwe Hlatswayo was always happy. He liked singing and dancing. Sizwe would have turned 30
20 during the arbitration.

Wesibe [inaudible] was a proud mother of three. She took pride in her appearance and liked to dress up. When her son visited her at Takalane, he could not recognise her because she had lost so much weight. She passed away at the age of 57. Felicity Adams was the mother of Gabriel Adams.

Felicity enjoyed spending Christmas and Easter with her son and ex husband. Before she died she was moved between several facilities. Dederick Johannes Botha insisted on changing his nick name from Dicky to Johan when he was younger. He died at Tshepong. Sepati Jane Philane was the mother of Edith Philane. Her favourite drink was tab when they visited at Life Esidimeni. She became blind at Precious Angels.

Joyce Semamane was the beloved and outspoken sister of Jacob Semamane. Johannes Jacobus Janse van Rensburg was the father of Joanne. He loved home cooked pap and beef stew. Joanne was informed 15 days after Johannes's death. Nicolas Jamnick was the beloved brother of mariana Jamnick Smit. He loved to read the newspaper. Johanna Kgladi liked chicken licken which her sister Sarah would always bring to her when she visited. After she was moved to Takalane home, she has been recorded as a suspected case of typhoid.

15However, her death is recorded as being due to natural causes. Christina Lale was the beloved aunt of Sophy Gwetsemang Maglatsi. Christina was found at CCRC where she died. Charles Stewart was a huge source of support to his sister Yvonne Mohammed. He was very proud of his 2014 award for the world's best male care user, mental health care user for good behaviour and 20loving care at Life Esidimeni. Siyabulela Roger Msimanga was the son of Lindiwe Portia Msimanga. He died of pulmonary tuberculosis and septisemia after being moved to Shama House. He was only 33.

Matsobani John Magloko was the beloved brother of Judah and the uncle of Peter Magloko. He was moved, after he was moved to Mosego Home, he slept

in a room with two beds and five other users. Peter Mgundla was a loving family member. He liked fruit, Coca Cola, bread and cigarettes. He died after being moved to Mosego Home. Julian Petersen could not walk or speak. His family was distraught to find him disoriented, confused and uncamped at 5Precious Angels. He could not longer sit up straight and the staff tied him to his wheelchair. Jeremiah Modise enjoyed birthday parties. His family found he decomposed body in a hospital mortuary.

Busisiwe Tshabalala could not talk, but she would laugh with her family. She died dirty as CCRC. Bheki Sithole was a beloved brother. He died at 10Siyabadinga. His body was bandaged and bruised. His family buried him without knowing what happened to him. Matlakala Elizabeth Motswahe was the beloved mother of Mord. She had been transferred twice and died after the transfer to Precious Angels. Benica Mokaneng was a beloved cousin. She could not talk, but communicated with her eyes and gestures. She smiled a lot 15and loved holding children. Benica indicated to her sister that she had been raped while at Takalane.

She died a few months later at Takalane. Julia Tshawe was the mother of Rosy Tshabalala. Julia enjoyed the fruit that Rosy would take her. Julia was moved to Moseko Home, then to CCRC, then to Precious Angels, and then to 20Kalefong Hospital where she died. Terence Tsjaba was the beloved nephew of Susan Poshoko. He was moved to Precious Angels. Susan learnt of Terrence's death when they were called to a meeting at Pretoria West Hospital and Terrence was referred to as the late Terrence Tsjaba. He was 28 years old. Sibusiso Mtombeni was the brother of Stella Mofokeng. Sibusiso was 25deaf, but all his siblings communicated with him in sign language.

He was moved to Bopelong where no one could use sign language. Emily Mthembo was the sister of Thami Mthembo. She would not stop screaming when her family visited her at Anchor. She ate a six pack of yoghurt in one sitting. Cindy van Rooyen was the beloved aunt and sister of Vaughn van Rooyen. She died after her move to Takalane. Mamesi Sina Mosalo was the mother of Vinolia Mosalo. She loved doing bead work. She was moved to Tshepong with only her night dress. Tembisile Lilian Dlamini was Vusimusi Dladla's sister. She was close to all her siblings. Her brother saw her body with blood in the nose and mouth.

10 Joseph Golden was the stepson of Winnie Golden. The family could not find Joseph after he was moved. The eventually found Joseph at Kalafong. By the time the family arrived, Joseph had died of hypoglycemia. Jabulani Mnisi was a beloved son of Jami Miriam Mnisi. Jabulani was moved without his mother being informed. He died at Tshepong without having seen his family. Kaswa 15 Mosiyani was the beloved son of Yvonne Mosiyani. Caswell was moved to Takalane following the March 2016 litigation. He was only in Takalane for a month before he died. Nongana Eric Mashiloane was the father of Zinzele Lincoln Mazibuko. He would make up stories to her, for example that he was a millionaire.

20 Motsabisi Michael Hlowe was the brother of Ike and Andrew Hlowe, and the father of Batseba Hlowe. Michael died after being moved to Shama House. Josephine Mhlongo was the beloved mother of Fortunate Mkabela. Her daughter found her at Thuli Home wearing a thin dress and sitting outside during winter. Frans Dekker was the brother of Magdalena Dilanga. His sister 25 found him with a broken ankle at Tshepong. Mohammed Adiel Shariff was the

nephew of Rodaba Jones. He was moved from one NGO to another before he absconded. He was 21 when he died. Isac Tholwana was a beloved brother and the brother in law of Paulina Tholwana. He was moved to Shama House without his family being informed.

5Gene Rontetswa was the beloved mother of Joyce. She died without her mother knowing where she had been moved to. Sedimedi Solomon Mohatse was the brother of Kefalotse. When his brother visited his brother at Masego Home, when his brother visited him at Masego Home he found that Sedimedi had been burnt from the waste down by hot bath water. Miriam Maratele was
10the sister of Daniel and sister in law of Lydia Maratele. She was the mother of Thabang Maratele. She died after being moved to Takalane. Nellie du Toit loved biltong. Her sister Bertha said that Nellie was a kind, gentle and happy person. She started crying as soon as she saw her family after she was moved and was in a wheelchair for the first time.

15David Senekal was a father and a grandfather. When his daughter Desiree went to visit him, he loved to play with his grandson. He died after being moved to Masego Home. Frederick Nelson was the beloved brother of Abraham and saw his family every week. He died after being moved to Tshepong. Mona du Preez was a beloved grandchild. She died on Christmas eve. Happy Makubela
20was a happy and beloved son and brother. His family did not get to see him before he died. Mswelinge Mokgeti had a very big appetite and he loved his family. Alfred Sithole was a beloved nephew. He used to complain to his aunt, Elizabeth that he was being served wrotten food at Thuli Home.

Siphiwe Tabete was much loved by his two sisters and enjoyed their home cooked food. Siphiwe passed away at Precious Angels at the age of 41.

ARBITRATOR JUSTICE MOSENEKE: Thank you Counsel. That's the last post of thoughts. Thank you. Very important in a matter like this. Just to remind ourselves that we are dealing with human beings and that is what they are.

ADV ADILA HASSIM: Human beings and members of a family and a family unit.

ARBITRATOR JUSTICE MOSENEKE: Yes. Thank you so much. On a lighter note I think your pronunciation is amazing.

10 **ADV ADILA HASSIM:** Thank you Justice.

ARBITRATOR JUSTICE MOSENEKE: Very well done. Advocate Crouse.

ADV. LILLA CROUSE: May it please you Justice. We will be very brief. Firstly the common law has changed after a few hundred years and I misled the court yesterday when I spoke about [inaudible] and the death of a person. Can I just
15 refer you to, I was referring to in paragraph 148 of my heads of argument to the matter ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You must have made a professorial procedural law. Who told you well you could have possibly been correct.

ADV. LILLA CROUSE: Justice, in paragraph 148 of my heads of argument I
20 refer to the matter of Modegwai Mfafu whose brother died prior to the terms of reference. The law has been by majority judgment changed in Nkala versus Harmony Gold Mining 2016 (5) South African Law Reports, page 240. It is a Gauteng decision. The majority judgment is by the honourable DJP Majapelo

and by the honourable Mr Justice Vali, and they deal with the whole aspect of general damages and the effect of the death of the person that suffered from paragraph 176 and further, and their conclusion at paragraph 220 is that a plaintiff who has commenced suing for general damages, but who has died of any cause whose claim has not reached [inaudible], and who but for his death would be entitled to proceed, can the state proceed.

I would therefore submit that in terms of the arbitration the terms of agreement is perhaps [inaudible], but the Ombud's report would perhaps be the start of the proceedings. I leave that aspect completely in your hands.

10 **ARBITRATOR JUSTICE MOSENEKE:** Ja.

ADV. LILLA CROUSE: Justice, then if I could just deal with the counselling aspect that was raised by my learned friend ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: It should surely be the conclusion of the arbitration agreement. It is when parties join issue, not so?

15 **ADV. LILLA CROUSE:** Yes. Justice, if I could then perhaps move to paragraph 187 of my heads of argument, and this is in respect to my learned friend's suggestion that the state must provide counselling for all the members. We have presented evidence that our clients do not trust the state to provide those counselling services. In terms of the court case at page 187 of my heads
20 of argument, it unless there is a legislative empowering statutory, something in the legislature empowering the state to give these counselling which there is not, or unless we agree to it, they cannot provide counselling to us.

For that reason we have quantified the amount. As far as the other two claimants are, they have agreed to receive that counselling. Our clients have not agreed to receive counselling from the state.

ARBITRATOR JUSTICE MOSENEKE: But Counsel, how practicable is that, show just the magnitude of the survivors makes it quite a trying matter, not so?

ADV. LILLA CROUSE: Well ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: To private counselling of over a 1000 patients who are kept in state facilities or facilities funded by the state. How practical is it to have them get private practitioners?

10 **ADV. LILLA CROUSE:** The mental health care users with respect Justice, they will receive counselling in their respective places where they are. This is not part of the award that the court is making. This is in respect of the family members that seek counselling outside, and it is our submission that the administration of that is much easier in respect of quantifying that, as we have
15 done in the amount of R20 000-00 per family, than to put another administrative burden on the state, and because of the cogent reasons that we have advanced, and because of the law being on our side, we submit that we would rather have the quantified amount in terms of future medicals.

As we have asked for in our statement of claim and we have done here. So we
20 submit we are not part of the agreement that is being reached in respect of counselling.

ARBITRATOR JUSTICE MOSENEKE: And how would this work, as and where you discover more claimants who would come to the fore. Later they

would do what? They would go to the guardian fund and claim the twenty thousand? Where would the money sit? How do you deal with these interests?

ADV. LILLA CROUSE: Justice, on this we ask that this be paid to the family members that are before you. The 168, the family members that are. We could not find anything in the terms of reference that further family members will as of right be entitled to compensation. I think the process needs to end somewhere. So we have for the 168 quantified this amount, and that is where we are asking for it. If I could then move off from the counselling aspect Justice. If I could just move to my learned friend's ... [interjects]

10 **ARBITRATOR JUSTICE MOSENEKE:** And the award for the 168 where would it, should I direct be paid to?

ADV. LILLA CROUSE: Justice, we and this is the next point I want to make.

ARBITRATOR JUSTICE MOSENEKE: Ja.

ADV. LILLA CROUSE: We have in our heads of argument distinguished between health care users that we have asked that their amount be paid into the guardian fund and family members in respect of general damages that that amount be paid by the family member that is being identified. So we are on a different footing as the rest of the claimants, because we have survivors and family members and we have dealt with general damages in respect of both of them. So that needs to be a distinction. In respect of general damages to mental health care users, that needs to be paid into the guardian's fund. In respect to family members, that needs to be dealt with on the same footing as the other claimants, and that will be paid to the families itself.

ARBITRATOR JUSTICE MOSENEKE: But of course the point it seems fairly plain that if you were to pay general damages to family members and pay constitutional damages to survivors, there will be a measure of double dipping surely.

5**ADV. LILLA CROUSE:** Yes. Justice, that is why our argument is general damages is not sufficient, because of the breaches of the, and for that matter we have pleaded general damages fairly substantially but we submit that that is not sufficient, and in so far as the court find that not be sufficient, we suggest that it should be an amount of one million rand, but that brings me to my learned
10friend's argument in respect of constitutional damages. My learned friend relied on paragraph 4.2.5 of our statement of claim. We submit that in so far as necessary we will ask that paragraph 4.2.5 that is in respect of constitutional damages, be re-numbered to paragraph 5.3 and our argument of yesterday would then stand, that we ask this in respect of the mental care health user as
15defined in the act, and as the court rightly pointed out, mental health care user in the act includes the family.

So in respect of the constitutional damages, we submit a split between these two entities would be necessary.

ARBITRATOR JUSTICE MOSENEKE: Ja, but you are not inviting me, are
20you, to grant general damages in respect of family members and then grant constitutional damages. That would be in respect of which category of claimants?

ADV. LILLA CROUSE: Justice, our argument is that there are general damages suffered by each of them. Unless the court find that we have not

suffered shock or psychological damage, then it will only be thrown over the bowl of constitutional damages.

ARBITRATOR JUSTICE MOSENEKE: You see, if you go to shock and pain and suffering, then you are in a terrain of the common law and you are obliged to go and look at awards that have been made up to now.

ADV. LILLA CROUSE: Yes, and that is what we have done.

ARBITRATOR JUSTICE MOSENEKE: As has been argued by the state I think correctly, and then if you go to constitutional damages, new considerations kick in.

10**ADV. LILLA CROUSE:** Absolutely Justice, and for that reason, and the state has now publically offered R200 000-00 for family members, but they have coupled that with mental health care users, but for each of the other claimants, they have accepted general damages for the family members in the amount of R200 000-00. We say in our submission general damages should be higher for
15family members, and much higher for mental health care users, but that in itself bearing in mind the constitutional damages or breaches that took place, that amount is not sufficient to cover them. So the only submission that we are making to you at this stage, is to say there are two categories that we are representing.

20**ARBITRATOR JUSTICE MOSENEKE:** Yes, notionally there always are. I am saying in substance, if mental health care user A, Thabo and as family to Thabo, if you had to contemplate awarding a million to Thabo and a million to the family, firstly you are out of sync with what you might award to the rest of

the participants in this horrible tale, and secondly those families would actually, there is a phrase about this in Zulu. [Vernacular].

ADV. LILLA CROUSE: Justice, I would need an interpretation.

ARBITRATOR JUSTICE MOSENEKE: Yes, you need interpretation and one of your colleagues might help you. It means they will be chewing with both their jaws. In that language when somebody has a lot of food, they are obliged to chew with both their jaws. That is how much food they have. [Vernacular].

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: So I am just saying you must acknowledge that there will be double dipping, if you invite me to give a million to the families and a million to the patients.

ADV. LILLA CROUSE: In respect of constitutional damages Justice? Is that what the question is?

ARBITRATOR JUSTICE MOSENEKE: No, if you do both. I mean if you were to award, as and when you consider constitutional damages, inevitably the considerations on general damages would also arise.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: So you cannot give to both as if you have not awarded anything for general damages.

ADV. LILLA CROUSE: No absolutely Justice, and we are not suggesting double dipping, but what we are saying is that the constitutional breach in addition to the general damages, should amount to a million rand, and that amount needs to be split between the family and the mental health care user.

ARBITRATOR JUSTICE MOSENEKE: Okay, I hear you.

ADV. LILLA CROUSE: Then Justice, we have dealt now with our reply, but might I just be allowed to thank you and the staff and the translators and civil society for their role in everything that has happened in the past 40 something 5days? Thank you Justice.

ARBITRATOR JUSTICE MOSENEKE: Thank you ever so much. We will find time to thank all of you in a moment, but thank you for the kind words. Advocate Groenewald?

ADV. DIRK GROENEWALD: Thank you Justice. Justice, we have no reply. I 10think my colleagues have dealt with all of the issues. From my side I would also like to thank yourself Justice and the support staff, the family members for all the kind words, words of support each day and I have just been reminded by Obakeng that we request the family members to sign the banner there at the back and show their participation in this process, but once again thank you for 15everybody that supported us in this process.

ARBITRATOR JUSTICE MOSENEKE: That is wonderful, but keep that in mind. The day you form a political party, make sure the name starts with an A.

ADV. DIRK GROENEWALD: Thank you Justice. I hope it is not prophetic words from you that I end up one day in parliament, but ja. Thank you.

20**ARBITRATOR JUSTICE MOSENEKE:** Thank you Advocate Groenewald and thanks for the kind words. Counsel?

ADV. PATRICK NGUTSHANA HUTAMO: Justice with your indulgence I beg leave to hand up two documents which we undertook to hand up. The report by

the Ombud which dealt with the list of the 12, which is ELAH172 and then the pledge is marked ELAH173.

ARBITRATOR JUSTICE MOSENEKE: Thank you.

ADV. PATRICK NGUTSHANA: And then Justice, through my engagement with you I would like to give reference to an authority which I have omitted ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. PATRICK NGUTSHANA: To make mention of.

ARBITRATOR JUSTICE MOSENEKE: Which is not in your heads?

10 **ADV. PATRICK NGUTSHANA:** Which is not in the heads Justice.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. PATRICK NGUTSHANA: It is the case of Du Plessis versus Road Accident Fund.

ARBITRATOR JUSTICE MOSENEKE: Yes.

15 **ADV. PATRICK NGUTSHANA:** 2004(1) SA 359 a decision of the SCA, and particular reference is made to paragraph 35 which deals with the powers of the court relating to the development of common law. Justice, on the last occasion you mentioned that it has come to your attention that there is an account, a twitter account opened in your name, and which was in fact not true. Justice, I 20am informed that I have fallen victim, I have fallen victim. I am told that like there is a twitter account circulating in the social media in my name, with my picture. I want to put it on record that I do not have a twitter account.

ARBITRATOR JUSTICE MOSENEKE: Is the picture real?

ADV. PATRICK NGUTSHANA: And I do not even read tweets.

ARBITRATOR JUSTICE MOSENEKE: Okay. Yes, thank you Counsel. You are worse off than President Trump who tweets every morning, but I take the 5point. Yes, we are in a world of zillion media people and they express themselves about all of us. I do look, I do read but I do not tweet myself. So yes, there is a lot said about all of us in there. Lots of pictures of all of us in social media. We have come to, let me allow the evidence leaders to say something at this stage before we close.

10**ADV TEBOGO HUTAMO:** Thank you Justice Moseneke. We do not have much to say except to thank our colleagues for the assistance and support and encouragement, and giving us space that is said to perform our duties, especially the officials from the Department of Health, in particular Dr Kenoshi. Every time we needed assistance from his staff, support staff, he will be the first 15person to jump. Be it at early in the morning or at night. He was always ready and available to assist. We have been able to get hold of many witnesses and to consult with them through his assistance and the other support staff, and the director general as well from the premier's office. She has been very off assistance to us.

20**ARBITRATOR JUSTICE MOSENEKE:** That is Advocate Baleni.

ADV TEBOGO HUTAMO: Advocate Baleni. They have all played their roles in order to ensure that the arbitration proceeds without any hindrance, and Bafani Malunga as well who has been with us throughout, he has been there also supporting us, and I cannot mention all of them now, and your presence

Justice and leadership, guidance we have learnt a lot through you. That is through your guidance. We thank you for the opportunity and my colleague, Ms Yina would say a few words as well if she has anything else. Thank you Justice Moseneke. We cannot thank you more than this. I think there are no words which can express the, what this opportunity has given to us.

ADV NONTLANTLA YINA: Thank you Justice, and thank you for the opportunity and I would also like to thank our colleagues for their collegiality and their professionalism, and the manner in which you have handled the matter up to this far, and also in a special way to your support staff, Obakeng and Aviwe. They have been very helpful and they have been prompt in responding to our requests and to our communications, and thank you for the opportunity.

ARBITRATOR JUSTICE MOSENEKE: Yes. Nkosi Counsel. We have come to the end, believe it or not. We have come to the end of quite a trying task. For those of you who are not judges, it happens often. After all the excitement of proceedings and the challenges, there comes a time when a judge retreats, to deliberate, to consider arguably that may be the most difficult time. It is a lonely time again, because you retreat again into your tower and hope to produce a just and equitable outcome. It is always amazingly challenging to those who think it is glamorous and fund, and we have come to that point where I have to do what judges routinely do. Is to go back and agonise and get it right and hope to produce just outcomes.

That is what is going to happen now. This was an arbitration. Must confusion out there. People call it an inquiry, call it commission, and I think mainly because of the total circumstances, but just to recap I think also for public

recordal and interest, this was an arbitration. It was a subset of an alternative dispute resolution called arbitration, chosen by the parties in which they submit ultimately to an award by an Arbitrator, which if not reviewed and set aside, would be binding on all the parties, and therefore they will be obliged to implement the award which ranks same status in our law as a court order. So we have come to that point where I have to go back and take, weigh all of the submissions and the evidence and write out what are the grounds.

First the decision in his full flurry and detail and what are the grounds for reaching those findings. We have agreed that the award will be available within 1030 days from today. So we have to go out and work very hard to try and keep to the timeline of an order, an award in 30 days from today. I will be privileged to go back and do that and my thanks start there. I want to thank the family members to start with, but for their pressing and probing we would not have been here. [Vernacular]. [inaudible] and social civil society should keep doing that. We, justice is illusive. It is hard to get at. So there is really wonderful, and the recordal that we have of your role would be seen by a posterity over many, many years as researchers come to look at this record.

And all the support you have had certainly from Section 27 and other attorneys who later came on and Counsel, I will talk about them in a moment, and I want to thank the state. It is not often said, but it is true. The state played a very vital role, in fact an exemplary role in many ways. I do not say everybody testified for the state was amazing. I am saying the state took its responsibility to implement recommendation 17. To find an Arbitrator and I know they made representations many to me, and I initially said no, and the family started pushing also and ultimately agreed, but so the state must not be left out of it. It

will be an error, because it is a good model, an example of how to get at a deep atrocity and to try and remedy its consequences and route it out.

So I am very grateful to the way and the state provided resources to this process in a real generous way. Supported the families to be here in a variety of other ways. So very, very well done and responsive and [inaudible] behaves the way we have seen happen here. I want to record that quite publically and openly and then I want to move on to all the people who have been active here. Thank you ever so much. Starting with the Counsel, I went looking for, the two young people who I have employed in the Arbitrator's office. Obakeng and 10 Aviwe, you were very special hard working, young law clerks who came in and started with a task and they have not disappointed, but the work is ahead.

The next month we have to produce an award and have it all edited and sign checked and the things we used to do in the constitutional court. We are going to have to do them here, and get that task behind us, but you have been very 15 special and amazing, way beyond my expectations. And the evidence leaders who right at the beginning you agreed to be here, and I am glad you found it worth your while and I hope it adds onto your careers. Thereafter came a variety of Counsel, very early Advocate Groenewald was in the mix, and with the same booming voice he was insisting that his clients should be protected 20 and he got it right.

He worked his way in to the table and found a space on the table and I would like to thank you. It is not easy to do good, [inaudible] when you are young, but it has been wonderful for you to be here. Advocate Crouse, and entire team, it was wonderful to have you here, and again the Law Society of South Africa is in

the right place. The progressive end of our world. It is very important to take positions that advance goodness. Particularly when public power is misspent, misused. It is so important to see the Law Society, a state entity, taking its rightful role in protecting the vulnerable.

5Legal Aid, what did I say? The Law Society, my goodness. Ja, Legal Aid South Africa. Ja, I think that is what confuses me, but I would like to thank you ever so much for having been part of all this, and I would like to thank you. Section 27, Advocate Hassim, together with your learned colleagues and your learned junior, it has been wonderful to have you here and you know it cannot be done
10without actually a collective work of all of the Counsel, all of the attorneys, all of the researchers. A lot of hard work gets produced by many people, but look where we are. We have managed to get over all this. I want to spend a little bit of time to thank the media.

I have done that over and over again. Social consciousness is derived from
15information that the public at large has. We have had over 11 cameras or so in here, for every time we sat and we have seen most of your crossovers throughout the day and in the evenings and the wrap-ups and all of the presenters here who have shown an amazing interest in something that I hope will be a contribution, a tutorial of good governance, good citizenship and how
20to be good South Africans. So the media has been amazing and have shown, I meet people all the time. [Vernacular]. Again you might need interpreters there, but it happens just so often where ever I step out people say hey, we saw you at Esidimeni, and they say because I think and people of all extractions in South Africa have been watching and only because the media has been
25available.

For the security there have been tight moments, I would like to thank all of you. There were very dangerous moments here, but very quietly the security has been managed, and our interpreters. They have been amazing and again the state made it possible and provided the resources to have full wall to wall interpretation, which most of us take for granted, and I really would like to thank all of you, and many other people who are not necessarily family members who have come here, except for those who wanted me to sign the book all the time. They knew where to find me, but beyond that there are many people who have come and taken interest.

10We have always had a full house from day one. I am most, most grateful and may God bless our country and may God bless Africa. I thank you. We are adjourned, thank you.