LIFE ESIDIMENI ARBITRATION

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

Date: 8th of February, 2018

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BEFORE ARBITRATOR –JUSTICE MOSENEKE

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SESSION 1

ARBITRATOR JUSTICE MOSENEKE: Thank you. Good morning to you all. We are going to have to speak pretty loud today, loudly, and I think we must proceed forthwith. It is 11 o'clock, and I think we will take the tea adjournment at 12. Advocate Hassim.

ADV ADILA HASSIM ADDRESSES ARBITRATOR JUSTICE MOSENEKE: Thank you, Justice. Justice, before I begin, I point out the time and in light of the discussion we had this morning that we are an hour and a half behind my allocated time, and if I may continue after the lunch adjournment.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: Thank you for you indulgence this morning.

ARBITRATOR JUSTICE MOSENEKE: After the tea adjournment.

ADV ADILA HASSIM: After the tea adjournment.

ARBITRATOR JUSTICE MOSENEKE: Elven to 12 and ja, okay.

ADV ADILA HASSIM: Yes. Justice, I would like to thank you for your indulgence this morning and for the facilitation of discussion between the parties. I am glad to be able to place on record that an agreement has been reached between the State and Section 27 [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Just a minute. I think Awiwe, you gave me a pen that has run out. [Vernacular]. Yes, Counsel.

ADV ADILA HASSIM: An agreement between the State and Section 27 as

follows.

In respect of claim A, which is funeral expenses, the agreement is that R20 000 will be paid to each claimant.

In respect of claim B, which the common law claim for emotional shock and psychological injury, the amount that has been agreed upon is R180 000 per claimant.

In respect of claim D, which is the claim in relation to counselling, that counselling will be provided to the families as required.

In respect of claim C, which is the claim for constitutional damages, we were unable to reach agreement.

In the light of the settlement on claims A, B, and D, I will focus my address to you on constitutional damages.

ARBITRATOR JUSTICE MOSENEKE: Advocate Crouse, do you confirm the term of the agreement in relation to these heads of damages?

ADV LILLA CROUSE ADDRESSES ARBITRATOR JUSTICE MOSENEKE: Justice, unfortunately, we have been unable to reach any agreement in respect of general damages. No offer was made in respect of counselling as yet but we are continuously taking instructions and we will place on record if we reach an agreement at any stage.

ARBITRATOR JUSTICE MOSENEKE: So you are not part of any of this arrangement.

ADV LILLA CROUSE: Unfortunately not, Justice.

ARBITRATOR JUSTICE MOSENEKE: Very well. Advocate Groenewald.

ADV DIRK GROENEWALD ADDRESSES ARBITRATOR JUSTICE MOSENEKE: Thank you, Justice. Justice, I can confirm that after deliberating with my colleagues from the State again, my apologies, we have reached agreement to settle our common law damages in the amount of R200 000 for each family member. So that will include the amount for funeral expenses as well as emotional shock. In respect of the claims for counselling [intervenes]

ARBITRATOR JUSTICE MOSENEKE: So in essence, it is 180 plus 20.

ADV DIRK GROENEWALD: Indeed so, Justice.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV DIRK GROENEWALD: In respect of counselling, we have not settled or discussed that with my colleague but I am assured that we will be able to communicate settlements in respect of that claim specifically. We have claimed exactly the same as Section 27 in respect of counselling so I do not s– or foresee any problems but I will need to clarify that with my colleague.

ARBITRATOR JUSTICE MOSENEKE: Very well. Advocate Hutamo

ADV TEBOGO HUTAMO ARBITRATOR JUSTICE MOSENEKE: Good morning, Justice.

ARBITRATOR JUSTICE MOSENEKE: Good morning.

ADV TEBOGO HUTAMO: It is indeed correct that an agreement has been reached with Section 27 on behalf of their clients on the terms that have been recorded in the total amount of R200 000 for each family. With the claimants represented by Hatta Spears Incorporated, we can also confirm that an

agreement has been concluded and the total amount agreed on is R200 000 and I should also indicate that the issue relating to counselling, it is a matter which will also be offered to the claimants in this regard.

And the remaining issues or issue that has to be determined is that one of constitutional damages sought by claimants represented by both Section 27 Hatta Spears. It is indeed correct that with regard to claimants represented by Legal Aid South Africa, no agreement has been reached yet. We will await to hear from them. And I should place it on record that on the last communication with Legal Aid, an offer relating to counselling has been made to them. That offer has been made to them. So we will expect to hear from them in relation to all those aspects that have been offered to them. And obviously, on the issue of constitutional damages we do not anticipate to reach any common ground on that, and then argument will be presented.

ARBITRATOR JUSTICE MOSENEKE: Very well.

ADV TEBOGO HUTAMO: And while I am still on the– if I can just be given an opportunity to report one matter which was outstanding from the last sitting. In relation to the list which had to be verified of the people who had to be included in this proceedings, we would like to report that we have indeed managed to get the assistance of the office of the Ombud who helped to verify the list which was submitted by Section 27.

The list of 12 which was debated on the last occasion, and from the report which we have and which has been circulated to all the other parties, do confirm that out of the 12 names, it is only person or it is only one claimant who qualifies to be included in the arbitration process. And on that basis, I beg leave

to hand up a copy of the report which gives detail of how the verification was conducted to exclude the 11 names from this proceedings.

ARBITRATOR JUSTICE MOSENEKE: As a consequence of the report, what, on the State's version, is the totally tally of mental healthcare users who passed on?

ADV TEBOGO HUTAMO: Justice, if we add 143 plus one it will give us the total of 144.

ARBITRATOR JUSTICE MOSENEKE: Yes. Thank you. A copy of the report will be made available to me, will it?

ADV TEBOGO HUTAMO: Indeed so.

ARBITRATOR JUSTICE MOSENEKE: And it will be ELAH

ADV TEBOGO HUTAMO: Justice, if we can hand it up later to verify the sequence of the ELAH numbers so that it can be appropriately marked. In the meantime, I should indicate that the report has been circulated to all the parties and we just wanted to place that on record before we proceed.

ARBITRATOR JUSTICE MOSENEKE: Yes. Very well. Thank you. Counsel, is there anything you have to say about the verification process?

ADV ADILA HASSIM: Justice, I prefer to say as little as possible. We are not contesting the report of the Ombud. We have amended our ANNEXURE A in the light of the report of the Ombud, and we would like to hand that up and circulate that to the other parties if we may.

ARBITRATOR JUSTICE MOSENEKE: Yes. Thank you. And in relation to missing persons, is there any number other than the one presented by the MEC

Dr Ramokgopa?

ADV ADILA HASSIM: We rely on the number presented by the MEC, Justice. We are not aware of any developments in that regard.

ARBITRATOR JUSTICE MOSENEKE: I saw that in your heads but there is no contestation now about the number of people outstanding, is there? No.

ADV ADILA HASSIM: In terms of the missing persons?

ARBITRATOR JUSTICE MOSENEKE: Missing persons, yes.

ADV ADILA HASSIM: There is no contestation on that.

ARBITRATOR JUSTICE MOSENEKE: Ja. Very well. Thank you. Just before you go ahead, also at some point, Adv Crouse, you are going to give me a schedule, are you?

ADV LILLA CROUSE: Yes, Justice. We have attached one to our heads of argument but we will make sure that it is in order when we argue.

ARBITRATOR JUSTICE MOSENEKE: Yes. That is final.

ADV LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: I have seen that number, whether it is preliminary or final but very well.

ADV LILLA CROUSE: Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: None of the parties has said anything about the contemplated memorial in the terms of reference, and at some point when the discussions are moving on, we have to talk about that, and so to the specificity around the counselling, i.e. the institutions. There should be sufficient

detail to be able to identify the institutions and the frequency of the counselling. That is going to be important if you have regard for the detail required for the award itself.

So I just want to remind the parties that it is going to be important in the agreement to identify the– and locate institutions that will be able to provide or a method that will be able to identify the institutions concerned, and whether or not parties have an agreement about the kind of memorial that will remind us of this tragedy and what order I should make in that regard ultimately. Counsel, I think you may proceed.

ADV ADILA HASSIM: Thank you, Justice. On the memorial, there is an agreement between Section 27 and the State, in other words, there is an agreement between the parties and the State that there would be place of remembrance. It is the detail that we need to work out and we will undertake to facilitate the discussions in order to present before the end of the hearing a bit more specificity with regard to that and in relation to the method to be followed for counselling processes.

ARBITRATOR JUSTICE MOSENEKE: Yes, but of course if the agreement is going to be part of the award, it has to be made available before I complete writing up the award.

ADV ADILA HASSIM: That is so.

ARBITRATOR JUSTICE MOSENEKE: Very well. You may proceed.

ADV ADILA HASSIM: Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: As I understand, the argument then is

limited to the legal basis for granting constitutional damages and its quantification.

ADV ADILA HASSIM: That is so, Justice, and I propose to go straight to that. Our written submissions obviously deal with the aspects in relation to emotional shock and psychological injury, and the only aspect of that which I will still rely upon for the purposes of the argument on constitutional damages is the evidence of Ms Cora-Lee Trotter.

Justice, the outline of my submissions then will be to discuss constitutional damages firstly through the prism of Section 38 of the Constitution and the case law dealing with the meaning of appropriate relief. This will necessitate a discussion of the facts, which will be followed by our submissions on the breaches of the claimants' rights.

It will be our submission that common law damages are not sufficient to– for redress in the extraordinary circumstances of this case, and that direct enforcement of Section 28 is required. In making the submissions in that regard, we will refer to the exposition of constitutional damages by our courts. In particular we will make reference to the *Foce*, *Modderklip*, and *Kate* judgments, but we will also make reference to the award of constitutional damages in comparative jurisdictions as set out in our written submissions.

I will thereafter deal with the question of the quantum of the award of constitutional damages, and in that regard I will make reference to the actuarial report by Mr Gregory Whittaker. I will then turn to the question of structural relief. There is some relief that is more structural in nature that is set out in paragraphs 353 to 357 of our written submissions. I do not believe this to be

contentious but I will address it at the tail-end of my submissions on relief, and then finally, I will address the question of costs.

Justice, the first principle we submit that emerges from the law on remedies is that just and equitable relief is determined by the facts and circumstances of the case at hand. Section 38 of the Constitution provides that where a right in the Bill of Rights has be infringed, the court may grant appropriate relief and as Justice Quickler pointed out in the *Foce* judgment, the provision does not provide relief where appropriate.

What is says is, "Appropriate relief" per se. In other words, what is very important at the outset and as a framework for understanding the remedies that we seek, is that the remedy is part and parcel of the right. It is not well established in our common law, that principle. It is expressed in the Latin maxim *Ubu jus ibi remedium*. It was referred to as we know by [Indistinct 00:16:56] CJ in *Minister of Interior vs. Harris.* We think that that is an important starting point for understanding the principle of remedies and the relief that we seek.

ARBITRATOR JUSTICE MOSENEKE: Yes, where there is a right there is a remedy.

ADV ADILA HASSIM: Indeed.

ARBITRATOR JUSTICE MOSENEKE: Or there must be a remedy.

ADV ADILA HASSIM: The right would be enervated without a remedy, in other words. The second principle we submit is that the courts have wide and generous remedial jurisdiction and perhaps the most cited dictum on remedies, the Constitutional Court in *Foce* held that appropriate relief means effective relief and this most often cited dictum is as follows and I quote:

> "I have no doubt that this court has a particular duty to ensure that within the bounds of the constitution, effective relief be granted for the infringement of any of the rights entrenched in it."

In our context, an appropriate remedy must mean an effective remedy for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced, particularly in a country where so few have the means to enforce their rights through the courts. It is essential that on those occasions when the legal process does establish than an infringement of an entrenched right has occurred it be effectively vindicated.

The courts have a particular responsibility in this regard and are obliged to force new tools and shape innovative remedies if needs be to achieve this goal. In the same judgment Justice Richler [?] considered what the meaning of an appropriate remedy is, and he described it as one that is specially fitted or suitable. And in our written submissions, we make reference to his discussion on what is– what it means to have a remedy that is specially fitted or suitable, and that is at paragraph 97 of the judgment.

I do not wish to read the entire passage, it is in our written submissions, except to highlight the following sentence.

> "The facts surrounding a violation of rights will determine what form of relief is appropriate."

Similarly, in *Mothau* the Constitutional Court held the to grant appropriate relief, the court must determine what is fair and just in the circumstances of the

particular case. And in reference to this case I would like to quote the following passage, which is at paragraph 85 of the *Mothau* judgment and it reads as follows:

> "The various interest that might be affected by the remedy should be weighed up. This should at least be guided by the objective to address the wrong occasioned by the infringement, deter future violation, make an order which can be complied with, and which is fair to all who might be affected by the relief. It also goes without saying that the nature of the infringement will provide guidance as to the appropriate relief."

So following on *Foce*, *Mothau*, has set out very neatly the principles that one should bear in mind when determining appropriate relief. It is also our submission that Section 38 which is to be read with Section 172(1)b of the Constitution and that is that the relief– that the court may make any order that is just and equitable, and our courts have held that this an expansive remedy that can be used even if there has been no declaration of invalidity. In other words, the bounds of the remedy that a court may impose is restricted only by what is just and equitable.

We have referred to the relevant case law in our written submissions and I do not wish to repeat my submissions now. What we would like to say it that the arbitrator's terms of reference, the arbitrator, the jurisdiction of the arbitrator which is contained in the terms of reference, specifically paragraph 6 of the terms of reference, mirrors the broad nature of the court's powers when

confronted with a violation of constitutional rights. So these principles tell us that the nature of the infringement of rights, the facts of a particular case, and the need to address the wrong are all relevant to what would be appropriate relief.

ARBITRATOR JUSTICE MOSENEKE: Well, it occurred to me that when one looks at the arbitration agreement, the terms are couched in full anticipation of equitable redress. So if one for a moment were to forget Section 38 read with Section 172(1), God forbid, we should never forget them, assuming we set them aside for the moment, is there not a pre-existing agreement between the parties on the kind of relief that the arbitrator ought to utilise? Its equitable redress in paragraph 6, the point you have just made, seems to guide us and tell us you are going to have to find equitable redress here. In other words, is it fair to say the parties anticipated that there will be equitable redress? And is that sufficient jurisdictional fact on its own

ADV ADILA HASSIM: We would submit that it is. The section– paragraph 6 rather, confers a very wide jurisdiction on the arbitrator and in essence, it is an equity jurisdiction that you preside over in this arbitration, which means that we have entrusted to you the power to award redress that is appropriate, just, effective, equitable in the circumstances. There are some examples and we have provided guidance as to the kind of relief we seek from the arbitrator, the kind of relief that is normally awarded by a court of law. That too is an indication of the wideness of your jurisdiction being one of equity.

ARBITRATOR JUSTICE MOSENEKE: So the argument that you have no part to grant constitutional damages, how does that stack up against the provisions

of paragraph 6?

ADV ADILA HASSIM: Well, our argument does not stack up with my interpretation of paragraph 6 as I have just presented it to you. It is precisely for the reason of reaching closure and equitable redress, including compensation, that the parties sought to bring this before an arbitrator, to suggest that the power of the arbitrator should be curtailed and that we should be bound by something less than what we would be entitled to get in a court is, with respect, an unreasonable argument.

ARBITRATOR JUSTICE MOSENEKE: Yes, because the essence of the argument would be you are limited to granting common law relief, and that we concede, but you are not entitled to look at the Constitution in order to search for equitable redress, is it not? That is the essence of [intervenes]

ADV ADILA HASSIM: That is the essence of the argument, and I think that we should make short shift of that argument. The entire purpose of our presence in these arbitrations has been to vindicate the constitution, it has been to hear from the families – and we have heard a lot from the families – regarding violation of rights. We have heard concessions from the government in relation to the violation of rights. So to reach the point at this stage of the proceedings in which we are now dealing with the arcana of law, to say that constitutional damages does not pertain is an affront, I would say, not just to the families but to the dignity of these proceedings.

I would also like to point out that constitutional damages, there is a tendency to perceive constitutional damages as something alien and out there and wild, but in fact the courts have awarded constitutional damages in the

past. So it is not something new. The only question before you, Justice, is whether these are appropriate circumstances in which to award constitutional damages and if so, in what amount. It cannot be that your hands are tied and that you cannot look at the availability of constitutional damages as a remedy at will.

ARBITRATOR JUSTICE MOSENEKE: Yes. Of course historically, claims sounding in money arising particularly from delict have always been couched in common law terms and in the transition, is it not so, when you look at the cases that the courts have always struggled with, that interface, and whether in fact there is– there are two separate jurisdictions, two systems of law or one system of law. Do we have two systems of law? Do we– if you couch your claim in common law terms, would you be denied reliance on constitutional protections?

ADV ADILA HASSIM: No, Justice, pharmaceutical manufacturers has answered that question already, and it was clear in the judgment of Justice Castleton[?] at the time that we do not have two bodies of law. We have one system of law in which the common law forms a part and indeed the common law may need to be developed and infused with the values of the Constitution but there are not two separate bodies of law.

ARBITRATOR JUSTICE MOSENEKE: And could you non-suit a litigant on the grounds that your claim relies exclusively on rights set out in chapter 2 of the Constitution? Could you send people packing on the ground that they did not plead an infringement traditionally as one would do in a delict, an act that is unlawful, that is negligent or intentional, and that causes harm. That is a standard definition of delict.

ADV ADILA HASSIM: That is correct, Justice. The first thing to be said in that regard is section 38 makes it clear that one may approach a court or another tribunal for appropriate relieve where there has been a violation of rights. The mechanism for doing this is shaped by our history and the vehicle of particularly the acquilian action for claiming a violation– well, for claiming relief under a delectional– under delict. And in our written submissions, we sat out how that has evolved over time and how emotional shock, for example, as general damages has come to be included within the framework of the aquilian action.

The fact that a particular framework and mechanism is used does not mean that one cannot in the context of that framework include a claim for a violation of rights. In fact, at times, at times, the common law and relief under the common law may include a decision on the violation of rights. So if in a particular matter the claim goes further to say the constitutional rights that have been breached cannot be effectively vindicated through the common law alone, then it is a natural extension to say constitutional damages is an appropriate approach.

ARBITRATOR JUSTICE MOSENEKE: Yes. In *Dikoko* [?], for instance, the argument, was it not, it was whether or not a defamation claim invokes constitutional protections.

ADV ADILA HASSIM: Yes, and [intervenes]

ARBITRATOR JUSTICE MOSENEKE: And the court was basically wrestling with that question whether if you came with vanilla [?] claim, i.e. a common law claim of defamation, are you entitled to rely on the protections that are also extended by the constitution?

ADV ADILA HASSIM: Indeed, Justice, and one is. The mechanism as I said is not a bar to– and it links to your first question about whether there are two bodies of law. It answers the question that there are not two bodies of law, and we need to, and *Kamichelle* [?] I think also dealt with it very well in addressing the question of development of the common law in order to bring it in accordance with the values of a democratic South Africa.

ARBITRATOR JUSTICE MOSENEKE: Yes, you may proceed. I delayed you a bit but I needed to debate with you something that probably is very fundamental in this particular case. Very well.

ADV ADILA HASSIM: I am indebted, Justice. So [intervenes]

ARBITRATOR JUSTICE MOSENEKE: But before you move away, why do you say the parties in the agreement used, preferred the phrase "equitable redress" and not just compensation? Is there any significance to be drawn therefrom?

ADV ADILA HASSIM: I think that it is quite an important phrase that is used in the terms of agreement, and it is intended to confer, as I submitted, Justice, a jurisdiction of equity on the arbitrator, and that is why my references to Section 38 and 172(1)b are relevant but my argument is that you may go further. You may do whatever is just and equitable in these circumstances.

ARBITRATOR JUSTICE MOSENEKE: Thank you.

ADV ADILA HASSIM: I left off before our discussion, Justice, about centrality of facts and the circumstances of the case to determining what is appropriate relief, and I would like to go to that now. And the facts of this all began with the termination of the contract between the Gauteng Department of Health and Life

Esidimeni, a decision which was given effect to on 28 September 2015 in a letter to Life Esidimeni providing six months' notice of termination.

That meant that all of the users, more than 1 700, would have to be moved out of the facilities by 31 March 2016, which was then later extended to 30 June 2016. We were provided with three reasons for the termination of the contract by the MEC and by– the former MEC, Ms Mahlangu, and by the former HOD, Dr Selebano, and others in the hearing. And these three reasons were the following:

- The first that the Gauteng Department was merely implementing national policy on the deinstitutionalisation of mental healthcare users;
- the second is that the auditor general had raised a concern regarding the duration of the contract with Life Esidimeni;
- and the third was budgetary constraints.

There is no particular order of hierarchy in those three reasons, but what we were able to establish by the end of the hearing is that none of these reasons hold water. The argument and the justification of deinstitutionalisation was roundly discredited at the hearing. There was no aspect of the marathon project that was consistent with the national policy, let alone the laws of the land.

Mental healthcare users were not consulted, informed, or prepared for the process of transfer out of Life Esidimeni. Their proxies, the families, were not consulted, informed, and prepared. There was no proper discharge process. The NGOs to which they were moved were in abysmal conditions. Many mental healthcare users were moved more than once, and many were moved to NGOs

far from their family home. All of those factors fly in the face of the national strategic policy– strategic framework on mental healthcare.

Secondly, both Ms Mahlangu and Dr Selebano claimed that the reason for the termination related to the need to comply with the auditor general's requirements concerning evergreen contracts. No evidence was provided to support the sustensible reason. To the contrary, the MEC for finance, MEC Chrissie, testified that despite her search of such evidence, no evidence of that claim could be found.

The third reason was resource constraints but we now know that there were no budget constraints in fact. The overall budget for Health in Gauteng increased in the years before and after the removal of the patients from Life Esidimeni. The contract with Life Esidimeni was cost-effective. The Department's bank account was a leaky bucket, with many millions of rand being paid to consultants at a time when National Treasury had instructed– had issued an instruction to curtail spending on consultants.

We also know that financial mismanagement was rife with increasing accruals and significant irregular expenditure, R1.6 billion of which was referred to the SIU for investigation during this period. The Provincial Treasury furthermore had advised the Department not to cut cost on core services. Those are the facts that have emerged from the hearing in relation to the reason that the Department faced budget pressure.

We also submit in any event that resource constraints cannot constitute an acceptable justification for the failure to protect constitutional rights if the Department was mistaken in its understanding of its obligations in relation to

those rights, and in that regard we refer you, Justice, to the judgement of the *City of Johannesburg vs. Blue Moonlight*, which is in our written submissions, in which the court stated as follows.

> "It is not good enough for an organ of state to state that it has not budgeted for something if it should indeed have planned and budgeted for it in the fulfilment of its obligations."

Here, the Department had previously budgeted for the care of mental healthcare users at Life Esidimeni but under the guise of budget constraints, they cut the level of health services to those mental healthcare users and the quality of health services that were provided to those mental healthcare users, resulting, in our submission, in a negative infringement of the right of access to healthcare service.

ARBITRATOR JUSTICE MOSENEKE: Is this a case of the limitation found in the constitution on fulfilment of a right being subject to available resources?

ADV ADILA HASSIM: It is indeed not. We do not even get there. This is not question of section 27(2) and the progressive realisation of the right. We are dealing squarely with the negative infringement of section 27(1).

ARBITRATOR JUSTICE MOSENEKE: Ja, nor was it pleaded or suggested by any of the principles, even [indistinct] suggested the opposite. We had more than enough money.

ADV ADILA HASSIM: That is correct. In the end, Justice, we still do not know why. I have addressed the three reasons. I said that they are not actually reasons we have learned. They are not the real reasons. In the end we still do

not know why this devastating decision was taken. As if the irrationality of the decision is not bad enough, there was no sense, reason, or responsiveness to be found at any point during which the saga unfolded.

What we find instead is disregard and in some cases, contempt for those who warned of the risks, cruelty, and serial violations of the law, constitutional rights, and obligations. In our written submissions, we sat out from page 17 to page 60 the very extraordinary circumstances of these deaths. It is set out with some detail, Justice. I would like to refer to the key aspects of these facts, and the reason I wish to do so is for the reason I stated at the outset of my address, which is it is inextricably linked to the relief which the claimants seek.

ARBITRATOR JUSTICE MOSENEKE: Yes, of course. The more egregious the violations the more they would attract a need for equitable redress.

ADV ADILA HASSIM: That is so.

ARBITRATOR JUSTICE MOSENEKE: So the facts remain very relevant.

ADV ADILA HASSIM: The first aspect that we addressed and the written submission was that there were warnings, that the alarm was sounded many times but was not heeded. And the first written evidence of the raising of the alarm is on 28 April 2015, and we are by now all familiar with this letter from the clinical head of the Gauteng psychiatric hospitals and head of departments.

The letter was addressed to Dr Manamela and copied to several other officials in which the clinical heads express their concern about the reduction of beds at Life Esidimeni. What the clinical heads noted was that based on available evidence, the decision to reduce beds at Life Esidimeni will, and I quote:

> "…in all probability escalate cost of healthcare delivery in our province rather than reduce them."

The clinical heads specifically warned against on masse discharge, and finally they stated that the decision to reduce beds in Life Esidimeni will have, and I quote:

> "…a devastating impact on the health and social wellbeing of mental healthcare users, the healthcare system, and members of the community."

The response we received from the officials who testified, Dr Manamela testified that she advised the clinicians that even though the letter was addressed to her, it should be rather send to the former MEC and to Dr Selebano, although he had been copied on that letter, Dr Selebano. Dr Selebano testified that he did not remember receiving the letter but he did not deny having received it. Former MEC Mahlangu testified that she personally never actioned communications that are sent to her. So the letter may have arrived at her desk, it may not have. She would not know because it is something she leaves to the officials in her department.

That was 28 April 2015. On 22 June 2015, the South African Society of Psychiatrists wrote to former MEC Mahlangu. The letter was also copied to officials both at the national and provincial level. Sasop stated its concerns that the reduction of beds at Life Esidimeni would lead to, in their words, "unintended costly negative consequences." There was no response to this letter.

In October 2015, Sasop addressed another letter to former MEC

Mahlangu. The letter was also copied to several officials. Again, Sasop raised it concerns that community mental health services had not been sufficiently developed to accommodate mental healthcare users. Again, they did not receive a response.

On 26 November 2015, the South African Depression and Anxiety Group addressed a letter to the former MEC Mahlangu, Dr Manamela, and Dr Selebano in which they recorded the minutes of a meeting that had taken place between the parties. They sought in this letter an urgent response to a long list of question. Again, Justice, I think we are all familiar with that letter. The details are set out in our written submissions but what the letter also showed was that the managers of the state facilities, the facilities that were referred to by formed MEC Mahlangu in response to the legislator, confirmed that the state facilities were not able to absorb additional patients.

Dr Manamela testified that she did not respond to the letter as it was addressed to former MEC Mahlangu and Dr Selebano, as well as to her, meaning she therefore did not have a responsibility to address the concerns or to respond to the authors of the letter. Former MEC Mahlangu testified that she did not remember whether she personally dealt with the Sadag letter sent on 26 November 2015.

However, in cross-examination, she conceded that she had in fact responded and the record shows her response to be as follows, and I quote:

> "Please get our legal team to get involved in this process. HOD and Dr Lebethe, you have to drive this process to provide leadership. These NGOs are dishonest!!! Please

treat this as urgent! Qedani."

In other words… Justice, I anticipated a question from but I think I will keep going.

ARBITRATOR JUSTICE MOSENEKE: No. No. It is little like walking away from a terrible situation and you come back to it, and you are bound to be asking as I do when you set out the facts as detailed as you do, truly, what were these public office bearers doing? How do they admittedly just ignore all these attempts to reach them in a variety of means, and to choose to see civil society as enemies? It– and I have minding over this and by reading hers, I am thinking why would they have taken this position that is so utterly devastating and choose that, and why would there be this continual pattern of just ignoring letters and emails that are never given attention to or responded to properly, as public officials are duty bound to? You might have the answer having worked through the facts.

ADV ADILA HASSIM: We can keep working through the facts. I am not sure I will have an answer for you, Justice, but what it does show is a contempt for civil society and the salt in the wound is that the same officials testified in these proceedings that they were not prophets. They were not foretellers. How could they have known? They could have known. They would have known if they had listened.

Unfortunately, Justice, the warnings did not end there. We heard evidence from Dr Mkhatshwa that in addition to the warnings by the clinicians and civil society organisations that I have referred to, that he also warned Dr Selebano of the like catastrophic results of a haphazard relocation. He was

unable to persuade his colleague in the health profession to stop the course of action, and when it became clear that the plan was moving ahead, Dr Mkhatshwa then offered for Life Esidimeni to help train the NGOs, and that offer was refused.

On 22nd September 2016, Section 27 wrote to Ms Dumi Masondo, the chairperson of the Mental Health Review Board. Ms Masondo too was warned in her very special capacity as an independent custodian of the rights of mental healthcare users.

ARBITRATOR JUSTICE MOSENEKE: She chooses to be completely ignorant of her statutory duties but happily takes home what, R30 000 or more a month, every single month, and never raises a finger to protect these patients. I mean, what were these officials smoking. I mean, what where they doing? She has as job with statutory duties set out painstakingly and she gets paid every month, and chooses to look away. I do not know what to make of that but I mean, this deal bothers me so deeply.

ADV ADILA HASSIM: It is clear that she did choose to look away and unfortunately, Ms Masondo exhibited the same disposition towards civil society. So this letter on 22nd September, Ms Masondo denied receiving the letter that was sent to her, although she confirmed her email address to be correct, she took no further steps. She confirmed too that she had had a conversation with Ms Stevenson of Section 27 but never reverted.

So her attempt to appeal to a party, a body, an independent institution of the Department where the families were getting no joy was also fruitless.

ARBITRATOR JUSTICE MOSENEKE: I mean, that is a wilful faughting[sic] of

a legislative purpose. The lawgiver goes out there and says, "I will protect mental healthcare users by using a review board." It is constituted. Members take their money every month and they never raise a finger to protect mental healthcare users.

ADV ADILA HASSIM: It is, Justice, that is– it is exactly why the tax payers have agreed to the appropriation of public funds for that purpose but those public funds were squandered in this case.

On 14 December 2015, Section 27's Ms Rejayjay [?] sent an email for the premier's attention. The premier testified that he had not seen the letter that was sent to his office by Section 27, and he did confirm that the addressees were his staff but that he had never received the letter, and he deny knowledge of the 2015 litigation that then ensued.

The National Department of Health was also warned about the project. Section 27 contacted the director general of Health, Ms Precious Masondo, and informed her of the risks in November 2015. Ms Masondo did intervene and facilitated a settlement agreement between the parties but she testified that she was under the impression that once the settlement agreement was signed, she did not have to intervene any further.

So the families of the mental healthcare users made their concerns known repeatedly in various means through meetings, protests, and even litigation but protestation by the families were seen as a sign that the families were being influenced by others or that there was a political agenda at play.

ARBITRATOR JUSTICE MOSENEKE: Of course this obvious and deep disregard, [indistinct] disregard for all these pleas must have a play in equitable

redress, is it not?

ADV ADILA HASSIM: We will be submitting that, that conduct not only goes to the violation of the breach of fundamental rights under chapter 2, but is fundamentally undermines the principle of participatory democracy that is enshrined in section 195 of the Constitution and without the ability to rely on section 195 as the mechanism to assert one's rights in chapter 2, the members of the public are bereft. They are disempowered. They are disabled.

ARBITRATOR JUSTICE MOSENEKE: If you think about it, had just the family committee or family members been listened to or at least their complaints investigated, the disaster would not have ensued.

ADV ADILA HASSIM: That is true.

ARBITRATOR JUSTICE MOSENEKE: The timeous protests and screaming and– that is set out in the heads, and they were ignored.

ADV ADILA HASSIM: And all of those protests and shouts and even the December 2015 litigation came before the patients began– before the transfer of the mental healthcare users.

ARBITRATOR JUSTICE MOSENEKE: Yes, indeed.

ADV ADILA HASSIM: Justice, it is almost 12 o'clock. Should I keep going for a few minutes?

ARBITRATOR JUSTICE MOSENEKE: No, you have three minutes [intervenes]

ADV ADILA HASSIM: I will use the three minutes.

ARBITRATOR JUSTICE MOSENEKE: If you go three minutes over it will not harm anything but it is fine. I think let us use that time and then take a break.

ADV ADILA HASSIM: It is just a wrap-up.

ARBITRATOR JUSTICE MOSENEKE: I know you are moving over now to the litigation.

ADV ADILA HASSIM: That is right, Justice, and [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Maybe just take the break now. That is fine. It is a good point to stop and we can take it from there.

ADV ADILA HASSIM: As Your Justice pleases.

ARBITRATOR JUSTICE MOSENEKE: Okay. We are adjourned until 12:30.

ARBITRATION ADJOURNS

ARBITRATION RESUMES

SESSION 2

ARBITRATOR JUSTICE MOSENEKE: Please be seated. Adv Hassim.

ADV ADILA HASSIM: Thank you, Justice.

ARBITRATOR JUSTICE MOSENEKE: I just want to quickly say this. I see a big headline on social media that claimants have been awarded R200 000. No amount has been awarded at all. It is just so misleading [indistinct] all those quick readers who look at headlines. Only the arbitrator can award an amount. All that happened this morning was the State indicating what amounts are they prepared to admit, not the amount that the arbitrator would lay down. It is an obvious error but in this world of social media and fast headlines it is totally

unhelpful. So the journalists, just please go carefully. These are deliberations and the final amount would come out at the end of the award. Counsel.

ADV ADILA HASSIM: Thank you, Justice. We left off at the point of litigation in December 2015.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: Which is preceded by a letter on 9 December 2015 by the lawyers for the parties, Section 27, representing Sadag, Sasop, the South African Federation of Mental Health, and the Association of Concerned Family Members of Residents of Life Esidimeni.

That letter was addressed to former MEC Mahlangu, Dr Selebano, and Dr Manamela. In it, Section 27 raised its clients' concerns regarding the need to assess mental healthcare users, the preparedness of public health facilities and NGOs to which the mental healthcare users would be transferred, and the violation of– the potential violation of the users' right to healthcare services.

They proposed a way forward that included a joint approach to court by the parties for the appointment of curators *ad litum* and for the suspension of all discharges, pending the submission of reports from the curators. Dr Manamela said that she did not respond to the letter as it was addressed to the former MEC Mahlangu and to Dr Selebano.

The litigation was in fact opposed by all of the parties, and including the premier. The premier testified that he was not aware of the litigation, and that he gave no instruction to the attorneys to file a notice of intention to oppose. We ended in a position where the premier– the premier's testimony was to the effect that matters arrive in his office and that it is handled by his officials, and

that this litigation was never brought to his notice for an instruction as to the way forward, the end result being that a notice was filed without a mandate from the political principal in that matter.

The parties settled the litigation the day before the hearing, and the settlement was important because it provided for a consultative process with the families and specifically, that the Department would not transfer mental healthcare users to new facilities unless they would receive health and other services of no lesser quality to those service that they were already receiving at Life Esidimeni. It is common cause now that the government parties did not honour the settlement agreement.

In March 2016, the civil society organisations discovered that the Department intended to move 54 mental healthcare users to Takalani Home, a facility that the Department had classified as a facility for children with severe or profound intellectual disabilities. None of the 54 mental healthcare users was a child. They all had a variety of mental illnesses, including dementia, behavioural problems, hyper-sexuality, schizophrenia, and severe cognitive impairment.

After an attempt to get an assurance from the Department that the move would not go ahead, the civil society organisations made an urgent application to the court to prevent the discharge of the mental healthcare users. It was brought in the form of an interim interdict. The Department defended the litigation, and based on the misrepresentations by the officials, particularly Dr Selebano, the court dismissed the application, and so began this mass disbursal of the patients to facilities scattered across the province.

ARBITRATOR JUSTICE MOSENEKE: Again, the question must pop up. Why the all the [indistinct] in order to achieve an unlawful end, i.e. to move these vulnerable patients? I mean, why? What we know now were lies in the affidavits, the question keeps popping up why was it so imperative to the extent of public officials lying in their affidavits? It continues to boggle the mind.

ADV ADILA HASSIM: Justice, it appear that the Department was more intent on opposing and fighting and warring with civil society in that litigation than addressing the real concerns that were being put on the table and they were successful in their fight.

ARBITRATOR JUSTICE MOSENEKE: By untruthful depositions.

ADV ADILA HASSIM: That is so. And Ms Mahlangu testified she did not remember whether she called a meeting to discuss defending that litigation, the March 2016 litigation. She also could not remember whether she opposed the interdict. She could not remember how many patients died at Takalani. She could not remember whether there was a typhoid outbreak at Takalani. So her evidence was of no use to us in trying to understand why, to answer your question, Justice. They defended the litigation in the manner they did.

Justice, I was remiss in our written submissions on this point in not referring the arbitration to section 165(4) of the Constitution, and I would like to make that submission now, coming after the submissions on the litigation in 2015 and 2016, 164(4) of the Constitution requires organs of state to assist, they must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.

The manner in which the 2015 and 2016 litigation was handled, both in

terms of dishonouring the settlement agreement in the first case, and the misrepresentation, the lies that were put to the court in the second, show a flagrant violation of 165(4) of the Constitution in our submission.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And that, too, Justice, we will submit is relevant to the remedy. So the Takalani litigation then opened the floodgates, and then began the mass removals– of the mass transfer of patients to NGOs. And as we have set out in our written submissions, the number of patients to be transferred was in excess of 950. The resolutions from a meeting in the MEC's office on 8 April 2016 show that 950, at least 950 mental healthcare users needed to be moved to NGOs within three weeks. None of those mental healthcare users had been assessed for discharge by doctors.

The second element of those minutes was that they were to be moved to NGOs, then assessed, and then it would be determined whether they should be moved elsewhere. So apart from them just on masse move out of Life Esidimeni, many mental healthcare users were moved from one NGO to another, and contrary to the protestations of some officials that it was just that the implementation of this plan went awry, the minutes of that meeting of 8 April show that it was by design.

Examples of the move from– transfer from NGO to NGO include Charity Ratsoso who was moved from Life Esidimeni to Cullinan CCRC, and then to Anker. Siswe Thlatswayo was moved from Life Esidimeni to an NGO in Hammanskraal then to CCRC, and then to Anker House. Daphne Ndlovu testified that CCRC took 21 mental healthcare users from Precious Angels

when it was closed down.

The mental healthcare users came via Kalafong and Pretoria West Hospitals. So, Justice, that is to demonstrate the point of the constant move from one place to another in the light of the evidence that was provided by the experts of the need to ensure the stability and a coherence and a security of the mental healthcare users in the manner in which they are transferred.

The transfer was also characterised by the failure to provide clinical records and medication or to ensure that the clinical records and the medication accompanied the mental healthcare users at each point along the way from facility to facility.

ARBITRATOR JUSTICE MOSENEKE: But surely all of these smart people would have known that it was a no-no to have mass removals of patients, is it not?

ADV ADILA HASSIM: Well, there were health professionals who were involved. So if nothing else, they were experts in something. They were experts in dealing with patients and the duty on them was higher.

ARBITRATOR JUSTICE MOSENEKE: And it just shows the egregiousness of their conduct, how they were determined to act unlawfully and uncaringly. They would have known, they should have known and they did know, should I find, despite their denials?

ADV ADILA HASSIM: Justice, I will be coming to that a bit later as well and we will be submitting that it is undeniable in our view that they knew. They knew because they were told. Apart form our submission that they ought to have known, people in their position, officials in their position and especially the

health professionals, they knew because they were told. They were told by experts. It cannot come to the aid of the officials that they did not know that a mass move of patients in these circumstances would not come to the end that it did.

Justice, Prof Makgoba corroborated the evidence on the clinical records and the medication but it would seem that in the process of the transfers things went missing. And in addition to that problem to the access to medication, we also learned through the testimony of Ms Franks that many of the patients did not have IDs, and she testified that she did not have IDs for 30 mental healthcare users under her care. And this is important because as a result of that, she had difficulties accessing care at hospitals for those mental healthcare users who were sick and who needed more acute attention at a hospital rather than being kept at the NGO at Anker.

While support from a family is important to ensure that a mental healthcare user is able to settle into a new environment, many families testified to not being informed of the moves. Some were told that the moves would happen but they were not informed when they did happen or where their relatives were being moved to.

The testimony also showed that the NGOs were given more mental healthcare users at a time than they could handle. Dr Selebano acknowledge the overloading and the overcrowding at the NGOs. The problems did not end there because what happened next was the manner in which the mental healthcare users were transported and the manner in which they were selected to go to several of the NGOs.

The process in the evidence, a common refrain was that the process described as chaotic. Mental healthcare users were left unattended outside Life Esidimeni facilities and multiple NGOs and vehicles collecting the mental healthcare users. A document submitted by former MEC Mahlangu shows that many of the NGOs in fact used their own transport. In at least one instance an NGO arrived at Life Esidimeni to collect mental healthcare users in bakkie.

Dr Mkhatshwa testified that he instructed that the bakkie be turned away. The picking of mental healthcare users was evidenced through the testimony of Dr Mkhatshwa and others but Dr Mkhatshwa said that he complained about this. He complained to the Department that it was unacceptable for NGOs to arrive at the facility and choose which mental healthcare users they wished to take.

ARBITRATOR JUSTICE MOSENEKE: Ja, almost reminiscent of slavery. I will have that one, not that one. That one looks fitter than that one.

ADV ADILA HASSIM: In the case of Cullinan, the facility staff went to Esidimeni to collect 10 mental healthcare users. Ms Daphne Ndlovu testified when they arrived at the facility, they were met by a group of 26 mental healthcare users and were told to take them to Cullinan on the basis that they have arrived with a 27-seater bus. In other words, there were space for more than they had come to collect, and therefor they were loaded onto the bus.

When it comes to the identification of the NGOs, there appears to have been no system at all to ensure that the NGOs were suitable. All the NGOs that– at they knew was that the NGOs provided care services, social services. They were all invited to a meeting in September 2015. At the meeting they

were told that they could sign up if they were interested in taking care of the mental healthcare users who were going to be moved out of Life Esidimeni.

ARBITRATOR JUSTICE MOSENEKE: Did any of the witnesses ever take responsibility for the change of tag in plan? I have not heard. Remind me. Any one of them saying, "Oh, ja, I was part of the decision not to take them to institutions but actually to NGOs. Who owned up on that, if any?

ADV ADILA HASSIM: As I recall, Justice, officials like Ms Hannah Jacobus testified that she was aware that patients were going to be transferred to NGOs. The former MEC said the plan was always to take them to facilities and a few to NGOs. Nobody explained the reason why the transfer suddenly became so urgent that required the mass discharge.

ARBITRATOR JUSTICE MOSENEKE: And why? I really mean who would have decided to change rump of the plan? The plan was to institutions and only a few to NGOs and I am trying to reel back. I do not remember somebody saying, "I decided no longer institutions except a few. The mass of the mental healthcare users must go to NGOs." Who made that decision?

ADV ADILA HASSIM: That is not– no one owned up to making such a decision. What we do know is although the initial reason, pardon me, although the initial plan, they say, was to transfer most to public health facilities, that changed quite early on. And it was obvious from the evidence of Sadag that it was going to change because there was no space within the public health facilities. But no one took on the responsibility for the decision to use these NGOs and to transfer to more NGOs than were originally planned.

Prof Makgoba in his testimony expressed the view, his view that there

were two indications that the NGOs were, in his words, "mysteriously selected." The first was that there was never any clear selection criteria; in fact, there seem to be no requirements for premises, staff, qualifications or experience. The second is that there were already other NGOs in the province that would have had the experience to look after these patients but new ones were brought in instead. New NGOs were brought in instead. So the best that Prof Makgoba could offer was that this was just mysterious and the mystery was not cleared through the evidence in these hearings.

With regard to the assessment and licencing, it was only by the time that Ms Hannah Jacobus testified that it was plain and clear by her admission that there was no assessment of the NGOs before they were licenced and before the mental healthcare users were sent there. There had been denials earlier on by officials until Ms Jacobus took a stand.

Apart from the questionable assessment before the licencing and the rapid deterioration of NGOs following assessment and licencing when it did ostensive [indistinct] occur, there were problems as we know in the licencing process itself. They reflected incorrect addresses, incorrect mental healthcare user classifications – all were backdated to 1 April 2016 regardless of the date of actual signature. All licenses were issued by Dr Manamela, despite her not having the legal authority to do so. And at least some, if not all, the licences were re-issues by Dr Selebano following his interview with Prof Makgoba and those too, were backdated to 1st April 2016.

Ms Jacobus testified she was the person in charge of licencing, and she claimed not to have known about this having occurred. Dr Selebano admitted to

having reissued the licences. What is shocking is that amongst those licences that he reissued, was a licence for Precious Angels which he issued at a time when the NGO had already closed down.

He also issued, reissued a licence for the NGO, Ubuthle Benkosi. This was after the discussion between him and Prof Makgoba about these NGOs, this NGO, pardon me, Ubuthle Benkosi and patients having been transferred from Marabastad to Lanceria airport and then somewhere else. Despite that knowledge, and the transcript is there on the record that Dr Selebano was aware of this, with that knowledge he reissued a licence for Ubuthle Benkosi.

Then we get to the conditions at the NGOs.

ARBITRATOR JUSTICE MOSENEKE: But as a matter of credibility, I know you are going to get there ultimately, we surely have to make factual findings around all these claims of ignorance. I do not know. I did not see this. I did not hear this. I did not open up my inbox of my email. I did not read the letter sent to me. I did not know about the litigation. It was done in my stead without my permission. I did not hear. Do the probabilities permit my holding these to be credible responses as a matter of factual finding?

ADV ADILA HASSIM: Justice, my submission is that the probabilities are that they are not credible, and they are not credible when you look at the context of the number of denials of not knowing. When you look at the number of attempts that were made to bring the information to the knowledge of the officials, and some of the admissions. So the admission is that the documents were received. Letters were received but "I do not remember whether I dealt with it or not," says Dr Selebano, for example.

Ms Mahlangu testifies that yes, she did receive the letters but she entrusted officials to deal with it. And when you read them all together, it is a smokescreen and it is this blanket denial on all of the officials to try to evade what was staring them in the face and what is staring them in the face in these hearings, and the responsibility that they bear for having made decisions in full– with the knowledge that there would be problems.

ARBITRATOR JUSTICE MOSENEKE: I mean, what is the impact of that on the hurt of the families, impact on what actable redress ought to be? You are seeking closure and you are confronted, if I so find, a bunch of lies.

ADV ADILA HASSIM: There is one other thing in relation to probability is that all of those warnings were public. They were in the media, in print media and on TV. I just wanted to point that out. We– I will be making submission on how these facts relates to the remedy and indeed, our submission is that it goes to the egregiousness of the offence and therefore, the quantum.

The conditions of the NGOs, if I could just turn to that, Justice. And we– again, we are all familiar now through 43 days of testimony with probably way too much detail, so what I would like to highlight is that the evidence that emerged in the hearing is undisputed. It paints a ghastly picture of the conditions of the NGOs.

What does this picture look like?

- Food was insufficient, number one. The food was insufficient, of poor quality, or had to be provided by family members.
- Two, NGOs had problems accessing correct medications for mental healthcare users.

- Three, there were significant understaffing, especially in relation to nursing staff and access to a medical doctor
- Four, some NGOs had insufficient security.
- Five, some NGOs were overcrowded.
- In others there was poor hygiene with dirty facilities and unwashed patients.
- Many of the NGOs were cold and there were insufficient clothes and blankets.
- And finally, there was abuse or suspected abuse that was reported at some NGOs.

This is not the totality of the description of the conditions of the NGOs but these are some of the descriptions that emerged from all the testimony in these hearings.

ARBITRATOR JUSTICE MOSENEKE: This testimony is not from experts. It is from family members, is it not, many who saw the conditions, who experienced them, and who testified on them.

ADV ADILA HASSIM: Well, no, Justice. It was not only from the families because there were audit reports that, series of audit reports that were filed, belated audit reports I may add, in which the conditions of the facilities were recorded by Department officials, and those descriptions are shocking in themselves. Shama House, for example.

ARBITRATOR JUSTICE MOSENEKE: Ja. So the argument that expert witnesses had no facts on which to make inferences of abuse, of shock, of likely

anxiety, of depression, and all that went on with beginning to understand what their loved ones were going through, will have to be investigated carefully, is it not. The facts are there.

ADV ADILA HASSIM: Justice, the facts are there. The facts are in the Department's own documents.

ARBITRATOR JUSTICE MOSENEKE: And we should not expect experts to themselves give evidence of the facts.

ADV ADILA HASSIM: It is not the role of the experts. The experts had to provide an opinion based on the facts that are given to them.

ARBITRATOR JUSTICE MOSENEKE: And the facts can be inferred [?] from family members, from reports of the Department, and so on.

ADV ADILA HASSIM: And the report of the Ombud.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: Justice, conditions at the NGOs are expanded upon in our written submissions, and we make reference to examples including Takalani, and the evidence of Ms Boitumelo Mangena and her brother who went to find his mother but did not recognise her because she had lost so much weight;

Ms Phehla evidence about her daughter, Debra Phehla, who had been kept in solitary confinement in a storeroom;

the reverend's evidence in relation to his son Billy, who was so hungry that he, when eating a bag of chips, licked the packet clean;

Mr Mogolani[?] testified that when he visited his brother at Rebafenyi, his brother had lost so much of weight that Mr Mogolani could not recognise him;

Ms Colitz testified that when she visited her husband Frederick, he could not eat, he was not receiving his medication, he had lesions on his face and heels, and although he was clearly ill, the staff refused to take him to hospital. He passed away while she was making a desperate plea to the NGO to take him to the hospital.

All of these circumstances we now know lead to the deaths of at least 144 mental healthcare users.

ARBITRATOR JUSTICE MOSENEKE: And a lot of these conditions were also relayed by NGO owners or managers, is it not?

ADV ADILA HASSIM: That is so. Some of the NGO managers testified and confirmed. And their reason, their explanation was that they had not received the subsidies that were promised by the Department and that explains, in their view, the conditions at the NGOs and the problem of not having sufficient food and blankets and clothing.

ARBITRATOR JUSTICE MOSENEKE: So there is no [indistinct] to your to your facts from which certain expert inferences can be made?

ADV ADILA HASSIM: Certainly not, Justice. The first mental healthcare user to die as early as 26 March 2016, was Debra Phehla, who died at Takalani with brown paper and plastic in her stomach.

Following Debra, at least 143 more mental healthcare users died. When Ms Mahlangu answered to the provincial legislator on 13 September 2016, she said

that 36 deaths had occurred. We know now that by that point, 82 people had in fact died. In her testimony, Ms Mahlangu claimed she was unaware of the deaths until she was provided with information from her department just before she had to answer to the provincial legislature.

When it was put to her, when a letter of 1st September 2016 from Section 27, in which several deaths were recorded, and when that letter was put to her, she said that again, she had referred it to relevant officials to deal with. We have on the record the response from Ms Mahlangu saying, "I will revert." That was her response to Section 27. She never reverted but also, she cannot claim not to have known as she later did during the hearing, that she did not know that people were beginning to die.

The families through all of this testified, and it was a recurring theme, their desperate search for their relatives, and this is because they were not provided with details as to where their relatives were going to be transferred, and when. After the moves, most families were not informed and some spent months searching for their relatives. And again, Justice, the examples are set out in the written submissions of the amount of time it took to locate the relatives and more shockingly, the delay in informing relatives that– sorry, informing the families that the mental healthcare user had died.

In the case of Ntombifuthi Dladla, she searched for her brother in several NGOs for more than four months. She could not find him. She approached the Department directly. She went to the Department of Health offices on 20 January 2017. The officials were unable to help her. Eventually Ms Dladla was informed only on 10 February 2017 that her brother had died on 24 July 2016.

And that brings us to the deceased and the bodies and handling of their corpses, and what Prof Makgoba says, and I quote from his report, from his evidence rather, he says;

> "There was total disregard, I think, for human dignity and human respect in terms of the patients, and even after death. Many patients, many relatives did not know where their loved ones were, and many I think are still somewhere looking for them and not having received answers proactively, they had to dig. They had to go knock at the many doors and I think that was traumatic and frustrating over time."

In other words, the lack of dignity, the failure to accord dignity to the mental healthcare users when they were alive, continued after their deaths. I referred to Ms Ntombifuthi Dladla and the delay in informing her of the death of her brother, and we have also heard, her brother was Joseph Gumede, that when she identified her brother, his body had decomposed and was riddled with worms to the point that he could not be clothed in order to bury him.

We have conflicting testimony as to why and what happened on that. We have on the one hand the evidence by Mr Ratsetsoge[?] who managed the mortuary at Cullinan where Joseph Gumede's body was kept. His evidence was there was absolutely nothing wrong with the temperature and the temperature control of the mortuary. There we minor issues. There was routing maintenance. We saw maintenance invoices and repair invoices in which it suggested the contrary, that in fact they were aware that there was a problem

and that that mortuary was not keeping cold.

But in contradiction of that evidence, Mr Ratsetsoge says in fact, all was fine and that when he dispatched Mr Gumede's body to Mamelodi Hospital, there was no decomposition of the body. But then we have Mr Budha who testified from Mamelodi Hospital and he is the mortuary manager at that hospital in which he says that he body arrived in a state of decomposition and in fact had to be moved because of the smell.

In addition to that, we have evidence of the bodies that were moved from Precious Angels to Kuthelo Funeral Parlour and Put You to Rest Funeral Parlour, which does not have its own storage for bodies, despite this being a requirement of licencing.

ARBITRATOR JUSTICE MOSENEKE: Well, in all of the horror and pain of the facts, from the facts, these operators were not unimaginative about names. Precious Angels [intervenes]

ADV ADILA HASSIM: Put You to Rest.

ARBITRATOR JUSTICE MOSENEKE: Put You to Rest. I mean…

ADV ADILA HASSIM: Justice, the Put You to Rest Funeral Parlour as we know, in fact does not have a restful premises for a deceased. They did not have storage facilities. Instead, the bodies were transferred to a mortuary in Saulsville, which is a converted butchery. And we heard the testimony not only of Ms Gonzile Motsegwa who spoke about the trauma, who herself is from Atterigeville.

So when she was informed of the address of this mortuary, her first

thought was, "But that is a butchery," and testified of her experience of visiting this mortuary and having to look through bodies to identify her relative. But we also the evidence of DG Precious Matsoso, the director general in the National Department who investigated the facility upon hearing of the testimony of Ms Motsegwa and others, and they are in the process of investigating that.

And they found that there were more mortuaries in fact that were involved in this scheme at the time, and that is contained in the evidence in a report was provided by the National Department of Health. As it stands right, all we know is they are continuing investigations in relation to those funeral homes and mortuaries.

Justice, the heads of argument go on to deal with cruel, inhuman and degrading treatment, and torture. I would like to address that in the section dealing with the breaches of the claimants' rights. I just [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Yes, [indistinct – cross-talking] I will be asking your learned colleague for the State about that secondary trauma of the way deceased bodies were dealt with, it was just incredible that as though it was not enough for the patients to die, the families had to confront all of this, and quite long after the actual death had ensued and given the normal reverence that human beings tend to give to deceased bodies, it must have surely caused massive trauma. I am not a psychiatrist. I am not a psychologist but mere common sense, is it not/

ADV ADILA HASSIM: I submit with respect, Justice, it is mere common sense. And the other factor in this was the inability of the families to pay due regard to their cultural practices.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And to preform rights in the way that is prescribed in their cultural practices, which in itself has, I would submit, again common sense, a traumatic impact.

ARBITRATOR JUSTICE MOSENEKE: And in the heads rightly you refer to account of Mr van Rooyen about his sister's body reminding him of the smell of dog faeces.

ADV ADILA HASSIM: Yes, and he was not the only person to testify, was not the only family member to testify in that manner, comparing what– the smell of his sister. Other have said that the treatment of their relatives was worse that the treatment of a township dog.

ARBITRATOR JUSTICE MOSENEKE: Ja, that speaks to deep, deep dehumanisation [intervenes]

ADV ADILA HASSIM: Indeed so, Justice, and you know, we refer in the written submissions to the evidence of Ms Trotter. It was Ms Trotter that spoke about the word "torture," and when she was questioned on it, she said yes, it is a strong term, and if I could just read from that evidence. She said:

> "It is strong term. I think once you have decided that a group of people is undesirable and you dehumanise them, then actually you are in the terrain of torture."

So if you take a group of people who did not know the move was coming up, were not prepared for it, and they are moved at the backs of trucks, tied with sheets, without supervision, without ID documents, without wheelchairs, without

medical files, this is no longer a human endeavour. That in itself is a torture. This was done inhumanely and so now we are on the terrain of torture and then that does not stop, because the patients are moved into these filthy, dangerous environments as if they are not people. And then you know for example, the reverend saying that they would not give Billy water because he would pee in his pants.

So then you have got the withholding you know, however people were fed or were not fed, whatever happened in terms of that. You have now got something that is a basic human right, which is water and food, has become complex. That is torture. When you torture people that is what you do; you play around with food. You play around with water. You deprive them at a sensory level. You overcrowd them. And all of those features of actively torturing people are in this situation.

And her evidence was backed up by Prof Dye[?] who characterised the conditions as inhumane, cruel, and degrading. Justice, I do not want to dwell too much on the SAPS and the other role players and the Mental Health Review Board. It is in our written submissions but what I would like to say is that the importance of these sections is that at every turn, at every edifice of the state to which the families addressed their pleas, they were not heard and when it came to the police, there were reports of the deaths, there were reports of the mortuary, there were reports– there were requests for inquests, and the evidence is set out in our written submissions as to the unresponsiveness of the SAPS in that regard.

The evidence shows the unresponsiveness of the Mental Health Review

Board and what the requirements were of the Mental Health Review Board in these circumstances.

ARBITRATOR JUSTICE MOSENEKE: And before you walk away from the police, I was also struck by the casual attitude of doctors who completed death notices and some, as you have pointed out to me, appeared to be– to have practice numbers and they sign MBChB but there is no careful care to give respect even in death. Many would just write the name, IDs, sometimes incorrectly, and very perfunctorily "natural causes" and leave the rest of the form almost uncompleted. What do you attribute that to?

ADV ADILA HASSIM: Justice, just to add that it was not just that the forms were left incomplete, but in many of those examples that were pointed out during the hearing, the place in which the professional is select natural causes or not was not selected, yet that was the document that served as the basis for the issues of the burial– the notice of death of the, yes, the death certificates rather.

ARBITRATOR JUSTICE MOSENEKE: And that casual, that lack of professional care and industry made it difficult to decide whether or not this is a case that the as the law requires, deserves a post-mortem and subsequently, an inquest. So you have very small number, just about a third of the– less than a third of the deceased who had post-mortems because when you look at the forms it is all "natural death, natural death, natural death." Why do you think the doctors would have behaved this way, if they were doctors?

ADV ADILA HASSIM: Justice, I would prefer not to speculate.

ARBITRATOR JUSTICE MOSENEKE: Ja. Very well.

ADV ADILA HASSIM: It is of course of great concern that that is the state of the bureaucracy, that we cannot rely on a death certificate to be a true reflection.

ARBITRATOR JUSTICE MOSENEKE: You see, the point is it extends that failure to be punctilious and careful and caring about recording a death notice, speaks to the kind of regard you have for the deceased. It is another act of dehumanisation, even in death.

ADV ADILA HASSIM: Yes, that is [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Because the law requires us to do certain things to protect all of us if we were to die, and if our deaths are not caused by natural causes, whatever cost, as a result of natural causes, then the law seeks to protect us, a post-mortem followed by an inquest, an attempt to try and find the reasons for the death. That is part of the big human project to preserve and respect live. That is what death is about. It is not forms and people. It is about even in death, did you die by natural causes or did somebody cause your death? And if there is, there ought to be criminal responsibility but we denied that here by, it just struck me, so many forms that were not properly filled and therefore, difficult to identify the actual cause of the deceased.

ADV ADILA HASSIM: That is so because they were buried. As a result of that, there were not post-mortems and it is a betrayal. It is not just a betrayal of the deceased; it is a betrayal of the public confidence in our state to be able to function at that level to ensure that that important information is correctly captured. And again, Justice, the reason, all of this goes to what all of this means in the context of the remedy that is being sought here.

ARBITRATOR JUSTICE MOSENEKE: Very well.

ADV ADILA HASSIM: I would like to deal with the issue of collective responsibility.

ARBITRATOR JUSTICE MOSENEKE: Just before you walk away about the police, I am speaking from memory, but I saw no submissions about what I ought to say, if anything, about the police and criminal responsibility even if it is by way of recommendation.

ADV ADILA HASSIM: Justice, in our– in the section where we deal with the other equitable redress, we ask that the parties and the public are updated as to the outcome of criminal investigations in respect of the officials.

ARBITRATOR JUSTICE MOSENEKE: You see, there are many obvious crimes here, are there not? Should I be bothering to draw attention to them?

ADV ADILA HASSIM: Most certainly, Justice. We have also lead that in evidence we provided in the cross-examination of Maj-Gen. Johnson. Some time was spent discussing the range of crimes that are implicated in the series of events.

ARBITRATOR JUSTICE MOSENEKE: Ja, well short of murder and culpably homicide, many other offences have been committed.

ADV ADILA HASSIM: Including purgatory.

ARBITRATOR JUSTICE MOSENEKE: Indeed, including falsification, including fraud, including [indistinct].

ADV ADILA HASSIM: And all of those, and as I recall at the end of the hearing and Maj-Gen Johnson undertook to report back on the letter that was

sent to the SAPS that went unresponded, the 24-page letter in which it was set out the various potential criminal acts that had been committed.

ARBITRATOR JUSTICE MOSENEKE: And did we get that letter for the record? You must hand it in [intervenes]

ADV ADILA HASSIM: It is in the record, Justice.

ARBITRATOR JUSTICE MOSENEKE: Okay. If you get your junior to get me the ELAH number it might make my task a little easier.

ADV ADILA HASSIM: I will get it for you in due course. It is actually in the record. It is not an ELAH.

ARBITRATOR JUSTICE MOSENEKE: Yes. No, very well. You may proceed.

ADV ADILA HASSIM: I cannot turn away from the facts without addressing the issue of collective responsibility, the theme of collective responsibility that emerged in the evidence. There was this common refrain that the officials held a collective responsibility, and they were eager to [indistinct] individual responsibility by relying on this theme of collective responsibility.

Former MEC Mahlangu testified that a government decision is never an individual decision, and to say that it was hers, her decision, any of these decisions, would be misleading, she says. She explained and I quote:

> "The decisions to terminate the contract with Life Esidimeni was our collective decision as a Department after submitted to the Treasury."

The collective she says included her, Dr Selebano, and everyone in the meeting. Ms Mahlangu testified that government decisions are never individual

decisions, irrespective of seniority but she did seek to place the blame on the head of department when she was asked if there was one person who would be responsible.

Dr Selebano for his part portrayed the implementation of the plan as a collective plan that was presented to him and that he signed off on the advice of managers from legal, finance, and mental health. Dr Selebano acknowledge that once approved, the head of department takes accountability for implementation but said that it was very difficult for him to monitor this at an operational level. He maintained that while he was accountable for what happened in the department, he could not be considered responsible for the outcomes of the project.

Dr Manamela testified that her individual responsibility was to ensure, in her words, "to ensure that things are running smooth," and that it was the responsibilities of the NGOs to protect the patients. She maintained that she was not directly responsible for the termination of the contract, implementation, payment, visiting of NGOs, assessment of NGOs, service level agreements, or discharging mental healthcare users from Cullinan to NGOs. She emphasised that it was merely a collective endeavour.

This constant reference to collective responsibility and a collective endeavour shows, in our submission, a wilful disregard or an ignorance of their constitutional obligations and it is a shocking indictment on the state of governance in the department that they continue to use that as a defence and that the constitution seems [intervenes]

ARBITRATOR JUSTICE MOSENEKE: As a matter of law, what is that? As a

political concept, I suppose it is saying, "We are a collective and we want to act in tandem." In my younger revolutionary days I used to talk about democratic centralism. It is the notion that you all own the decision once it has been taken. So it is a nice, fancy thing in political and uprising circles, but what is it in law?

ADV ADILA HASSIM: There is no place in the law, Justice. We, and that is our submission on this, it is as if the constitution and the statutes that governed them is just [indistinct]. The law sets out specific individual responsibilities.

ARBITRATOR JUSTICE MOSENEKE: Yes, absolutely. It apportions public power and once it is vested in you, you are the one who makes the decision. You can listen to the whole word but thereafter, you make the decision.

ADV ADILA HASSIM: Well, it is what they are paid to do and in a senior position they are paid very well to do it.

ARBITRATOR JUSTICE MOSENEKE: So collective responsibility is what? It is nice political jargon but in law I do not know what it is. If you are a magistrate, either you have the power the marry somebody or you do not have the power. It has nothing to do with many other magistrates that might be around you or anybody else. So the law is quite careful to identify decision makers and our whole administrative law is premised on the notion of decision making, a decision and normally, the person must have the power to make the decision. With no [indistinct] no decision. So you cannot in your life say Mr Mosenochi made the decision. Can he? Does he have the power? It is the first question you must ask. So I thought you might know more about what collective responsibility is in law.

ADV ADILA HASSIM: Well, Justice, our submission is there is no such thing

as collective responsibility in law because if there was, then we would have no accountability. We would be shaken to our foundations if we are not able to hold politicians accountable, officials, bureaucrats accountable. We cannot rely in any even just on the election process and political process. That is a separate and a parallel part of our political life. It has no place in the law, and the added, again the salt in the wound, is that the officials come here and say that there was collective responsibility, that they would not take individual responsibility, and that they did not know. And which in itself is a further affront to the families. It is an insults. It is contemptuous.

ARBITRATOR JUSTICE MOSENEKE: Because the whole constitutional scheme, indeed you are right, the whole constitutional scheme is to understand who wills which power. Who know who appoints judges. We know who appoints the cabinet. We know who appoints whatever. We know who issues licences.. We know who will give you a driver's licence. These powers are clearly defined. They have nothing to do with the collective.

ADV ADILA HASSIM: That is so.

ARBITRATOR JUSTICE MOSENEKE: Of course you may discuss with Manny. Of course you may consult. Of course you may talk to your wife or lover about it in the evening, but in the end, you have to make the decision and the law holds you to account and that is a decision that the law sets aside. So I do not know what collective responsibility is but we might hear more from your other colleagues.

ADV ADILA HASSIM: It would be interesting to hear what– how we are to understand this other than the only way in which I can say which is that it is to

be disregarded. It is a political term. It has no place in our law and as I say, it is– the shocking aspect is that the officials seem to think that it is a permissible answer and without any cognisance of all of the obligations that they bear in statute and in the constitution.

Justice, that brings me to the next section which is the breaches of claimants' rights, which is the next part of my submissions. And that is set out from page 61 of heads of argument, and we submit that the claim for constitutional damages is founded on the severe breaches by the government of the constitutional rights of the claimants. And what is important to bear in mind is that the bereaved families were compelled to place their loved ones in the care of the state, in the hands of the government, because they did not have the skills and the resources to provide the care themselves.

They relied on the public health system and the effectiveness of that system to provide proper care to their relatives.

ARBITRATOR JUSTICE MOSENEKE: The first requirement of course of contemplating constitutional damages is you must show a constitutional breach. I have not heard any of your colleagues that there were no constitutional breaches. Could we on the facts ever argue that?

ADV ADILA HASSIM: I think it has been conceded, maybe not in the terms or the language that is used in the constitution but I would be very surprised to hear anyone argue that the breaches of the rights that we set out did not in fact take place. And I will in a moment also refer to the testimony of the officials who acknowledge the egregiousness of the violations.

ARBITRATOR JUSTICE MOSENEKE: Starting from Prof Makgoba, who is a

high flying clinician and professor in medicine, yet he could readily identify the constitutional breaches in his report.

ADV ADILA HASSIM: He did. We expect that, judging from the argument, written argument by the state, that there will be something more to be said about this. They deny breaches of rights in their heads of argument. They deny that constitutional damages are to be awarded and they do that on the basis that there are no rights that have been violated. It is an astounding claim and I would like to address it in reply.

ARBITRATOR JUSTICE MOSENEKE: Well, I [indistinct] see the argument a little differently. I thought they conceded that there have been constitutional breaches. They [indistinct] the test; first there must be constitutional breaches. Second, you must then formulate equitable redress in the face of the breach, and they say well, you have to formulate it in common law terms because there are no constitutional damages available other than through the common law. I thought that was the [intervenes]

ADV ADILA HASSIM: Well, that is part of the argument but I will in reply address the point I am making about the claim that there were– there was not– there is not a breach.

ARBITRATOR JUSTICE MOSENEKE: Okay.

ADV ADILA HASSIM: But it is correct. That part of the argument is that there is equitable redress that is achieved through common law damagers. What we set out as far as the breaches go is we begin with the right to dignity and we do so deliberately because at the centre of this case is the right to dignity: the dignity of the mental healthcare users while they were alive; the dignity of

mental healthcare users after they passed away; the dignity of the family members who watched their loved ones waste away and die; the dignity of the family members who were powerless to do anything to prevent it.

We also begin with dignity because it hold a particular place and a particular importance in our law. In the case of *NM* the late Justice Magala stated that:

> "While it is not suggested that there is a hierarchy of rights, it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid: the restoration of human dignity, equality, and freedom. The concept of Ubuntu underlines our constitution as a whole. It is closely connected with the right to dignity."

Justice Moseneke, you yourself highlighted the importance of the communal nature of society and in your words, the ideas of humanness, social justice, and fairness.

ARBITRATOR JUSTICE MOSENEKE: Well, Counsel, flattery will not give you more money for your clients.

ADV ADILA HASSIM: Justice, rather I am saying you cannot run away from your words. You spoke of group solidarity, compassion, respect, human dignity, conformity to basic norms, and collective unity, and you did so in the ever-fresh case. Its presence in the constitution was confirmed of course in the early juris prudence [?] of the constitutional court in which the court held that a person's status as a human being entitled to unconditional respect, dignity, value, and

acceptance from the members of the community such person happens to be a part of. It also entail the converse that there is a corresponding duty to give the same respect, dignity, value, and acceptance.

And of course, in *Dikoko* the court repeated the importance and the intrinsic nature of Ubuntu to our constitutional culture.

ARBITRATOR JUSTICE MOSENEKE: And the dignity protection of course is a bulwark against abuse by the vulnerable in society because what the law does is to give them that protection, even if they have nothing. If they have nothing materially or by standing or high ranking or any of all those things, but the starting point of our constitution is you are human and therefore you are dignified. Stop.

ADV ADILA HASSIM: As you say, Justice, it is there specifically. The importance of it grows when it is the vulnerable, the disempowered, the disable [intervenes]

ARBITRATOR JUSTICE MOSENEKE: So it is not just idle. It is important when you have nothing else and you are open to abuse and the law seeks to protect you by at least recognising the bare minimum, naked or clothed in gold or in nothing, you would still be worth something, and that worth ought to be protected. So it is very opposite here were people are totally vulnerable.

ADV ADILA HASSIM: And because dignity was violated in the most wanton and flagrant manner in which the Department– and the Department [indistinct] paid lip services to policies like Bathopele. And what is the meaning of having those posters on the walls of government offices then?

We submit in other words, that the claimants' were stripped of their

dignity in the way that they were treated in this process. The right to cruel, inhuman, and degrading– the right not to be treated in a cruel, inhumane, and degrading manner is also a self-standing right in the constitution. It is closely related to the right to dignity and as stated in *Maponyane*, a denial of humanity amounts to cruel, inhumane, and degrading treatment. Here ultimately, it resulted in the deprivation of life as in *Maponyane*, as in the considerations in *Maponyane*.

Thirdly, we referred to the right to family life and there is no express infringement of this right in the constitution but like cruel, inhuman, and degrading treatment, our argument is this is closely linked to the right to dignity. We rely on the *Darwood* case in which the court stated the following:

> "Human beings are social beings whose humanity is expressed through their relationship with others."

The family unit, in our submission, is an important source of security and comfort and support and companionship, and any action that violates the integrity of the family unity violates the right to dignity as well.

We refer you, Justice, in our heads of argument to the *Dladla* case in order to support this argument, and we would like to add that one of the secondary trauma, if you may call it, that rest on the family was the perception or the accusation that they did not care about their relatives. The families continue to seek answers as to how and why the government excluded them from participating in decisions about their loved ones' care, and why their loved ones lost their lives. We submit that the right to family life has been breached by the deprivation of the opportunity to take decisions in the best interest of their

relatives. Not only did they lose their relatives in this tragedy, they lost their power to ensure that their needs would be met.

The right to equality is implicated, particularly on the basis that these mental healthcare users suffered from a disability. We submit in our written submissions that what is evident is a violation of Section 9 of the Constitution in the manner in which mental healthcare users were treated and the discrimination against them as people with disability, in other words, discrimination on a listed ground.

What is worse is that it was perpetuated against those who were unable to speak for themselves. We [intervenes]

ARBITRATOR JUSTICE MOSENEKE: I struggled a bit with that argument. What would your comparator be? They as a group together in one institution were treated horribly and nobody was spared the horror. Some lived, survived in other words, and others did not. In an equality inquiry you normally would go and look for a comparator

ADV ADILA HASSIM: Justice, we base our argument on [intervenes]

ARBITRATOR JUSTICE MOSENEKE: You gave to girls more sweets than you gave to boys. Explain yourself.

ADV ADILA HASSIM: Our argument is that the choice of this program and to cut this program, we have had no reasons that we can rely upon. The three that were provided are not– does not come to the assistance of the government. There is no explanation. What we do know is that this group of people was chosen as a cost cutting measure.

What we also know is that there is stigma in relation to mentally ill people in our society, and we rely on the evidence of Prof Grobler in that regard. And what we say is that the indirect– it need not be direct discrimination, but the manner in which this was carried out, starting from the decision to terminate, there is nothing on the evidence to show why this group and this group of mental healthcare users, why this group of the population that relies on health services was selected.

Why were they chosen and not cutting consultants' cost? Why did it happened [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Well, I am talking about the normal legal inquiry on inequality. I am sorry, on discrimination. You have to at the very least find comparator but they would have been treated otherwise but for their disability because look, this set of disabled people are treated in another way. So you always have to as a starting point, I am not saying it is the only way to do it, but the juris prudence has always been you give soccer more money than rugby as a code [?], assuming the numbers are comparable and then the question becomes does that distinction rise to discrimination? If it does, the discrimination unjustified. You know the inquiry. The inquiry has been there. It is quite clear.

ADV ADILA HASSIM: Yes, [indistinct – cross-talking].

ARBITRATOR JUSTICE MOSENEKE: Yes, indeed. So I am struggling to find a comparator, and some of your colleagues might be able to– they are treated differently from a similarly placed other cohort or group. That is normally how discrimination works. Married people and unmarried people are treated

differently or boys and girls or…

ADV ADILA HASSIM: Justice, the comparison here is between. [intervenes]

ARBITRATOR JUSTICE MOSENEKE: …Christians and traditionalists believers or– so you need comparatives to be able for the inquiry to be meaningful.

ADV ADILA HASSIM: I hear you point, Justice, and my response to that would be first that the comparison here is between types of healthcare users and these being mental healthcare users, and the fact that all of the circumstances that we have described were only possible because they were mental healthcare users. They could not speak for themselves and that in relation to– and that in conjunction with our argument on stigma and with the particular position of this group of people in society, that is the basis upon which our submission rests and perhaps [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Other argument could be had they not– had they been a collection of or another category of healthcare users, they would have been better placed. They were discriminated against because they were known to be vulnerable and therefore, easier to ill-treat but on one [indistinct] always going to say, "Look at them. They have been treated better than them," but it does not detract from the rest, I mean, you know, dignity and cruelty and inhumane… all of those things or you know, right to life. It is a whole collection of them which are together there. I just do not know as a matter of law equality finds juris prudential place. I have got a hunch there is an equality but I am not able to get [intervenes]

ADV ADILA HASSIM: Justice, we [intervenes]

ARBITRATOR JUSTICE MOSENEKE: …on the juris prudence.

ADV ADILA HASSIM: Yes. I will return to it if I may once I have given it more thought but our position is that it is in relation to this group of people, their particular disadvantage, the inability to voice their own concerns, that if these similar steps were taken against other healthcare users, this would never have happened. It was only possible because this is a marginalised group and because they are disempowered, and that the stigma that Prof Grobler spoke about is very much in the midst of this mix of facts and events that have taken place.

Of course [intervenes]

ARBITRATOR JUSTICE MOSENEKE: You can come back to that in reply and so on. You have heard my– my concerns are legal.

ADV ADILA HASSIM: No, I hear your concern.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: I hear your concern. On the right of access to quality healthcare services, I alluded to our argument earlier that that the breach in respect of this right is in relation to section 27(1) and the negative infringement of the right rather than section 27(2). The evidence is clear: they were receiving a level of healthcare services and a quality of healthcare services, the enjoyment of that right was taken away from them.

ARBITRATOR JUSTICE MOSENEKE: Yes, and none of the internal or external qualifiers of section 27 – we have talked about that already – come in to play.

ADV ADILA HASSIM: None of [intervenes]

ARBITRATOR JUSTICE MOSENEKE: We have not heard a defence that says, "I had no money. I was trying to provide progressive realisation" or any of those defences. I mean, none of that was raised. If anything, we were told the opposite.

ADV ADILA HASSIM: That is right. We were told the opposite, and if anything, as we know the budget was there for the mental healthcare users when they were at Life Esidimeni. So there is no qualifier in relation to available resources and the like, the triad that of qualifiers that are in section 27(2) of the Constitution.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And then the founding values, we referred to the founding values of the Constitution and the principles governing public administration and I have to say, Justice, we cannot stress this enough. It is often disregarded because it is not part of chapter 2 of section 195. Of course the founding values are in section 1, but it is not understood and appreciated in my view, and was not appreciated in this entire process, nor in the way it was dealt with by officials in the hearing, that without those values and adherence to those values and the obligations in section 195, one cannot give effect to the constitutional promise of a democratic society based on human dignity, equality, and freedom.

And we set out the provisions of section 1 [intervenes]

ARBITRATOR JUSTICE MOSENEKE: Yes, the intriguing part in my view of that argument is that link inevitably that ought to be made between section 1,

the rule of law requirement, and section 195. Once you are obliged to uphold the rule of law, to act in accordance with the law, and 195 tells you what you ought to do. So there is that connection between that founding value and the obligations to be a good public servant, a good public official. It is founded not in just humble pie and goodness. It is founded in the Constitutional provision, which is part of the supreme law.

ADV ADILA HASSIM: That is so, and it is for that reason that section 195 is as detailed as it is.

ARBITRATOR JUSTICE MOSENEKE: Yes, indeed.

ADV ADILA HASSIM: Our argument goes further than to the connection between section 195 and section 1. It is also the connection between section 195 and chapter 2.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And that the inability to rely on section 195, and in fact the refrain by the officials that they did not know, that none of the warnings reached them, denudes section 195 of any value and meaning. It means that– section 195 is central to the ability of members of the public to assert their rights.

Without the proper compliance with section 195, we have what we have here, but also what it means is that if members of the public wish to assert their rights they must go to court, because that is the only way, if you are lucky, that you will receive a response from government. And of course, that is not the type of democracy that the Constitution envisages. Justice, it is two o'clock.

ARBITRATOR JUSTICE MOSENEKE: Yes, just wrap up that point. Is ignorance ever a good response to public duty, in other words, to a Constitutional obligation to act in a particular way? Is ignorance ever a good response to public duty, in other words, to a Constitutional obligation to act in a particular way? Is knowledge a requirement?

ADV ADILA HASSIM: No, our law has long, at least in the criminal context, dealt with that question of ignorance. In this matter, what we have heard is yes, "We did not know but [intervenes]

ARBITRATOR JUSTICE MOSENEKE: You see, here is the point. Let me phrase it much more tight and narrowly. If there is uncontested evidence of egregious breaches of constitutional protections, perpetrated by an official, [indistinct] power of those who report to her or him, and all you hear is, "I did not know," is that an adequate answer or does that diminish the consequences of Constitutional breaches?

ADV ADILA HASSIM: We submit that it is not an adequate answer. We have dealt with why in fact it is not an adequate answer, and in law it is it is not an adequate answer because the duties that rest on the officials are there in the Constitution and they are there in the statute. When they take office and when they swear the oath to uphold the Constitution as in the case of the premier and the MECs, they are bound by it. It cannot be a legitimate defence to say, "I do not know what the Constitution says about the way I must go about my job."

In addition, we know from the law that at the very least, we should be– we can expect, we have a certain expectation of officials but also that in this case, the harm was foreseen.

ARBITRATOR JUSTICE MOSENEKE: I did not know that the NGOs would not handle them properly. I did not know that they would be transferred in this particular manner. I did not know that they would die. I did not know that the plan would be implemented in this manner. I am struggling with the place of that claim of ignorance within a legal context. Can one validly raise that as a defence when you have a statutory obligation to make sure it happens?

ADV ADILA HASSIM: If that were to be regarded as a legitimate defence, Justice, I am not sure how any of the cases against the state could be litigated properly when it comes to claiming a violation of a statutory duty or a Constitutional duty. It is not the subjective condition of the person who is standing before you and denying it. We are entitled to expect that officials– that there is an objective duty that rests on the officials, and this case to say, "I did not know this," or "I did not know that," it actually lies at the hands and at the feet of those officials. It is something they should have known, in fact.

ARBITRATOR JUSTICE MOSENEKE: Because it may very well be that the correct legal position is putative knowledge. It is, in other words, it is deeming the officials to know. I have not worked that through properly and that is why I am engaging you on it. It is an objective establishment of egregious violation by that official and/or those who serve under him/her. The question that arises is can they without more say, "No liability arises because I did not know"? On the one end there will be state liability, on the other there would be of course personal liability, and it may be that the answer, "I did not know" serve different purposes in relation to different [indistinct]. I go the impression that "I did not know" was useful to try and avoid criminal, or they thought it was useful to try and avoid criminal liability. I do not know whether you could ever raise it

[intervenes]

ADV ADILA HASSIM: Not as a matter of law [intervenes]

ARBITRATOR JUSTICE MOSENEKE: As a matter of law within a [indistinct] setting. "I did not know" might just demonstrate gross negligence if anything, but not a defence.

ADV ADILA HASSIM: That is so and that is consistent with our principles of the [indistinct] claim that is at play here. Justice, I am happy to return to that and to engage further on it.

ARBITRATOR JUSTICE MOSENEKE: Yes, your other colleagues are also– obviously, you know how arguments go. I am flagging these things also for the rest of your colleagues, for the state, for all counsel so that they can expect that I will engage that with them, and usually things that worry me as a matter of law, having the duty to make those decisions. This was very helpful, thank you. We resume at three o'clock, do we?

ADV ADILA HASSIM: I believe so, Justice. It is now just after two.

ARBITRATOR JUSTICE MOSENEKE: Ja. Thank you. We are adjourned until 3p.m.

SESSION 3

ARBITRATOR JUSTICE MOSENEKE: Thank you, you may be seated. Well Counsel, how long have you been on your feet?

ADV ADILA HASSIM: I have not been counting Justice.

ARBITRATOR JUSTICE MOSENEKE: You have not been counting. Well, I am sure all of us have been. I have two and a half hours. We will have to keep it within the 30 minutes, shall we?

ADV ADILA HASSIM: I will do my best Justice.

ARBITRATOR JUSTICE MOSENEKE: Yes, thank you.

ADV ADILA HASSIM: I am now getting to the juice, the meat.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And that is the constitutional damages. The issue of constitutional damages. What I have dealt with thus far have been two factors that are relevant to remedy being the factual circumstances and the nature of the breach of constitutional rights. It was necessary for me to set that out in order to justify our claim under constitutional damages. My learned friends for the state in their heads of argument does not concede that there was a breach of constitutional rights. But I would like to address that question in reply. I have set out my argument both in the written submissions and to you earlier. The reason we then turn to constitutional damages is because our submission is that common law damages are insufficient to constitute an effective remedy in this matter, having regard to the dicta I referred to this morning.

The reason the common law is insufficient is because there is no recognition in the common law for a claim based on the loss of a life in these circumstances or the breaches of constitutional rights such as have occurred in these circumstances. That is the simple reason why the common law damages do not go far enough.

ARBITRATOR JUSTICE MOSENEKE: In fact the common law is quite remarkable on the issue. Near death alone is not a cause of action.

ADV ADILA HASSIM: It is not a cause of action, and in our written submissions we set out how that has come to be in our law, and through the influence of our former, through the influence of Roman Dutch and English law, but that is the state of the law as it is right now. That is the current position of our common law.

ARBITRATOR JUSTICE MOSENEKE: Ja, that excursion is helpful. I saw it. Thank you for it, but it of course it accentuates the question. When the common law was formulated, something like a right of access to health care was nowhere near in the horizon. Cruel and inhumane treatment and it was slavery then and in fact the principles bind lives, do they not? The more money you have, the more you get rewarded. So the emphasis is on [inaudible] damages.

ADV ADILA HASSIM: That is also something we allude to in our ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Yes, indeed you do. You go ahead and ... [interjects]

ADV ADILA HASSIM: I am not going to go through all of that, because it is set out in the written submissions.

ARBITRATOR JUSTICE MOSENEKE: It is set out fully, very admirably. Thank you for that. No, you can go ahead.

ADV ADILA HASSIM: Thank you Justice.

ARBITRATOR JUSTICE MOSENEKE: You do not have to ... [interjects]

ADV ADILA HASSIM: But just in relation to the last point you made, I draw your attention to our reference to Car Michelle and the extract from Car Michelle that we included in our written submissions and even though that extract was dealing with the question of development of the common law, we submit that it is equally relevant to remedy, and that is that given where we come from and given the constitution, and the notion and society's notions of what justice demands, what Car Michelle says, is that these notions of what justice demands might well have to be replaced or supplemented and enriched by the appropriate norms of the objective value system embodied in the constitution and that is simply just to address your last comment about where we stand in the common law.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: What we do know is that stand alone constitutional damages have been awarded and at least two cases, there are two presidents and that is Kathe and Modderklip, and in the case of Kathe, the facts I think are quite well known and it was in relation to the endemic failure of the Eastern Cape Government to provide social grants to people who had applied for it, and in ordinate delays in the system, and in that case the court considered the award of constitutional damages, and they did so, even though they accepted that Mrs Kathe was not entitled to her claim for interest on the amount that had

been, in relation to the delay of the social grant. They awarded that the social grant should be paid from a certain date onwards.

They recognised that the interest as claimed by Mrs Kathe was not available to her in the law, because the debt had not yet accrued, but they chose to award the damages partly on the basis of the systematic and sustained failure of the government to award social grants in that province, and what the court said is the following, and this was the judgment of his lordship, Justice Newgent:

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

Although the amount of constitutional damages to be awarded was debated in that matter between Counsel and the bench on the basis that Mrs Kathe had not suffered direct financial loss. What the court said and I quote:

"It has not been shown that Kathe suffered direct financial loss, and it is most unlikely that she did, for the grant was destined to be consumed and not invested, but the loss was just as real and in the absence of an empirical measure, the court awarded amount equivalent to the interest to which Mrs Kathe would not otherwise be entitled."

Importantly in this case the court made it clear that while the question as to whether the claimant has sufficient remedies outside of constitutional damages is relevant, while that is relevant to the assessment of what is just and

equitable, it is not on its own decisive, and it is set out very, in unambiguous language in the judgment and I would like to refer Justice to the passage, and where the SCA said the following:

"No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights or be it indirectly, and no doubt delictual principles are capable of being extended to encumbus state liability for the breach of constitutional obligations, but the relief that is permitted by Section 38 of the constitution is not a remedy of last resort to be looked to only when there is no alternative and indirect means of asserting and vindicating constitutional rights. While that possibility is a consideration to be born in mind in determining whether to grant or withhold a direct Section 38 remedy it is by no means decisive for there will be cases in which the direct assertion and vindication of constitutional rights are required."

And that is precisely what the claimants are seeking in this case. The direct assertion of the Section 38 remedy in relation to the rights that have been violated. Justice, I have referred to Modderklip and in a similar vein the court awarded constitutional damages as a result of unlawful occupation of the farm, the Modderklip farm and in that case too ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: And more importantly the omission of the state to take steps to restore [inaudible] to the owner. The evasion was in front of the police. The police were alerted to it and the police failed to fulfil their obligations. To give assistance to the face of an unlawful conduct. So that was quite an important consideration indeed.

ADV ADILA HASSIM: That is so.

ARBITRATOR JUSTICE MOSENEKE: State omission.

ADV ADILA HASSIM: State omission, and although it was difficult, well it was not difficult, but what the court noted, observed that there is not am empirical measure again for the calculation of constitutional damages, they use the mechanism under the expropriation act as a means of determining an amount of compensation. It was not based on any patrimonial, pure patrimonial loss and calculation as it normally is.

ARBITRATOR JUSTICE MOSENEKE: Sure.

ADV ADILA HASSIM: So the key principles that we see that emerge from these cases is that constitutional damages may be awarded for violation of rights as a self-standing remedy in appropriate cases. Two, while the question of whether the claimant for constitutional damages has sufficient remedies outside of constitutional damages is relevant, is not decisive. Section 38 is not a remedy of last resort, and the nature of the breach example in Kathe, the endemic nature of the breach of the right and in Modderklip as pointed out Justice, may call for the independent assertion of the right. We have had regard to comparative law and we have included that in our written submissions, and we think that these, it is in relation to Canada, New Zealand and [inaudible], we consider these to be helpful in guiding us in understanding how constitutional damages have been awarded in other jurisdictions. The Canadian case is particularly important, because of the similarity between the charter and our constitution.

In Vancouver versus Ward the facts of the case, it was a case of a wood be pie thrower who was unlawfully arrested, and so that was the basis of the claim and

the breach of rights in relation to the unlawful arrest. The Canadian supreme court held that in order to award damages, there is certain factors, hurdles that the plaintiff has to cross, and the first is that a constitutional right has been breached. The second is that damages are just an appropriate remedy in that they fulfil the functions of compensation, vindication of the right and or deterrence of future breaches. If it is established, if the first two are established, then the state carries the burden of adducing counter veiling facts that defeat some of the functional purposes of the damages.

In the absence of persuasive counter veiling evidence by the state, the court will proceed to determine the quantum. With regard to the purpose of constitutional damages, the Canadian supreme court said the following:

"Damages may be awarded to compensate the claimant for his loss to vindicate the right or to deter violations, future violations of the right. These objects, the presence and force of which varies from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded."

In other words we are submitting that not only are the facts of this case relevant to the necessity of constitutional damages as an effective remedy, but also it is relevant to the quantum of damages, and we base our reasoning on the helpful guidance of this judgment. Justice, the New Zealand case is set out in our written submissions. I would like to emphasise the one passage which we have referred to, because and what is interesting about it, is that it recognises a dual purpose of bill of rights remedies and the recognition that when there are breaches of human rights, there are two victims. The individual and the immediate victim, and that victim's interest, but also society as a whole

becomes a victim too, and I think this again in the circumstances of this case, is relevant to the award of damages as well as the quantum that we will see.

ARBITRATOR JUSTICE MOSENEKE: And for good reason, not so? If constitutional bridges are bound and they go unpunished, it is a matter of time before all of us will be engulfed with the legality. So it is also a measure of public self-interest. It is a little like the state having always the right to charge a rapist. If they make common cause with the victim. It is a broader principal. It is the same principal enunciated there. It is a principal of public goods and an invasion therefore of public good if you have endemic legality and unlawfulness that is unchecked. So you cannot wish away or agree not to be prosecuted for instance.

ADV ADILA HASSIM: It is the same principal.

ARBITRATOR JUSTICE MOSENEKE: So pretty much the same principal. Aside from that consideration, it is important to protect the constitutional arrangements we have, and when they are breached there should be responses. What [inaudible] ought to be then becomes the second inquiry. So I understand the submission.

ADV ADILA HASSIM: Thank you Justice. In those circumstances we submit that the claimants should be awarded constitutional damages on the following basis. The facts of the case are so shameful that it is difficult to imagine circumstances more deserving of an award of constitutional damages. The stensible reasons for the decision to terminate the contract has been shown to be false. They want and violation of numerous rights in our view is indisputable. I had initially said it is undisputed, but I take that back. Despite all the attempts

by the families to change the course of events, their pleas went unheard. Even in death the mental health care users had no dignity. The families were further traumatised by having to visit mortuaries, identify their relatives. State of decomposition in some cases, and the record is littered with examples. Some of which I have referred to in my address to you.

The officials who are health professionals, failed to be moved by their own ethical code and Professor Dhai has provided cogent evidence as to what those obligations are. Professor Grobler addressed the disconnect between beurocratic decisions taken, despite forewarnings by clinicians responsible for the care of mental health care users, and in the opinion of Professor Dhai, she [inaudible] entire endeavour to a cruel experiment. It was possible she says, because the subjects were vulnerable and disabled. She likened the project to patients being herded and taken into, in her words, taken into concentration camps as described by families. For me she says, it is a distressing reminder of Hitler's Nazi war atrocities where the vulnerable were considered to be sub humane of decreased intelligence, of no moral status and lacking human dignity and therefore exploitable.

The evidence of Ms Trotter in turn also speaks to the pain and informer that goes beyond anything our courts have ever had to deal with. That that is the reality we face. In my, sorry in our written submissions we dealt with the evidence of Ms Trotter. I did not revert to it here, because we settled on the issue of common law damages, but I wish to stress Justice, that the reference to those findings by Ms Trotter are not only relevant to common law damages, but to constitutional damages as well. The state officials [inaudible] ignored their constitutional duties under Section 195. We have addressed, we have had

some discussion Justice on this and Section 95 and the I do not know response. In the beginning of our written submissions we set out in some detail all of those responses by the officials in which they claim they did not know.

We submit that this is a stunning response in the true sense of the word. It stuns one, and it is an echo of past atrocities in human history where the same claim was made. Despite the disclaimers and despite saying that they did not know, there are officials who testified that accepted the magnitude of the authority.

ARBITRATOR JUSTICE MOSENEKE: And right there surely the apologies from senior state or public office bearers must carry some weight, to [inaudible] or to mitigate the extent of the hurt and the amount of equitable redress, not so? The apologies are not without consequence. I am talking less about [inaudible] the witnesses, but more about those who did not portray themselves, but who sought to apologise on behalf of the state as a whole. That must carry some weight surely.

ADV ADILA HASSIM: I think that it is relevant. I think it carries some weight. I think apologies are important. In these particular proceedings it is part of the type of redress that was envisaged and hearing an explanation is part of the redress that was envisaged. I would agree with you to that extent Justice. Of course some apologies were more sincere than others, and even in those sincere apologies, it does not take away from the breach of the rights and the violations that took place. That is what I have to say ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Ja, but it does mitigate, I mean the hurt, what does not mitigate the hurt and you made the point, is untruthful

explanations of what happened or the absence of explanation of why it happened. That exacerbates no doubt, but as you weigh up and exercise the discression as an adjudicator you say there were apologies.

ADV ADILA HASSIM: I think they ought to be taken into account, but at the same time Justice I stand by my submissions that it does not take away from the breach and in fact that we stand here today without answer.

ARBITRATOR JUSTICE MOSENEKE: And that the seniors themselves could not anphathom this irrational decision. None of them could say it was now, a year later. We know what happened.

ADV ADILA HASSIM: That is so

ARBITRATOR JUSTICE MOSENEKE: There was an apology, but nobody was really saying you know what, [inaudible]. I found it. This is what happened. They seem to be as ignorant as we are.

ADV ADILA HASSIM: And leave us to speculate what the possible reasons could be, and we hope that more answers will come. We hope that this will not be the end. That answers will continue to come, even at the close of these, after the close of these proceedings.

ARBITRATOR JUSTICE MOSENEKE: Is it relevant that the state agree to be a party to the arbitration? Is that a relevant consideration in deciding the extent of compensation as part of equitable redress?

ADV ADILA HASSIM: Justice, our courts for example in Henjongi have spoken about the duty of the state where litigation occurs, where there is litigation on the basis of constitutional rights to participate in a certain manner. I think that

the participation in the arbitration process is continent with that duty. I would not want to take it further than that.

ARBITRATOR JUSTICE MOSENEKE: Yes, of course you can compare the response of the state here to the response of the state in Marikana.

ADV ADILA HASSIM: Well, if that is how you ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Here we are dealing with a contrite and a ja, a remorseful state at least from the high end of the province leadership. There you dealt with persistent denial of any liability of any kind whatsoever.

ADV ADILA HASSIM: It is my submission ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: So there is a difference, I am saying the state could have the obligation to behave in a particular way but we know as a matter of fact that quite often it is [inaudible] that leads to a lot of grief and harm and cost and sometimes failure to prove a claim. So I am just asking is the attitude of the state here a relevant factor in weighing up what is just inequitable?

ADV ADILA HASSIM: Justice, I hear the question and I think I am not misrepresenting the families when I say that there is an appreciation for that attitude of the state. The cooperation, but it did come after a very long, hard, gruesome process, and I think that the standard and the measure is rather what the courts have said, is the duty of the state in litigation of such nature, rather than past bad experience.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: That now requires me to turn to quantum, and what we would like to submit in this regard is that there is, as we say now our submissions is there is no manual for calculating the monitory value of a life, nor of the price tag of the grief and the trauma that families have endured. There is no way we could put a price tag on this, but the families have chosen the refrain from what often happens in cases of general damages, and that is to refrain from presenting a thumb suck figure and to place some evidence before the Arbitrator that gives some guidance as to the basis for the quantum that we seek, and to do that we provided the actual report of Mr Gregory Whittaker and what that report does is it provides evidence of the money that the government would have spent on the deceased if the marathon project had not taken place, or as Mr Whittaker refers to it the money that they saved.

He presented different scenarios and I will turn to that in a second, but I want to stress that our reference to this is not on the basis of some sort of enrichment claim. It is simply a way to assist the Arbitrator to understand the numbers and what would be a reasonable award of compensation. Mr Whittaker provided three scenarios and these are set out in page 91 of our heads and you will see from the scenarios there were variables that were taken into account including the life expectancy and the net discount rate. So the present value in other words of the money to be awarded and the families have chosen to follow Mr Whittaker's recommendation which is a middle of the road recommendation which places us in table 2, the second table, the middle of the road loading of 120 percent, which is one and a half million.

That is how the amount of one and a half million was determined for the basis of the statement of claim.

ARBITRATOR JUSTICE MOSENEKE: I am grateful that there was an attempt to compute and quantify the train. I struggle still a lot with the usefulness of the quantification in this particular context. What is the premise? The premise is had mental health care users lived this is what the state would have spent on them.

ADV ADILA HASSIM: If these mental health care users had survived, this is what would have been spent on them. Not if they survived, if there was no marathon project.

ARBITRATOR JUSTICE MOSENEKE: If there was no marathon project and therefore they continued to remain at Life Esidimeni at the cost that they were at the time, and you give them a value, you are really saying if you had not killed them, this is what it would have cost them. So the basis of the calculation is very challenging. I cannot bring my arms around it and it creates another tension. General damages unlike special damages are not susceptible to exact calculation, and the courts have over and over again, in fact they defied calculation. That is why there is so much discression in the adjudicator in the triad of fact and law. So this inquiry a mixed approach.

ADV ADILA HASSIM: Yes Justice, I see your difficulty. Perhaps if I could try to explain it in this way. There is no exact science. This figure does not bind the Arbitrator. It is an attempt to provide an evidence based figure and a mechanism in a similar way to which in Kathe for example the interest was used as the placeholder. There was no suggestion that that was a calculation of damages in a way that ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You know that is hankering a little to the past. He is trying to put monitory value on human beings. There are moments when that is valuable, but think of a proposition for a moment. If an [inaudible] and a garden worker were to die in exactly the same accident, let us add a third person who was unemployed and there is a claim you know that the actuary is probably going to get a thousand times more than the garden worker, because the formula is to place the claimant in exactly the same position she would have been [inaudible]. That is the law. Common law as it currently stands. So you place the gardener in the same position as she, he was in poverty, and as for the unemployed person on the common law formula you give them zilch, nothing.

ADV ADILA HASSIM: Or for a mentally ill person.

ARBITRATOR JUSTICE MOSENEKE: Yes, or mentally ill person because they had no source of income.

ADV ADILA HASSIM: Yes.

ARBITRATOR JUSTICE MOSENEKE: So when I look at the [inaudible] calculations it is almost an invitation to go and weigh up.

ADV ADILA HASSIM: Yes.

ARBITRATOR JUSTICE MOSENEKE: People in terms of money, and I am raising something quite fundamental about ... [interjects]

ADV ADILA HASSIM: I appreciate that.

ARBITRATOR JUSTICE MOSENEKE: How law has approached computation of damages. It is trust driven kind of formula. You are an actuary I give you 20

million, you are a gardener, sorry I give you only as much as you otherwise, what you would have had and you had nothing, I give you nothing. So at law school we always take those formula for granted and we take them, and as we go along you start asking difficult questions which I am asking now.

ADV ADILA HASSIM: Justice, there is much to be said for the invidiousness of the approach that has been taken and the president that binds us, but that is not what we are proposing. The figure here is not intended to represent the value of the life. It is to take into account a series of circumstances, including and importantly the breach of rights, and the breach of rights under the facts of this matter, that [inaudible] violation and the ongoing disregard of the attempts by the families to save the situation.

ARBITRATOR JUSTICE MOSENEKE: You see Advocate Hassim, some breaches like in Modderklip denial of the use and enjoyment of a farm, clear readymade value, and [inaudible] and you say get an equivalent of the market value of your farm and you order the state to pay it. Fair, equitable. It is a right of access to property and has been violated, it is easier. When you kill somebody in horrible circumstances and they have nothing, in circumstances that violate fundamental values of the constitution, what is the just and equitable response of the law to that invasion, where damages can be specified in specific circumstances, fair and good. Funeral expenses, and whatever else, but where the violation happens in circumstances where people have nothing, is the proper response of the law nothing.

ADV ADILA HASSIM: Justice, that is the difficulty, because that is what we face. The difficulty in being able to price what has happened. To price the loss

and the violations. It does not follow from that that no award should be made. That surely is not the logical conclusion. If anything, one should err on the side of making an award rather than avoiding the award.

ARBITRATOR JUSTICE MOSENEKE: Yes, I agree with you. Those are long discussions, but it also exposes some of the thinking prima facie as you know as a lawyer at this stage, vesting with a number of legal notions past and present, and how just and equitable they are for the actuary to get 50 million and the unemployed person to get nothing, in exactly the same set of violations. So that is a money, patrimony driven kind of compensation system, and whether the constitution counting as it is the only system you could use. Coming back here, I hear what you are saying. I am struggling to find, it is interesting, but to find guidance out of the numbers in weighing lives of people.

ADV ADILA HASSIM: Of course Justice you would also ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Have you left I would have paid so much for you therefore there is an extent of my damages. Can you imagine a parent saying that about her own child or son?

ADV ADILA HASSIM: I do not know.

ARBITRATOR JUSTICE MOSENEKE: Had you lived I would have paid so much, you are gone and therefore I lost that much.

ADV ADILA HASSIM: Justice, but I do not want you to please to misunderstand what we are saying, because that is not the basis. It is as I have said, but also to show the reasonableness of it, particularly in respect of the impact of the public purse and to, there may well be the arguments that will be

made, I have not seen them yet, that this is, this will have an undue impact on the public purse.

ARBITRATOR JUSTICE MOSENEKE: I understand the point, but you okay let me hear further submissions on that. At this stage prima facie I am unpersuaded that this is useful, and it [inaudible] from very excellent heads that I have had before me, but I am very reluctant to in relation to general damages arising from constitutional breaches, in other words constitutional damages of this genre, this particular genre. I have shown you what happens in Modderklip. It is uncomplicated. It is much, much clearer and there are calculating value of [inaudible] objects like property. Easy. When you start weighing up human beings, in the context of general damages it becomes quite a challenge and traditionally there was not. She has got more money, she must get more or she has got little money, she must get nothing. But that is hardly certainly my [inaudible] word.

ADV ADILA HASSIM: Or one could argue it the other way around.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: You have got little money, therefore should get more.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: But I hear your point.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And Justice, on the question of the public person liability, we submit that that has no, the issue of limitless liability is not relevant to this award.

ARBITRATOR JUSTICE MOSENEKE: No, I do not think so at all if you think for a moment, will debate that with Mr Hutamo later. We have unaccounted or wasteful expenditure of 6.8 billion in the health department alone. So when you think about people, also think about all of these, there is the evidence before me. The same department is able to rack up 6.8 billion and 1.6 of it being suspect, [inaudible] referred to the police.

ADV ADILA HASSIM: That is precisely our submission that I ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: It is part of the context in which I will think about ... [interjects]

ADV ADILA HASSIM: Indeed.

ARBITRATOR JUSTICE MOSENEKE: About the money and what would be just and proper for ... [interjects]

ADV ADILA HASSIM: Indeed.

ARBITRATOR JUSTICE MOSENEKE: People who are otherwise very ,very placed in needy circumstances. Very well.

ADV ADILA HASSIM: If I may move from here to the other equitable redress.

ARBITRATOR JUSTICE MOSENEKE: Yes, please.

ADV ADILA HASSIM: And Justice, in the interest of time it is set out in our heads of argument. As I said it is not controversial. I think it is not controversial. It is relevant to the future into how to ensure that this does not happen again.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: And so in that regard we ask for certain steps to be taken and information to be made available, that information which has in fact already been offered by some of the officials, and we would seek an award to be made by the Arbitrator to reflect those paragraphs from 353 to 357.

ARBITRATOR JUSTICE MOSENEKE: And it is a formal structure interdict. How would that be policed? How would we know that these steps are being complied with?

ADV ADILA HASSIM: Justice, we did not include any supervisory element. We anticipated that Justice would want to be shot of this once the award is handed down. We would hope that in the light of the cooperation, that has been to some extent at play.

ARBITRATOR JUSTICE MOSENEKE: You could put the Ombud, the referee. You could put the Ombud to be the supervisory body.

ADV ADILA HASSIM: I am indebted Justice. I will take that and I would like to add that then, that the Ombud could be the independent arbiter as to the provision of the information and the compliance with the recovery plans and so on.

ARBITRATOR JUSTICE MOSENEKE: He has asked for this. It is being done and he can scream and shout as he has done very ably and say ordinarily a supervisory order would go back to court. SASSA case as an example. It is an order which was made when I was still on the court and the court [inaudible] up to this day. So the supervisory orders have got that leg. They live around for long. So somebody like the Ombud, typically that would be within, ja very well.

ADV ADILA HASSIM: Justice ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: I do not know whether the point will be argued, but I am raising it now and some of your colleagues may touch it as you sit down. Is, the arbitration agreement makes provision for compensation individually or in groups. I have not heard, the state does not argue it. Nobody argued it. Ordinarily damages are individualised and damages could be granted collectively and the agreement says so. You may do that. Is there any reason why I should not do that? Is there any impediment in law why I could not do that?

ADV ADILA HASSIM: Justice, we see no impediment and again it goes back to the terms of reference and what jurisdiction has been granted to the arbitration to the Arbitrator to make such a decision, and it is partly [inaudible]. I am instructed that there is a process that will follow afterwards, for advising the families but that is not the concern of the arbitration.

ARBITRATOR JUSTICE MOSENEKE: Yes, and the last thing just before you sit and I want to urge you to sit. The last thing is the submission of part of the awarded money being placed in a fund that would do good in relation to mental health care users. Are you still going to get there?

ADV ADILA HASSIM: Justice, that ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: It is quite intriguing, very interesting. Again I am just thinking how would that fund be, how would the hygiene of that fund be policed?

ADV ADILA HASSIM: I think that what would be useful is in the same way as we need to specify the relief in respect of the counselling, we could and it would assist us to work with the department on how to formulate that, because we are

not preview to the mechanisms within the department of such funding and donations and how they are managed.

ARBITRATOR JUSTICE MOSENEKE: Of course the, you have to have that debate with your colleagues. Of course the money is truly an intriguing idea, very selfless idea. Of course the money could be placed in a fund, jointly managed by civil society and representatives of the department, and therefore they would be mere automatic, trying to ownership of the goodness that might come of it, but partially fund the Ombud in the work that the Ombud might have to do for mental health care users in particular, and so on. So I found that there was no proper ring fencing of what effectively would be a donation from families of the mental health care users, I mean donation from the claimants.

ADV ADILA HASSIM: Donations from the claimants for the, for allocation to the mental health care budget. So the idea was that the funds would be used for the survivors and others in similar position, but I hear you Justice and there are different ways to skin that cat, and there are different mechanisms in which we could set up a joint fund or just to have transparency and accountability from the department to show that the money is being spent for the benefit of the mental health care users in the Gauteng province.

ARBITRATOR JUSTICE MOSENEKE: Ja. If it sits in a ring-fenced fund of sort it would be quite helpful. Also you will keep the memory alive of this horrible tragedy. But if it is just poured into the big pot that sometimes has unauthorised expenditures running into big numbers then the intended impact might just dissipate.

ADV ADILA HASSIM: Hence the qualification that it needs to be ring fenced and that there needs to be a proper transparent accounting mechanism for the expenditure of those funds.

ARBITRATOR JUSTICE MOSENEKE: Ja, but I leave it to the parties. I mean by the time we finish tomorrow on whether you, ja. Ring fenced means within state funds or ring fenced means in a fund outside of the normal budgetary processes of state. Very well. Any further submissions?

ADV ADILA HASSIM: Justice, subject to your ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Costs.

ADV ADILA HASSIM: Instructions, I do have to come to cost, but there is one aspect of the submissions that I have not gotten to and that is the claimants and their family members and who it is that we, in respect of which victims and which deceased we are claiming.

ARBITRATOR JUSTICE MOSENEKE: You are taking me to the annexure, are you?

ADV ADILA HASSIM: Well, it is Annexure A. I had intended Justice to in a plea to you in your deliberations, in relation to the award, to hold in mind the faces of the deceased and it was in that regard that I intended to refer you to who they are, and with one or two facts about them in order for you to have a fuller picture of the people and the lives that were lost and the place that they held in the family unit. I would wish to do so, but I understand the time constraints and I am in your hands.

ARBITRATOR JUSTICE MOSENEKE: How would you want to do that? I have looked at Annexure is it A or 1, most useful. [inaudible] attack on it I take it as gospel.

ADV ADILA HASSIM: We are not aware of any dispute in relation to Annexure A, but what Annexure A does not do Justice, is give you the sense of who the people were. Their names and then there are references to the record where you can find the facts in relation to each of those deceased.

ARBITRATOR JUSTICE MOSENEKE: Yes, I thought it was valuable, but you say you want to humanise the list more. You want to have roll call of sorts and place ja. [inaudible] to every claimant, is that it?

ADV ADILA HASSIM: Roll call ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: To the deceased or to the ... [interjects]

ADV ADILA HASSIM: And to give, and to provide some sense of who they were as members of a family.

ARBITRATOR JUSTICE MOSENEKE: Yes, I think it is going to take quite a lot of time, and it is a lot of time that we must find in your closing remarks in the reply, and the reason for that we need to get to grips with the real disputes between the parties, and I do not think this is disputed, and given the verification process we should come back to it. Is it okay? Unless you see some prejudice I think you should come back to it.

ADV ADILA HASSIM: I see not prejudice.

ARBITRATOR JUSTICE MOSENEKE: In your closing remarks.

ADV ADILA HASSIM: I am indebted to you Justice. We will then ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: We will have to create the time tomorrow to do that.

ADV ADILA HASSIM: We will deal with it in my reply. That leaves costs. My instructions are that the, costs have been born by Section 27. They claim no costs in relation to the services of Section 27 or the dispersements, but there is a claim for costs for one Counsel, and that is necessary because it is part of the agreement that Section 27 has with legal aid that is part funding the litigation. So costs to include the costs of one Counsel, and then ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: It excludes attorneys costs, would it?

ADV ADILA HASSIM: And it would exclude attorneys costs.

ARBITRATOR JUSTICE MOSENEKE: And exclude the cost of other Counsel.

ADV ADILA HASSIM: It would ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: What other Counsel?

ADV ADILA HASSIM: We do not know which one yet, but yes.

ARBITRATOR JUSTICE MOSENEKE: Those are submissions on costs. Okay.

ADV ADILA HASSIM: Those are my submissions on cost, and those are my submissions on costs. I have just been handed something that I should have alerted Justice to earlier, and that was there was an interlocketory application for the provision of post mortem reports that was made earlier in these

proceedings. The application speaks for itself. We have not received any notice of opposition to it. It is simply for the Arbitrator to consider in the award the provision of those post mortem reports to the families. The SAPS has agreed to provide it to the Arbitrator, and as for provision to the families, they leave it in the hands of the Arbitrator, and we request the Arbitrator ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: But were there costs granted in the [inaudible] application?

ADV ADILA HASSIM: Costs, I am not aware of that.

ARBITRATOR JUSTICE MOSENEKE: I do not understand the submission then. Just help me understand.

ADV ADILA HASSIM: Sorry, that is not in relation to costs at all. This is simply the interlocketory application that was made.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV ADILA HASSIM: That I was remising mentioning at the outset of the proceedings.

ARBITRATOR JUSTICE MOSENEKE: I see.

ADV ADILA HASSIM: It would have been better to clear it out before I began my address on relief, but I did not want to let it go because we do require an award from you for the release of the post mortem reports.

ARBITRATOR JUSTICE MOSENEKE: Okay, very well.

ADV ADILA HASSIM: Those are my submissions Justice.

ARBITRATOR JUSTICE MOSENEKE: Thank you. Advocate Lila Crouse, it is ... [interjects]

ADV. LILLA CROUSE: May it please you Justice.

ARBITRATOR JUSTICE MOSENEKE: Let us look at the time. It is five past four. You are going to run for an hour and we adjourn. Is that right? Then you can continue tomorrow.

ADV. LILLA CROUSE: Justice, I am very concerned that we will not finish tomorrow or that we will sit late into the night, but I am of course in your hands.

ARBITRATOR JUSTICE MOSENEKE: I can sit late into the night today. I cannot tomorrow.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: For reasons I have privately disclosed to.

ADV. LILLA CROUSE: Yes. I was wondering whether we should not at least finish the claimants today.

ARBITRATOR JUSTICE MOSENEKE: Okay.

ADV. LILLA CROUSE: In order not to sit late tomorrow, because I am concerned in so far as we receive the heads of arguments of the state very late last night, that we have not given them proper thought and that we, our right to reply might be lengthier than we anticipate. So if you will allow us, I would rather sit late today and ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: So let us do. Let us sit late. I am quite happy after an hour, an hour and a half we take comfort break and then continue.

ADV. LILLA CROUSE: Thank you Justice.

ARBITRATOR JUSTICE MOSENEKE: And Advocate Groenewald, are you up to it?

ADV. DIRK GROENEWALD: Justice ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Because you will be next after this.

ADV. DIRK GROENEWALD: Indeed so Justice.

ARBITRATOR JUSTICE MOSENEKE: So if there is any prejudice it will cover you too.

ADV. DIRK GROENEWALD: Ja, no.

ARBITRATOR JUSTICE MOSENEKE: And then we will hear Advocate Hutamo then tomorrow. Tomorrow morning as originally planned. Then have a reply then from the claimants also tomorrow, and as I gather evidence leaders will not be making any legal submissions.

ADV. PATRICK NGUTSHANA: None Justice Moseneke.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. PATRICK NGUTSHANA: Although we have prepared something in writing, but we are not going to speak on it.

ARBITRATOR JUSTICE MOSENEKE: Yes. I think that is proper. Proceed Counsel.

ADV. LILLA CROUSE: Thank you Justice. Justice, just to put it into perspective. Our list of clients have now reached 68 people and we will make sure that that list reach you before the end of today.

ARBITRATOR JUSTICE MOSENEKE: Yes, thank you.

ADV. LILLA CROUSE: We have prepared Justice, fairly substantial heads of argument again to written arguments. So I am not going to read everything or refer to everything. If I might just page through it with you, I would be glad to do so.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: And I will start at ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: It will be easier that way. Let me, I was just about, I have just closed the Section 27(1). Let me just open up yours. I got it, it is open before me, thank you.

ADV. LILLA CROUSE: Thank you Justice. I will start at paragraph 4 of my heads of argument. Just to reiterate that Justice you ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Just repeat that number again. It is now?

ADV. LILLA CROUSE: 68.

ARBITRATOR JUSTICE MOSENEKE: 68, thank you.

ADV. LILLA CROUSE: That you have mandated us to act for the survivors and their families in terms of the entitlement in paragraph 2.3 of the terms of reference, and we refer throughout to these people as survivors and their

families, but we have been unable to make contact with all the survivors, despite our best efforts and therefore our list now stands at 68, and we will make sure that that new list reach you today. Can I just work in at this stage already the, after we filed our heads of argument the state has objected to our prayer that the missing or the unrepresented health care users be included in any argument of us, and I just want to give Justice, just some background to this if I may, and I think the, it was raised in the statement of opposition by the state which we received after we filed our heads of argument.

Now there are two categories that are unrepresented if we do not represent them. On the one side it is the missing mental health care users, and nobody can find them and the other side it is those mental health care users that is [inaudible] and that we could not take instructions from, who has no family members. So those are the two groups that we say we are entitled to make representations for and in doing so, I want to refer you to Section 15(2) of the Mental Health Care Act, which states that a mental care user is entitled to Legal Aid South Africa in any conduct or institutions of legal proceedings in terms of this act, and I would submit that the arbitration could fall into that category.

ARBITRATOR JUSTICE MOSENEKE: Of legal proceedings?

ADV. LILLA CROUSE: Of legal proceedings, yes.

ARBITRATOR JUSTICE MOSENEKE: Ja.

ADV. LILLA CROUSE: And these proceedings, with respect as already pointed out, are with the consent of the department, and in terms of our manual and our act ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Which department now?

ADV. LILLA CROUSE: The Department of Health.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: Is part of the ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Arbitration, yes.

ADV. LILLA CROUSE: Of the arbitration, but in terms of our act, the Legal Aid South African Act and the manual, we give, we act for people that is [inaudible] and vulnerable and these groups by definition fall within that, and in terms of our manual further, when [inaudible] and vulnerable people is at risk of being abused or unfairly discriminated or exploited, we are obliged to act for them. Now if we then go to the terms of reference, it is our submission that these people fall within the entitlement of the criteria in 2.3, and that their terms of reference mandates the Arbitrator to determine redress for affected persons in the marathon project. They also fall into that category. They are missing in terms of ELAH163. We have that list, except for one of our clients that is not on the list, and the state has accepted liability for them.

We would therefore submit that we are entitled to represent them, even though we do not have specific instructions, but it goes further than that, and the reason that they should be given redress is our constitutional principal that a court will not only deal in effective relief with the parties before it, but it will also deal with people similarly situated. Because of this, it is our respectful submission that there is a wider public dimension, as stated in our authority and the [inaudible] for everyone s stated in the national coalition for gay and lesbian equality. The citation there is 2009(1) SA 390 constitutional court. This in our submission requires a consideration of the interest of all those who might be

affected and not merely the parties before the arbitration, and this was also set out in the matter of S versus Thunzi 2010(10) battle with constitutional law reports 983.

In this case Justice Moseneke, we were part of the bench and I was arguing the matter. The constitutional court made great effort to deal with people that were similarly situated in that matter, and if I could then just perhaps quote lastly Justice Harms in the Modderfontein matter in the SCA he said:

"Courts should not be over [inaudible] by practical problems. They should attempt to synchronize the real world with the ideal construct of a constitutional world and they have a duty to mould an order that will provide effective relief for those affected by the constitutional breach."

ARBITRATOR JUSTICE MOSENEKE: Can we pause there for a moment? It is matter that has been engaging me quite a bit. What would be the rich of the award in relation to the two categories you have addressed me on, as well as the 68 mental health care users on your list. There are approximately about 1400 and something people.

ADV. LILLA CROUSE: 1170 I think it is.

ARBITRATOR JUSTICE MOSENEKE: 1170 who, 1170. What would be the rich of this award in relation to ... [interjects]

ADV. LILLA CROUSE: To those people? Justice, we

ARBITRATOR JUSTICE MOSENEKE: How do you make the bell [inaudible] for everybody?

ADV. LILLA CROUSE: We have submitted and I will submit this when we argue the remedies, but we have submitted that the best place to suit these mental health care users, is by making an allocation which is paid into the guardian's fund, and the guardian's fund has, it is these days in terms of the Estate's Act 66 of 1965, but it has not always been, but it has always been in terms of the provincial legislation since before time it seems to me, to deal with people, children and they still refer to the term lunatic and missing persons. So our mental health care users would fall within those terms and it would, the money would be available for them. That money would be available until they die, and thereafter if nobody claims it or if it lies there for 30 years, it will fall back to the state which I submit is the best solution that we could think up in the circumstances.

ARBITRATOR JUSTICE MOSENEKE: But should the order not, do we know the names of the balance of potential claimants?

ADV. LILLA CROUSE: Yes Justice, it is attached to the list that the state provided.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: So we have that.

ARBITRATOR JUSTICE MOSENEKE: Yes. So if we know who they are, we could very well make awards that would accrue to their benefit.

ADV. LILLA CROUSE: Absolutely Justice.

ARBITRATOR JUSTICE MOSENEKE: That is the submission you are making.

ADV. LILLA CROUSE: That is our submission, and of course ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: And subject to means to access the money.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: Out of the guardian's fund.

ADV. LILLA CROUSE: The means to access that would be if they are no longer in a state where they are not [inaudible] or when they a family member on their behalf make representations to the master, and that is the master's role in the guardian fund, I submit.

ARBITRATOR JUSTICE MOSENEKE: Ja, and the beauty of that arrangement would be that they will not be obliged to start their own arbitrations ... [interjects]

ADV. LILLA CROUSE: No.

ARBITRATOR JUSTICE MOSENEKE: Later, nor would the state want to be litigating forever.

ADV. LILLA CROUSE: Absolutely Justice, and it will also make provision for family members that belatedly hear about this, the whole incident. We are of course not catering for those family members, because just logically we do not imagine that they have suffered any damages if they are not part of the arbitration hearing.

ARBITRATOR JUSTICE MOSENEKE: Well, the order of that [inaudible] could be useful also for claimants in respect of mental health care users who have

died, but are not on Section 27's lists currently. I am just saying the formula is interesting, because it could then catch even that situation.

ADV. LILLA CROUSE: I think Justice, the family, those who have died and that we know that have died, their claims might not be in existence anymore, but those that have survived their claims, are still in existence. Their families have not played a role, so I do not know whether we would want the family members that is not, has not been part of these proceedings, knowing how wildly it was published that they would have a claim at this stage. So I am not so sure that that is the way that one should go Justice.

ARBITRATOR JUSTICE MOSENEKE: Why would it be okay to go that route with survivors?

ADV. LILLA CROUSE: Because the survivors have suffered, in my submission and we will deal with that in our remedies, but their suffering is there for everybody to see. But their families if they are nonexistent families, might not have suffered. That is the just of our submission.

ARBITRATOR JUSTICE MOSENEKE: Okay, I follow that thank you.

ADV. LILLA CROUSE: Thank you Justice. We have also provided a time line. We are not going to refer much to it at this stage, because we are not going to deal much with the facts of the matter. If I can take you to paragraph 6, just to indicate the structure of our heads of argument. We deal firstly with the purpose of the arbitration proceedings. Then we deal with the harm causing conduct and the harm causing conduct we have put into three categories. Firstly the state's obligation towards mental health care users, and then the disgraceful disregard of these obligations by the Gauteng Department of Health,

and then lastly the effect this had on surviving mental health care users and the families, and then not really as an afterthought, but we also deal with the losses of people who are not health care users or families.

We just put that in there Justice, as we will say, to show that there were really unintended consequences and no plan. We will deal with wrongfulness and then we will deal with the relief sought. If I could just then go back. In respect of the disregard we will show seven failures or headings under which we deal with the disregard. Now the purpose of the proceedings Justice, is in our heads of argument, and we, I do not intend to deal with that. The harm-causing event is at paragraph 13. We just say:

"It can certainly be described as the Gauteng Department of Health irresponsible and rush continuation of an irrational marathon project to move 1711 mental health care users despite being told in no uncertain terms of the consequences and in so doing causing the death of at least 143."

And we say that the mental health care users, and causing severe suffering to others and their families and this conduct was either reckless or grossly negligent. Now if I can then start off at paragraph 15 with the state's obligations to these mental health care users, we state that the South Africa is bound by the international obligations, constitutional principles, legislation and policy. In paragraph 16 we deal with the universal declaration of human rights. In paragraph 17 we deal with the African charter on human rights, the [inaudible] charter. In paragraph 18 we will deal with the convention on the rights of persons with disability.

ARBITRATOR JUSTICE MOSENEKE: Yes. [inaudible] of international standards is very helpful and thank you very much for that.

ADV. LILLA CROUSE: Thank you Justice. In paragraph 19 we deal with the 1991 UN principles of the protection of persons with mental illness and for the promotion of mental health care. In paragraph, Justice we are skipping a few pages. Paragraph 20 we deal with the compliance of our international obligations, as it also stands in our constitution, and we make the submission in paragraph 20 Justice that the NGO's should be regarded as organs of state vice versa the mental health care users, and in this regard we refer to the all pay matter. If I could perhaps just very briefly, Justice I think you were still part of ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: Yes. It says in paragraphs 52 to 59 deals with the cash master and it says that SASSA is an organ of state. That is clear, but for purposes of the [inaudible] contract so too is cash master, and what all pay says is that the state cannot get away from his obligations by passing it on to another person and by taking obligations that is part of the state, the NGO's then in our submission became organs of state. But even if we are wrong in that submission Justice, we still say that in terms of the horizontal obligation on them, they still had the duty to care for the mental health care users.

ARBITRATOR JUSTICE MOSENEKE: Yes. It is a good proposition. At the same time it raises the tension inevitably. The inadequacies of the NGO's are there to see. They were horrific. They were not suited for purpose. So the tension is as you extend, the reason why you would extend the notion of the

state to entities which assume obligations of the state, is a healthy one [inaudible] very sound. Here all pay was doing the pay and therefore it was an extension of the state. Here when we do, it depends on how you are going to use that. When we do, the question must be when something is so instate like as these NGO's were, that is a useful extension of the obligation. We can debate that a little further, but in law you are correct. I am just a little careful in cases where NGO's are so unsuited to be organs of state, would they still be organs of state.

ADV. LILLA CROUSE: I would submit that places the blameworthiness of the department in transferring their duties to these unsuitable NGO's. It will just exponentially increase their own blameworthiness.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: Justice, in paragraph 21 we deal with the rights of mental health care users in our constitution. We specifically refer to Section 10, 11, 12, 27 and 133.

ARBITRATOR JUSTICE MOSENEKE: Did I miss that you make no reference to any of the standards under the [inaudible] protocols. I seem to remember in one of the submissions there was a reference to protocol on the care of mental health care users.

ADV. LILLA CROUSE: I did refer to it Justice.

ARBITRATOR JUSTICE MOSENEKE: Ja, in your argument.

ADV. LILLA CROUSE: I am not sure whether I took it out again, so it is a little bit late in the day for me to remember, but I will make if it is not in there ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Yes, if it is not in there you will make it available to me.

ADV. LILLA CROUSE: Yes Justice.

ARBITRATOR JUSTICE MOSENEKE: It is quite important that this is not some standard that hovers somewhere above.

ADV. LILLA CROUSE: Yes, absolutely.

ARBITRATOR JUSTICE MOSENEKE: Somewhere in the global north. In fact these are obligations which have been assumed even by the African union.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: And therefore there are, and we have rectified them and you made that point last time in your cross-examination.

ADV. LILLA CROUSE: Yes Justice.

ARBITRATOR JUSTICE MOSENEKE: So I would like to have reference to that.

ADV. LILLA CROUSE: I will make sure if it is not in the heads that it is.

ARBITRATOR JUSTICE MOSENEKE: Sure, thank you.

ADV. LILLA CROUSE: Justice, in paragraph 22 we refer to the National Health Act.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: And in paragraph 23 we refer to the Mental Health Care Act. I am going to just, those are uncontroverted so I am not going to deal with any of that.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: I will then ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: It is a very valuable legal frame work. As I said I am grateful for that.

ADV. LILLA CROUSE: Thank you Justice. I will then turn to page 32 of my heads of argument and at paragraph C2 at the bottom I refer to the disgraceful disregard of these obligations. Justice, I make reference to a book by Andrew Solomon Far From the Tree, and it seems to me that this quote is so at for these proceedings, and if I may I would read it:

"Beurocrates who drew our programs, often have never seen a patient, much less treated one. A vacuum of empathy exist in any system that returns people who do not know how to be in a community to communities that may not be prepared to handle them. The lack of support and erratic access to medication often result in rapid deterioration, but family members who attempt to arrest, that they are frustrated by the courts."

It just seems as an [inaudible] quote of what exactly happened in these circumstances.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: Justice, then in paragraph 25 we deal with the ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: I am not familiar with, that is a book is it? Or is it a collection of SA's. What is it?

ADV. LILLA CROUSE: Justice, it is a book on deinstitutionalisation and mental illnesses that ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: I see.

ADV. LILLA CROUSE: That is around.

ARBITRATOR JUSTICE MOSENEKE: Thank you.

ADV. LILLA CROUSE: We then say:

"The [inaudible] harm was caused by irrational en irresponsible manner in which firstly the decision was taken."

And then:

"The responsibility of this decision must be placed before the door of the MEC, the former MEC of Health and her officials. However, even if this decision was correctly taken, which we of course deny, then the execution of this decision was so reckless that all involved in it are responsible for the harm that is caused."

And I will deal with this under seven headings, and I will, my learned friend has dealt extensively with the facts. The facts are in here. We have tried to put footnotes that Justice does not have to go back to the record to read, but we have quoted them ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: In a manner that will probably, well we hope that would save time. The first issue is that there was no identifiable reason for the closing of Life Esidimeni, and my learned friend have dealt with that completely. If I could just perhaps end this off at paragraph 32, to say there is no reasonable or logical reason for the marathon that is given thus far, and it is our submission that the government bore the onus to place honest and correct reasons for this project before the arbitration, as that was within their exclusive knowledge. In the absence of a cogent reason for the marathon project, we submit that you will be able to find that there were no such reasons. Other perhaps than that the project was a national political move to harm the interest of Life Esidimeni, and that in the process the mental health care users were the ultimate victims.

It must also be noted that the MEC as the policy maker either was not telling the truth that this project was not driven by her. Alternatively she recklessly and incompetently neglected her statutory duties as MEC in making sure that the policy and its implementation was lawful and within government policy. We have dealt with that aspect in cross-examination. Justice ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: But I surely would have to make credibility findings there, not so?

ADV. LILLA CROUSE: Yes, absolutely Justice, and we throughout our heads of argument we say in no uncertain terms that there are definitely adverse credibility findings to make, to be made of a number of people. Then secondly Justice, we say that there were no implementation plan. If we could then move to page 44 Justice. Thirdly we say that there was a total disregard for human dignity and we say that our country is founded on human dignity and the

achievement of equality and advancement of human rights and freedom in terms of Section 1 of our constitution. If I could then move to page 48 of the heads of argument. The fourth point that we make is that the department was non-responsive, and again we refer to the preamble of our constitution which says:

"We, the people of South Africa, lay the foundations for a democratic and open society in which government is based on the will of people and every citizen is equally protected by law."

And unfortunately Justice, these patients were not protected. Their families were not protected. We, at paragraph 66 we deal with Section 1D of our constitution that determines that South Africa is founded on the universal added saferage and national common voters roll, regular elections and a multi party system of democratic government and our emphasis lies thereon to ensure accountability, responsiveness and openness, and once again it is our submission that that did not happen. We make the submission that there was no consultative process embarked upon. We make the submission that the department was not responsive to the previous tragedy in 2007 when children died. We make the submission in paragraph 69 that they did not act on their own experts. They did not act on outside experts. They did not, they ignored family members. They ignored marches, and in paragraph 75 we refer to the email sent by Ms Nkosi to the national minister who, and that never reached him.

If I could then go to page 77 after that Justice.

ARBITRATOR JUSTICE MOSENEKE: Paragraph or page?

ADV. LILLA CROUSE: Paragraph 77, sorry Justice.

ARBITRATOR JUSTICE MOSENEKE: No problem.

ADV. LILLA CROUSE: They did not even listen to the NGO's, because when the staff refused to place more patients per ward, Dr Manamela and Ms Jacobus pushed the beds around themselves, and Dr Manamela lied about her involvement in this exercise. In paragraph 78 we deal with the non responsiveness to certain NGO's. Before and after the allocation or the move. Justice, if we can then go to paragraph 85. Dr Selobano acknowledged in court that he missed the warning signs. However, it is our submission that the department did not miss the warning signs. They refused to listen. The only reason for this, is that there was no understanding of our new democratic and constitutional principles and values.

ARBITRATOR JUSTICE MOSENEKE: Is it the genuine what, ignorance? I mean a genuine lack of understanding?

ADV. LILLA CROUSE: A general non caring for constitutional principles I submit or for Ubuntu or for human beings. That is my submission Justice.

ARBITRATOR JUSTICE MOSENEKE: Ja.

ADV. LILLA CROUSE: Dr Selobano also acknowledged that he did not adhere or the Gauteng Department of Health did not adhere or respond to their own values of being patient centred, accountable, transparent and efficient. The department was even after this tragedy, non responsive to the Ombud's recommendations in that they merely paid lip service to disciplinary hearings. The danger of the department's unconstitutional conduct can be seen in the consequences thereof. The deaths and suffering could have been prevented if

the department acted as is expected of a responsible government. Justice, then fifthly we say that there was no adherence to the rule of law, and we deal in paragraph 90 especially with the fraudulent issues of the operational licences which my learned friend have dealt with, and I am merely going to skip to paragraph 93.

In terms of Dr Grobler's evidence they have also neglected the legal prescripts of how to discharge mental health care users from Life Esidimeni. Justice, then on page 60 we deal with the sixth way in which they disregarded the obligations, in that there was insufficient monitoring even after the death.

ARBITRATOR JUSTICE MOSENEKE: After the event.

ADV. LILLA CROUSE: Yes, and mental health care users died of hunger and became emansiated, at a time when 82 people were already dead that was the first time Ms Jacobus heard about the deaths. It just boggles the mind. If I then can go to the seventh aspect ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: What do I do with this preposterous denial of knowledge? You know, we have debated this a little bit with your learned colleagues and it [inaudible] and makes the mind boggle. How could such a big project with so many people go totally unnoticed by senior officials in the department that was hell bent on making this happen.

ADV. LILLA CROUSE: Justice, it starts with the MEC not following her statutory duties. It follows through to the department fraudulently issuing licences, and it lies in incompetence in our submission, and the fact that there were or that they say they did not have knowledge, is just not sufficient to get away from responsibility for these, but it lies in our submission in total

incompetence, and trying to put something on a subjective foresight which should have been there if you were competent. If I could then move to the seventh ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You are very kind if you attributed this to incompetence only. Yes, you may proceed.

ADV. LILLA CROUSE: Thank you Justice. Then the seventh and the last failing of the department, is in the moral administrative and competency failures and we deal with the Gauteng department that has no insufficient regard to the basic values and principles governing public administration as set out in paragraph 195 of the constitution. Justice, I quote in footnote 151 that, and just by reading that we can see that there was total disregard. They part of the moral failing is the departments entering and my learned friend have dealt with it, but I want to just reiterate it. They enter into a deed of settlement in December 2015. But they did not have any intention to adhere to that agreement, and if one follow the timeline we can see that.

Then when an urgent application is brought, they lie to the court, and the court cannot protect the vulnerable people. Then I deal with in paragraph 103 with the HOD and the legal departments not heeding the constitutional duty as they should have, and Justice this is a failure that we see so often these days, that it is about technical points. It is not about the protection of our constitution, and it is something that needs to be underlined for state departments to know and my learned friend has dealt with the constitution as well. This cannot continue, because people died as a result of what happened here. Then another failing is in paragraph 2.4, ag 104.

When the Drum article appeared, Dr Manamela's first confrontation with Ms Mjabi was we do not want to look bad and we do not want to lose our bonuses. That stands out as an immoral attitude to what was said and the photographs in the Drum report.

ARBITRATOR JUSTICE MOSENEKE: Right.

ADV. LILLA CROUSE: A further failing in our submission is that none of the leaders directly involved wanted to take responsibility, and we it is our respectful submission that this is disjointed and fragmented roles that this procured and it is either dishonest or it is total ineffective leadership. We deal with the fact that the officials was grossly incompetent. We make the, deal with that in the footnotes, and Justice what stands out is Dr Selobano that sees himself as blameless in this tragedy. He endeavours not to give any evidence by applying, I think I have misread myself now. But he did not want to come and give evidence. He tried even to go to the high court to prevent him from giving evidence. That is not what we expect of a responsible leader. The Ombud complained about the type of collective obedience.

I think that the Minister of Health have put stop to that, showing that that can never be part of democratic processes. We deal with the lack of understanding of statutory and constitutional duties, and officials complying with unlawful instructions, and then the current HOD told an untruth to this court by saying that the department did not make recommendations as to what sanctions to the various disciplinary hearings. That was also not true, and to top this all up, even after this process the officials that were involved in the marathon project received performance bonuses. It just flies in the face of the value of people's

lives. My learned friend have referred to the professional misconduct, and I am not going to deal with that.

I deal in paragraph C3 with the effect on surviving mental health care users and their families and I quote Ms Nompilo Nkosi that said:

"Our loved ones are cold in strange places."

And that sums up much how they experienced what was happening. We have dealt with the number of mental health care users that are still missing, and I have dealt with the traumatisation, that the family members were traumatised. Justice, we have supplemented just to put in more of the stories of the family, and I am not going to read through all of that. That is before the court. I have to however deal with two seperate incidents and three family members. If I could go to page 1, paragraph 142. 142. This is the evidence in ELAH147 of Ms Sophie Kansa about her father Guy Daniel Kansa that was a patient. He is still missing, and it is important to know that he is not on the list.

Justice, and then I am duty bound to refer you to page 148 and just deal with the evidence there, and to lift out that is the evidence of Mr Modogwai Mahambu. His brother was part of this process. However, he passed away in 18 August 2017. It is important to just underline this, because ordinarily in litigation where a person dies, his estate can only follow up if he dies after the close of pleadings, and close of pleadings if you use the terms of agreement as close of pleadings, that would be on the 8th of September. So he had died before the close of pleadings in this respect. So he might have to lose his claim, but I submit that his family would not lose their claim, because he did not die as part of the project.

He died after the project and they went through this project and the uncle bought things for him, and were traumatised by what has happened here.

ARBITRATOR JUSTICE MOSENEKE: He was moved to Tshepong in May 2016.

ADV. LILLA CROUSE: Yes Justice.

ARBITRATOR JUSTICE MOSENEKE: But why would he be, would be excluded on account of what? His date of death?

ADV. LILLA CROUSE: Yes, only on his date of death because it is before close of pleadings. I had to bring this to the attention of you Justice. I am duty bound and to my learned friend.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: There is another such a person and that is on page 4660 of the record. That is in respect of Fakazile Dibetshu. Her aunt died also part of this process, but the aunt died on 8 September 2017. So that was on the same date as the terms of reference. I would submit that her claim would fall into her [inaudible]. If I could then move to C4 ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: That is quite tricky. Assuming there was a distinction between survivors and claimants in respect of the deceased, what amount will be due to them? Which category of amount?

ADV. LILLA CROUSE: To the deceased or to the family Justice?

ARBITRATOR JUSTICE MOSENEKE: Well, the deceased is not here. I am saying if we were to make a distinction on account of the date of demise, the

claim of the families or the claim of the estate, would that be entitled to whatever amount might be granted in respect of ... [interjects]

ADV. LILLA CROUSE: The surviving ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: The survivors or ... [interjects]

ADV. LILLA CROUSE: I would submit ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Or should it be in respect of families whose loved ones have died?

ADV. LILLA CROUSE: Justice, we will get to that in terms of our relief that we seek. We try to put the family member's trauma on a different footing as the survivors, because we submit that there is a difference. So in terms of these mental health care users that passed away, I submit that their relief will be on the same footing as other survivors, and their family's relief will be on the same footing as other family's relief, and I will deal with that in due course.

ARBITRATOR JUSTICE MOSENEKE: Okay, ja. Let us get to that then.

ADV. LILLA CROUSE: Justice, then we deal just with the losses of people not party to the proceedings, and it is just an idea to show how irresponsible and irrational the plan was. There is more than 700 professional persons that lost their jobs, despite many requests from yourself Justice and from us, for the precise number that has not been given. There is no more training. The training went, was stopped. The NGO's were told to renovate buildings without a plan. The buildings was not allowed. They lost money. The person that was tasked for supplying linen, apparently lost his house, and all this just show to

the unintended consequences and it just shows to no plan at all by an uncaring department.

Justice, then I deal with wrongfulness or we deal with wrongfulness under D. If I could go to paragraph ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Why do you do that?

ADV. LILLA CROUSE: Justice, the reason we deal with it is ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Terms of reference concede that outright.

ADV. LILLA CROUSE: With respect Justice, in our reading of the terms of reference, they only concede to negligence and we submit that their conduct exceeds negligence. Perhaps if I can deal with it ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: No, but wrongfulness here of course would mean unlawfulness, would it not?

ADV. LILLA CROUSE: It is ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Negligence is one element. Unlawfulness another.

ADV. LILLA CROUSE: Yes, but what ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You only said unlawful or wrongful and negligent ... [interjects]

ADV. LILLA CROUSE: Yes, this goes to ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Or intentional conduct.

ADV. LILLA CROUSE: It goes to intent, but we have dealt with it under this to show that even though they have accepted that they have gone, that it has gone astray the whole project, we want to just deal with in our understanding on negligence. So what we say is in paragraph 161 is that negligence is proven when the conduct complained about falls short of the standard of the reasonable person. Justice, you know this.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: And I am sorry, I am not lecturing you. I am just trying to get to the next point.

ARBITRATOR JUSTICE MOSENEKE: No, no.

ADV. LILLA CROUSE: The state says yes, we were negligent, but we argue that they were reckless, and instead of them working with an objective assessment of their conduct against that of a reasonable person, we argue that we can work on a subjective assessment on their own conduct and the harm that they have caused, and that in itself has an influence in our submission on the solace that this court will give, because it goes without saying that intentional harm hurts you more than negligent harm, and it is the difference between in criminal law culpable homicide and murder and the sentences that comes in there, because as soon as a person, even if it is [inaudible] or even dolus eventual, the blameworthiness of the perpetrator comes into play and that makes any award that this court will make, will then be higher.

ARBITRATOR JUSTICE MOSENEKE: You see, the Ombud finds recklessness.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: And the state admits the contents of the Ombud's report, in the agreement they admit negligence. I hear the point and it may well be, I am sorry. Aviwe, would you get me a cord please to plug in my laptop from which I read? So I hear the argument. I am saying on all versions, I think both negligence and recklessness have been admitted.

ADV. LILLA CROUSE: Justice, I am not going to argue with them. They say they accept the report.

ARBITRATOR JUSTICE MOSENEKE: What is individual perpetrators, and I call them that advisably. They are careful to try and scrum away from dolus eventualus if they were to be tried criminally, and I know you may very well be going there. But for delictual liability I think we have more than enough on our plate.

ADV. LILLA CROUSE: Justice, I am not going ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: For criminal liability I think, I do not have to express my view on that, but it is something that another judge will do so. If you know enough to have reason to believe that a certain consequence will eventuate, and in truth and in fact it does eventuate, the law has always been quite uncomplicated. You have reconciled yourself with the consequences.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: Shooting into a crowded little toilet and the consequences ensue, the law will impute.

ADV. LILLA CROUSE: Absolutely Justice. Justice, I have dealt with those issues up until paragraph 168.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: With the facts and I am not going to repeat that.

ARBITRATOR JUSTICE MOSENEKE: I have seen them and they will be helpful for the MPA I think.

ADV. LILLA CROUSE: Justice, then we say that the department has very close to [inaudible] the matter there tried to say but we were exercising a right, but they were actually abusing a right. That is just as general background. I am not going to do anything of that. Paragraph 170 we say that the harm causing conduct goes further than merely abusive motive. We deal with recklessness, and then if with this as background if we could then deal with the relief sought.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: Justice, we in paragraph 172 we say in so far as this arbitration was defined the true reason or reasons behind the cancellation of the Life Esidimeni contract, this process has failed. Never the less we submit that it has exposed the Gauteng Department of Health's reason for the marathon project and the result in tragedy as false and malicious. So in that aspect it did not fail, and to this end the evidence of especially Ms Mahlangu, Dr Manamela and Dr Selobano has been shown as false beyond a shadow of a doubt. In so far as ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: But you know Advocate Crouse, one cannot resist saying and asking again and again and again what were they

doing. The reasons are false. They are not the real reasons. We were told by very senior power wilders in the province, and the question pops up what were the real reasons. Are you any wiser? Of course not.

ADV. LILLA CROUSE: Justice, it is our submission as we do in our heads of argument, is that there was an ulterior motive. We would not know what it was, but it is for the state with their insight knowledge to tell this arbitration what it was. In the absence of that, it just shows to the recklessness. That is our submission.

ARBITRATOR JUSTICE MOSENEKE: And the whole state machinery to write up to the Minister, cannot tell us what have they discovered, discerned from then to now.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: What was it?

ADV. LILLA CROUSE: Justice, in paragraph 173 we say in so far as this process was aimed to remind the state about the statutory and constitutional obligations to mental health care users, we have endeavoured to highlight that through cross-examination and we hope that your, with respect that your award will remind the state as a whole about the rule of the law and constitutional principles and forcing the government to put functioning systems and structures into place to ensure the wellbeing of mental health care users. In so far as this process was aimed at forcing the government to put in proper functioning, we have the evidence that there was a staff cleansing at the department. That there were new information structures and new reporting lines have been created, and we hope that that would make a difference.

We have dealt with this before in argument, but I just want to reiterate again. It is necessary that state departments needs to be reminded most urgently that frivolous and untruthful and technical points does not belong in human rights litigation. We have shown with respect beyond a shadow of a doubt, that the department was dishonest in their opposition in Takalane. In the Takalane, the contempt case. We have shown the Siyabadinga matter that is before the court in ELAH169. What is particularly heartbreaking of the Siyabadinga case, is that they have asked that the curator [inaudible] be appointed. We have the sister of Jaco Stolts that is saying in the founding papers please appoint a curator [inaudible].

These are the photographs, this is how it looks. The department comes back and say no, no, no. That is totally untruthful. She then makes in reply again says I am afraid my brother is going to die. The photographs are true and within a very short while thereafter, her brother dies, and the frivolous point taken by the state legal representation, is that Rule 57 has not been followed. There was not a psychiatrist, which is with respect it just flies in the face of human rights litigation, and that needs to be underlined with respect Justice in human rights positions, that that cannot happen anymore and for this reason and it can also fall under constitutional damages. We ask that the state would make a contribution to a charity of the attorney and own client costs in both of those two matters.

The reason we ask for this is that there must be some thought that the state cannot get away with untruths and taking technical points and then know that if those points had not been taken, we might not have had the deaths that we now have. Justice, then it is our hope that if the court makes such an order, that the

consequences of such unethical and indefensible conduct will be discouraged. In so far as future governments and future generations should be reminded, we have made the suggestion in paragraph 178 that something like at Freedom Park or the Steve Bikho museum in King Williams Town, that something [inaudible] to that should take place, because there is a lot of documentary evidence. There is a lot of photographs. There is a lot of things that can be looked at, and we submit that it would be a good idea if future generations had that opportunity.

In so far as the proper acknowledgment and apologies ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: So on that I would require the province to do that. What else do I fix and who makes sure it happens?

ADV. LILLA CROUSE: Justice, again this is not a supervisory role that the, that you would want to assume after these proceedings. Could we come back and reply to ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Think about that, about the details.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: I am just in that mood as a judge I know already the responsibility would be with me, to fashion an order, and orders do not sound in generalities.

ADV. LILLA CROUSE: Absolutely Justice.

ARBITRATOR JUSTICE MOSENEKE: They never do, so I have done that for many, many years. I have to go down and write out an order that is capable of compliance. Otherwise it is no order.

ADV. LILLA CROUSE: Absolutely Justice. Justice, and then as far as acknowledgement and apologies should take place, that has run its course. Some apologies were more sincere than others. However, it is our submission that the process of stigmatisation is continuing in the uncaring attitude of some officials that lied to this arbitration. If I can then move to the compensation for survivors and their families, and the starting point is ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Should there not be a crafted public apology at the end of all of this, written and given some level of publicity or should it be sufficient, written and crafted by the head of the province or whoever, at the end of all this to say never and never again and an apology that will be to everybody else who has been dragged through all of this, or is the apology given here sufficient?

ADV. LILLA CROUSE: Justice, we have not taken specifically instructions on that, but such an apology can be dusted off in three years' time when the Life Esidimeni contract is again wily nily cancelled. That would not be a futeless or fruitless exercise in our submission, or my submission. In our submission.

ARBITRATOR JUSTICE MOSENEKE: Ja, free of all the emotions of a hearing or anything.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: A public pledge of sort and an apology. Never and never again ... [interjects]

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: Kind of position.

ADV. LILLA CROUSE: The frivolous never and never again is shown not to have worked Justice.

ARBITRATOR JUSTICE MOSENEKE: Yes, I know. Mr Mandela did promise us never and never again. When he was sworn in for the first time, but we will have to still continue trying.

ADV. LILLA CROUSE: Yes Justice. Justice, at paragraph 180 I just deal with some of the law, dealing with the [inaudible] and I am not going to repeat that. Perhaps at paragraph 183 I can just refer to Justice Strafforth in Herseman versus Shapiro where he said:

"Monitory damages have been suffered. It is necessary for the court to assess the amount and make the best use of it can on the evidence before it. There are cases where the assessment of a court is little more than an estimate, but even so if it is certain that damages have been suffered, the court is bound to award damages."

And I submit that there cannot be anything wrong with that. We then deal with the counselling aspect. Justice, we refer to the court case, the Premier versus Western Cape versus Kiewiets at paragraph 11 that says:

"It is impermissible for the state to provide future medical like counselling unless without paying a monitory equivalent in the absence of legislature of empowerment or an agreement."

In so far as we are concerned, there are no such an agreement. We therefore ask that for in respect of the families that we represent, that a monitory amount be given and we suggested that that amount should be R20 000-00. In our

statement of claim we started off by saying R50 000-00 but we have now referred the court to the SADEC website to show that it might not be sufficient.

ARBITRATOR JUSTICE MOSENEKE: And 20 would provide how many sessions and to how many people?

ADV. LILLA CROUSE: 20 would be more than two people for more than eight sessions. So that should be sufficient in our submission Justice.

ARBITRATOR JUSTICE MOSENEKE: Two times eight or eight for two?

ADV. LILLA CROUSE: Eight sessions, for two people. Just more than that Justice.

ARBITRATOR JUSTICE MOSENEKE: Thank you.

ADV. LILLA CROUSE: As to the clothing and travelling, we submit that an amount of R5 000-00 for specific damages, for the replacement of clothing and R1 000-00 in respect of cost for the location of the mental health care users. In respect of shock, pain and suffering, Justice again we have set out the law. We have set out what was suffered. In our submission the suffering was foreseeable and was in fact foresaw by the department. We submit that but for the deaths of the mental health care users, the families that we represent, suffered trauma akin to that, and that was the evidence as well of Ms Trotter. I refer in, we refer in paragraph 199 to emotional shock aspects, and in the Mart matter, a child was killed by police and in 2017 terms that is R249 000-00 that was awarded. In Minister of Safety and Security versus Raymond Augustine, there were two claimants or there were four claimants actually, but the court awarded and this is a 2017 case, R200 000-00 and R250 000-00. In the Latte matter again a child was killed and there were two plaintiffs, and in 2017 value

they were awarded R138 000-00 and R165 000-00. In the Walters matter the husband was arrested by the police and he committed suicide in police custody, and in 2017 terms that would damages or general damage was awarded in the amount of R243 000-00. In the ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: In the light of the tender by the state, what do you make of that, given the numbers that you are setting out here?

ADV. LILLA CROUSE: Justice, I can only speak to, I do not think the state has tendered us the same amount that it is awarded to agreed on by the two, the other claimant parties, but in terms of what is set out here, if I can answer perhaps in two ways and I will come back to the families general damages, but we do not only represent families. We also represent mental health care users, and as set out or as we will show now they have suffered more than the family members. So in terms of only the family members, if that is offered, then of course it lies in the hands of the court or the Arbitrator to award that, but we want to with respect show also in the Kritzenger matter where the children died in a motor vehicle accident and the court awarded damages in the amount of R231 000-00.

All of these acts were negligent acts. They were once off acts and they were unlike the marathon project. These were prolonged trauma to the family members that could not be heard. That tried to be heard. That tried to make sure the family members died. That gave up their lives or their working life just to support, and I would therefore submit that a fair general damages for family members would be R300 000-00. In respect of general damages to survivors, we submit that they are on a completely different footing, and we could find no

authority on quantum of patients that died of or that suffered hunger, thirst and cold as patients in a hospital and that must be an indication in our submission that it is unheard of in any civil society or civil place.

We submit that the lack of food and water has been dealt with in evidence and the trauma of this intense suffering outweighs in our opinion the trauma experienced by any family member. We refer the court in paragraph 203 to the matter of Smith versus the MEC for Health. It is a 2016 matter. The plaintiff had just had an operation, she woke up in the recovery ward and she asked for water to drink, and instead of water they gave her formalin to drink. The court awarded her damages in 2017 in terms of R361 000-00. In Eastice versus Metrorail the plaintiff was injured when a train derailed after a collision. He was awarded in terms of 2017 values R590 000-00. In the Gibson versus Berkawitch matter, the doctor negligently placed undiluted acid in the vagina of a 20 year old woman.

He should have used diluted acid. The court awarded in terms of 2017 general damages of R247 000-00. Now having regard to these severe abuse, the suffering of the mental health care users was akin to torture, and the was much more than the once off suffering or negligent conduct of what happened in hospital.

ARBITRATOR JUSTICE MOSENEKE: Well, ja. The argument is quite sometimes leaves me a little not understanding. You see, I do not understand the election you have made. Approaching this as a delictual claim only.

ADV. LILLA CROUSE: With respect Justice, we are still getting to the constitutional part. I am only on the delictual part of that claim now.

ARBITRATOR JUSTICE MOSENEKE: Yes, because the youth you see, all the factors you are raising undermine one or other constitutional entitlement and protection. The idea that there are common law delictual damages on the one side and constitutional damages on another, is one around which I have to get my arms.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: As you have heard me talk earlier. Formulating one's claim in delictual terms would amount to no more than using the common law as a vessel, as a container and where the common law can do the job on its own fully, that is fine. Where it cannot, because an over arching violations of the constitution, then we have to think hard and long.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: Where do we draw the line. All I am saying is that I find difficulty in drawing the line.

ADV. LILLA CROUSE: Justice, we what you have now stated as the law, we have dealt with that in our heads of argument, but we would want to make a suggestion in very soon, if I might just finish off on the delictual part of where we are going.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: Justice, we say more appropriate than these awards that we have now referred to would be in paragraph 207 M versus the Minister of Safety and Security where a woman was arrested unlawfully and then repeatedly raped in the police cells by the cell commander, and the 2017 value

of her general damages was R472 000-00 and in DW versus Minister of Police, the claimant was raped by a rapist on bail and the court awarded general damages in the amount of R750 000-00 and [inaudible] in the amount of R350 000-00. Now these two cases are very serious and they would no doubtedly have a long term effect on the victim, but we would like to argue that the harm causing conduct for the mental health care users was a more prolonged misconduct, and we would therefore suggest that for general damages an amount of R750 000-00 for each mental health care user would be appropriate in respect of general damages.

But Justice, as you have set out and we have said with reference to the rail commuters action, sometimes these general damages are not sufficient to vindicate what should be vindicate in constitutional damages. Now with respect Justice, you have made some transition about constitutional damages since 2006, and in 2006 it is our respectful submission that you said if this can do the, the common law remedies can do the trick, there is no reason to move away from them. But then on 25th November 2010 in the Law Society versus others versus Minister of Transport, you opened the door slightly that there might be constitutional damages, and what we, we have listened intensely to what you have stated so far Justice, and we hope to show that constitutional damages in a case like this is important to consider.

We do not want to preampt what your decision is going to be, but we would submit that general damages is not sufficient in this matter. You have seen the atrocious evidence that we have heard, and it is important that there must not only be a punitive, that there must be a punitive impact on what has happened, and I submit that constitutional damages could do so. Justice, if we might and

then we will end off by this. If I could refer you to an article, it was written in the Akte Juridica on 2015 and I know that you must have seen it before, because you have also written an article in that document, but this was written by Alistar Price on the occasion of Chief Justice's Langa's death.

The idea of this article was to deal with state liability and accountability and I submit that the author of this makes a compelling argument for constitutional damages, and if I might just refer you to some aspects of this article. On page 315 the author says what is accountability, and then he says first to hold people accountable or to account means requiring them to explain or to justify their actions. Accountable government for instance have a duty to explain and justify their decisions, actions and laws to citizens. Now this is what this arbitration tried to do. Is to hold the government accountable. To ask them to come and explain. Now the, he deals with the ways to do that. But I am not going to refer you to that in itself.

If I might refer you on page 320 and this is still accountability. The second paragraph says:

"Of some importance here is the distinction of degree drawn by the constitutional court between the general characters of public litigation and remedy and private litigation and remedy. The court has stated that generally speaking, whereas private litigation tends to concern with a determination of a dispute between individuals, relief is specific and often retrospective, and non parties are seldom directly affected. Public litigation tends to deal with more diffuse and a morphus harm to be more forward looking in its outlook and to affect directly a wider range of people."

And then he refers to the rail commuters case in which with respect you are well aware of, and he says:

"Anonymous court remark that private law damages claims are not always the most appropriate method to enforce."

And then he goes on to deal with state liability, and if I could also read to you that first paragraph. It says:

"Without doubt then, imposing liability on the state to pay a monitory some or damages to a victim of wrongdoing is a well recognised and appropriate legal means of securing accountability which rightly co-exist alongside the other legal and political accountability mechanism summarised above. If it chooses to resist such a claim ..."

That is the government:

"The state will have to defend and thereby account for his challenged conduct. If it admits liability or is held liable, the state is held responsible."

Now then he deals with the ways in which the state can be held responsible, and that is on page 321. It says:

"It is either a delict or a statutory compensatory scheme or in terms of the promotions of the PIA act."

And finally towards the end of that paragraph:

"Finally public functionaries may be held to pay constitutional damages for breaching a requirement imposed by the constitution. That is monitory award may on occasion constitute appropriate relief and a just and equitable order in terms of Section 38 of the constitution."

Now what he says is that the public functionaries can be bound, as you have also said with respect Justice, either by the law of delict or by one or either of the other three mechanisms, and then he asked the question on page 322 how then does the South African law manage the relationship between these various potentially overlapping branches of law, and with respect he answers them by dealing with them separately, but I would want to take the court to page 324 towards the bottom third of the page.

ARBITRATOR JUSTICE MOSENEKE: Okay. I am relieved. I thought you are going to take me to 323. Steenkamp, but you are not going to go there.

ADV. LILLA CROUSE: Justice, it says in the third place consider a relationship between constitutional damages and delict and then just a little bit on, our courts more over must promote the spirit and values of the bill of rights when developing the common law of delict. So he says one way of dealing with this is to develop the delict, but then he says in many cases the common law will be broad enough to provide the relief and that would be appropriate relief, but that depends on the circumstances of each case and then he refers to Vossie, and of course our submission is that in these circumstances it is not enough. On page 326 in the middle of the page he says:

"Given the willingness of our courts to stress the states delictual liability in various way, there has been little need to rely on the subsidiary remedy of the constitutional damages which consequently remains rather underdeveloped in South African law, compared to certain other systems."

So he says courts try to put more into the common law remedy, and he does not criticise, but he said more can be done, and if I can then page 327 just, he

refers to the [inaudible] of delict as referred to by Justice Sax in the, and that is in effect what happens, and then he deals with accountability and a new public law delict, and that is where I would like to take the court to. Page 329, the top part. It says:

"In my view the constitutional court has led a heather do unnoticed shift away from the [inaudible] approach of presumed delictual liability for public law wrongs, adopting a more flexible case by case assessment of whether recognising a novel delictual duty and thereby extending liability will or will not promote accountability."

So if the court decides whether to extend the general damages or the constitution, the constitutional damages, one of the questions I respectfully submit should be upper most is should there be accountability and would this promote accountability. If I could then just very briefly Justice, I am very nearly finished. If I could go to page 331 under Roman five. He says:

"When and on what basis is it appropriate to hold public functionaries liable to pay monitory sum to individual victims of wrongdoing."

And at the bottom of that page:

"When should we direct public funds to re-compensate individual victims, and when should such funds rather be spent on improving fallible state services that is failing in the first place for the general good of all."

So that is one of the issues that the court will grapple with. Of course we are not saying there is not enough money, but we say that is a consideration that the court will take into consideration. Then in, at page 333 he says:

"Given the state's distinctive constitutional duties, a distinctive public law of state liability may be needed ..."

And was explained in the previous section that he referred to:

"Has in fact started to emerge as the law of delict."

And then he refers to Du Booy and Boonzaaier, that the traditional delictual model [inaudible] is not well equipped to deal with all the state's own duties as opposed to that of his Employers, and that is part of the question that this court is asked. In how far is the individual officials here. Must they be held accountable, but if the court sees the bigger picture, with respect, of the state that has failed, then there should be a direct responsibility, and of course, and I am not going to read through all of it now, but of course that is the whole problem of whether there is a direct liability or whether it is a [inaudible] liability, and that is something with which the constitutional court has given some thought to.

ARBITRATOR JUSTICE MOSENEKE: It is an interesting article. Thank you for the reference.

ADV. LILLA CROUSE: Justice, and then he just says, maybe at some stage he says you need to decide whether it is public or private law, and you need to decide what you want to reach with this, and it is not necessary to extend the common law principles.

ARBITRATOR JUSTICE MOSENEKE: Hence my question why the split? I know all of you have done that in [inaudible] ways to try and struggle. You do not catch it on the one end, you catch it on the other.

ADV. LILLA CROUSE: Justice, I think the reason why we have done it, is because of the authority that say you must go to where you can find your relief, and but what this article says, it is not necessary to go that route. You can go directly, as he has also remarked to my learned friend. So that is where we are going. I would ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You see, historically Advocate Crouse the problem has always been there and I alluded to it. In the early, early years if you remember the judgment written by Kentridge AJ in Zuma and this is under the interim constitution, and the call then was you always start with the common law. Where it goes limping, then you go to constitutional law. [inaudible] later and said we do not know what these older judges were saying, and I may or may not have been one of the youngsters, and you go and look at cases like that came later, Metro rail, and the big question there was somebody who got killed in a train that was not properly policed, and later another Metro rail case where somebody was thrown out of a train.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: In both cases there is [inaudible] on failure of the state to accomplish and fulfil its obligations. Under statute and the constitution.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: And the question was do you couch these in ordinary usual delictual subheads that we all have learnt. It is a [inaudible] or omission which is unlawful, which is perpetrated wrongfully and recklessly or negligently and as a result harm has ensued, and then you go to

the traditional way of doing it, look at [inaudible], harm is ensued and then you grant damages. It is a [inaudible] claim. If somebody were to come to court and suffers enormous harm, being precluded from accessing eduction or accessing health care or housing, that formula will not ... [interjects]

ADV. LILLA CROUSE: It will not work.

ARBITRATOR JUSTICE MOSENEKE: It will not work. It is a common sensical thing, it will not work. So then the question becomes whether in fact there is no remedy in the face of Section 38 read together with Section 172(1) B and read together with the total import of the constitution Section 7. The obligations set out in this constitution shall be fulfilled. Are binding and shall be fulfilled. So you cannot go down that route where you have not sued somebody because they have not claimed it is an act or omission committed by a servant of the state, done recklessly and negligently, you have established [inaudible] liability, you have established [inaudible] as required in normal claims, and to go to the boot you must still show that in fact damages ensued because you have got to place the claimant in the same position she would have been but for the delict.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: And after that exercise you could send somebody packing. You have not shown me that you lost a penny. Sorry, bye. That was the one approach under the common law. Constitutional imperatives impose all of these debates we see in this article, you see in Steenkamp, you see in Metro rail, in Modderklip, and we can go on and on, Indicoco. Where is the intersection between the common law and constitutional imperatives, and

that is really where we are, not so? So here when you say the pain and suffering and the shock reside cruel and inhumane treatment or it resides in the shock delictual shock claim. You can debate that, but in the end ... [interjects]

ADV. LILLA CROUSE: It is a constitutional issue Justice.

ARBITRATOR JUSTICE MOSENEKE: They are constitutional issues.

ADV. LILLA CROUSE: But it goes further than just the, it goes to the breach of statutories that is part of the rule of law as well.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: So and our submission is although we have thrown it over the common law remedies for general damages, and for specific damages, what we are saying is that it just does not go far enough for, in respect ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: I hear the argument yes, I hear it and you may want to start there as you have done, and lawyers are very conservative. They start from the known to the unknown.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: And they tend to go slowly towards the brave new world, but in fact if you have [inaudible], you cannot ordinarily hold if delictually. It is not easy. People fraudulently write out licences.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: How do you hold anybody accountable delictually?

ADV. LILLA CROUSE: There is no delictual accountability there Justice.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: That is why we are saying the common law just does not go far enough, but in terms of the common law there was some intersection in that our clients have suffered general damages.

ARBITRATOR JUSTICE MOSENEKE: I hear the argument.

ADV. LILLA CROUSE: As the court pleases. We therefore submit and we have submitted that there is a direct constitutional damages for mental health care users and again we use the term mental health care users as per the act which include the family and the mental health care users.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: And that they should be awarded damages, constitutional damages.

ARBITRATOR JUSTICE MOSENEKE: What number do you put to constitutional damages?

ADV. LILLA CROUSE: We have put a million rand to constitutional damages. We say if the court is not amenable to that, the court should then develop the common law to include a million rand to that.

ARBITRATOR JUSTICE MOSENEKE: And 750 would be ... [interjects]

ADV. LILLA CROUSE: That would be ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: That will be general damages.

ADV. LILLA CROUSE: General damages yes.

ARBITRATOR JUSTICE MOSENEKE: For survivors.

ADV. LILLA CROUSE: For survivors and then the 300 for the families.

ARBITRATOR JUSTICE MOSENEKE: For the families, yes.

ADV. LILLA CROUSE: In the event that my learned friend as I no doubt he will argue and say we have not proven that, then of course that falls under constitutional damages. Justice, and then if I could just lastly deal with the aspect of costs, may I still continue Justice?

ARBITRATOR JUSTICE MOSENEKE: Yes, please continue.

ADV. LILLA CROUSE: Justice, the president Maya, she was not president then, said in the Legal Aid South Africa versus Magidiwana matter.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: That is the Marikana matter, and I quote. She says in respect of the issue of cost, she says:

"What happened at Marikana is extremely rear and hopefully a tragedy of this kind will never happen again."

And we must say a wish has shown not to be true. We therefore submit that our participation here as survivors of family has not been frivolous, it has not been vicsatious and it raised a number of factual and constitutional issues, in which we hope we will be successful, and that we are therefore entitled to party and party costs in these proceedings. Usually party and party cost does not include dispersements for travel and accommodation, but we have shown that the dispersements for travel and accommodation was close to R127 000-00. We have put that in paragraph 223.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: In terms of the Legal Aid Act, in terms of Section 20, the costs are ceded to Legal Aid South Africa. In terms of the manual of 2017 paragraph 8.1.16 C places a duty upon Counsel to recover costs and the regulations ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: You do not have to apologise beyond this.

ADV. LILLA CROUSE: Justice, I just want to say that in terms of the regulations 26 of the 27 regulations, after the Marikana matter and the constitutional court case ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: It says that legal aid will only be provided in commissions of inquiry where the establishing authority give funds. The establishing authority did not give funds here, and this is not, this is an arbitration.

ARBITRATOR JUSTICE MOSENEKE: Yes.

ADV. LILLA CROUSE: Justice, then we in our conclusion we just deal with ... [interjects]

ARBITRATOR JUSTICE MOSENEKE: The only question is are you entitled to covers costs either and being an entity, give it birth by statute, and if the answer is yes, the statutory provision for it that is the end of the inquiry.

ADV. LILLA CROUSE: Thank you Justice. Justice, then just in conclusion the marathon project was rightly labelled by the Minister of Health as a period of

darkness and a moment of madness. We have dealt with what we see as darkness and madness. We have dealt with the harm that is caused, and we have dealt with the payments that we want in respect, that we seek in respect of redress. We have egg on our faces Justice in so far as between paragraph 227.6 and 227.7. We have neglected to insert there the constitutional damages. That was merely an oversight and it was not a fraudulent slip. If we could include that there Justice, and then we ask for the party and party costs including cost of ten Counsel.

ARBITRATOR JUSTICE MOSENEKE: And that would come as 22.7A or something.

ADV. LILLA CROUSE: Yes.

ARBITRATOR JUSTICE MOSENEKE: That is the one million claim for constitutional damages.

ADV. LILLA CROUSE: That is so Justice. Justice, those are our submissions.

ARBITRATOR JUSTICE MOSENEKE: Thank you for very full heads, and with ample references. Much appreciated. Advocate Groenewald, we are going to take a comfort break. You know, let me tell you a little story having lived longer than you. When I was working at the IEC, the night just before the elections, before the 1994 elections, some people were coming to register their name and a political party, and they were hurdling backwards and forwards during the registration process, and one of them said whatever you do, your party must have A in its first component of the name. So you must be African something or athletic something or Afrikaner something, because then you have the advantage of precedence, if you use A for your party. Just keep that in mind.

Because the list is always alphabetical on the [inaudible] and many people will see your name first before they go down the long list. You might have an advantage, so next time make sure you are the first Counsel and not the last.

ADV. DIRK GROENEWALD: Thank you Justice, I accept it.

ARBITRATOR JUSTICE MOSENEKE: Advice for nothing, thank you. We are adjourned for 15 minutes then we will continue.

SESSION 4

ARBITRATOR JUSTICE MOSENEKE: Thank you, you may be seated. Advocate Groenewald.

ADV GROENEWALD: Thank you very much Justice. Justice as always my colleagues have already done the heavy lifting and I am basically just here to emphasise, or place emphasis on specific points. Justice I would like to start off by stating that according to me the first issue should be to accept that this mental health marathon project has been one of the greatest causes of human rights violations since the dawn of our democracy.

We are not dealing with a defamation case; we are not dealing a loss of support case: these facts are unfortunately extraordinary in light of our Constitution or values in light of our laws, in light of the obligations placed on state officials. So the way in which we assess what is just and equitable compensation should be viewed from the facts and this my colleagues have also pointed out.

144 People died, human beings: and it has been accepted by the State that they have died due to the unlawful negligent and reckless conduct of the State. That is not an issue that is in dispute, that is common cause. Well Justice we say that this acknowledgement is crucial for a number of reasons and firstly due to the fact that it confirms that the issues to be decided is a matter public importance. It relates to the good governance and State liability and secondly, it places greater emphasis on ensuring the relief granted cannot be concerned only with restoring the claimants to the position he or she would have been in had the breach or tragedy not been committed.

But it was also be so, to ensure that the rights of the families are vindicated and that the State is deterred and prevented from causing further infringements. So there are two issues at play here. It's the right of the individuals and the rights to good governance, holding governments accountable and responsible and that's where just and equitable compensation must work towards, finding that balance.

Now Justice we have also in our Heads of Argument, we have referred to and we have set out some of the relevant facts and I am going to deal just in short with it. The first issue is the preverbal missing piece of the puzzle and both of my colleagues have referred to that. But I do submit that that reason or the fact that we do not know why, why was this Life Esidimeni contract cancelled, why was it done in such a haphazard manner, why didn't they follow the initial policy or the plan? That is an obstacle in respect of finding closure for the families, which is one of the main objects of these arbitration or this arbitration proceedings and it most certainly must be worked into or taken into account when considering what is just and equitable compensation.

Well, the further issue that we've identified Justice, is the unlawful and the unethical conduct of government employees during the, during this projects. And we have highlighted a number of those and my colleagues have also referred to that. The main issue is we don't even know how these NGO's were identified. Mrs Jacobus came here and she testified that they didn't even submit applications. We know these NGO's was not qualified or experienced enough to look after these individuals.

The licensing process, we have gone to lengths of exposing the unlawful conduct that went apart with that and once again, Mrs Jacobus came and she

said to us, I admit it was unlawful. Dr Manamela came and testified and said no, everything was done according to the law, according to the prescripts, however Mrs Jacobus testified and she, she admitted that it was unlawful; those licences were issued simply based on a budget letter. A budget letter, that was all.

Now Justice so also the transfer of the mental health care users: Having regard to the fact that we represent the family members of four mental health care users who were patients at CCRC. In terms of the Ombud's report those individuals were sacrificed to other NGO's to make place for Life Esidimeni patients. Now we know at least, according to the record, patients that were admitted Siyabadinga it's unclear and they weren't assessed, there was no determination as to what, what was there mental and physical conditions: we know that there wasn't any medication, we know that there was problem with the food, we know that the... some organisations had to assist to get the food.

Then we also know that when Siyabadinga was closed down, one of the family members didn't even know about it. We also know that when those patients were transferred back CCRC they were never formally admitted as patients. Now Justice, Justice during the evidence of Mrs de Villiers who pointed out that that was perhaps one of the reasons they didn't admit him at the hospital at Mamelodi at one point in time when he was ill so there was just a total disregard of rules and standards and norms.

We also know that Mrs Monaka conceded that at least thirty eight mental health care users were not assisted by clinicians who were placed at Anchor or under gruesome cross-examination where we established those facts.

The competence to care for the mental health users Justice, I think the evidence and record and the transcripts speaks for itself, we have sat here, we have listened to it, we know that these facilities and the Ombudsman has confirmed it, were not fit to look after these mental health care users. Now the circumstances Justice I have highlighted the circumstances regarding the deaths of Jaco Stolts, Thabo Monjani(?) Gutso Mpopo(?) and Jabulani Mahlangu(?) These are tragic stories Justice. These are tragic stories that no individual wants to hear. There are the stories of Mrs de Villiers who pleaded that her brother be admitted, who sat here and listened; only here realised what was the exact extent of his medical condition. He was vomiting a brownish substance for four weeks, which we later learned is caused due to internal bleeding. He lost 14 kilograms in two weeks time. And at the end of the day it was she who had to admit him or to ensure that he was admitted at Mamelodi.

The stories of Thabo Monjani, once again, a mother phoned and a mother(sic) said well your son is ill and she asked since when? And the nurse couldn't tell her since when is her son ill. When she came to pick him up at the hospital two days thereafter at CCRC and she admits him to hospital, two days thereafter he passed away.

Gutso Mpopo... his family up until today, doesn't know what the exact cause of his death was. There is just no answers, no information.

Jabulani Mahlangu we know now has had a epileptic seizure from at quarter to one in the afternoon. Nine o'clock that evening he wasn't yet admitted to hospital. The doctors didn't want to admit him. This tragedy is... has befallen them no once but twice or the system has failed them not once but twice. The

family was failed by the Gauteng Department of Health in respect of the project as well as in respect of our hospitals who didn't want to admit him.

Justice in respect of the failure of government to intervene there is a lot of individuals that say that they didn't know. They didn't know. But the long and the short is the facts were in front of them and especially in respect of the Premier. We know what the evidence. The evidence was quite clear, November of 2014 the Department of Health tabled their budget and they said they want to reduce 20% of the beds. In November of 2015 the Premier is informed that they going to cancel, they had already cancelled the contract with Life Esidimeni. Now this is a department who has been under administration just the previous year but no questions are asked but where are those patients going?

What is the sudden change of heart, last year you told us you going to reduce beds by 20%, now suddenly we hear that you have cancelled the contract? But the evidence shows us that those questions are not asked. There was no due diligence, there was no proper care. I will try and speak a bit softer Justice, I think it's... we are trying to compete here. Justice I have indicated that subsequent to this tragedy, what are we face with? You have referred to the scales of justice numerous times. On the one hand we have 144 individuals that have died, thousands who have suffered and on the other hand we have three individuals, key role players who have simply resigned and we have six officials who were issued with final written warnings and we have the head of the Mental Health Board(?) who was found not guilty.

Now where is the accountability, where is the accountability. We know also that up to today no formal action, criminal action has been taken against

any of the State officials, that is still pending. Justice I don't know if I should push through or...

ARBITRATOR ARBITRATOR JUSTICE MOSENEKE: Can you speak any louder, any louder than that? (Laughter)

ADV GROENEWALD: Justice I am going to be twenty minutes so it we could do it tomorrow morning and I can wrap it up...

ARBITRATOR JUSTICE MOSENEKE: Yes I think so. It is a lot of rain. I think it might be prudent for us to start tomorrow at 9:00am. Shall we resume tomorrow at 9:00am? Will that be suitable to all counsel, 9:00 am tomorrow? Start, in other words we will start deliberations at 9:00 and allow Advocate Groenewald to have proper address. It's a lot of rain, we should be sending some of it up to Cape or down to the Cape but I think it's down to the Cape, but it's a lot of rain and giving us some amusement, some of the camera people here. Well we are going to adjourn now until tomorrow morning at 9:00am. Thank you.

(PROCEEDINGS ADJOURNED)