

LIFE ESIDIMENI ARBITRATION

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

DATE: 09 OCTOBER 2017 DAY 1

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DAY 1 SESSION 1 – 3.

BEFORE ARBITRATOR – JUSTICE DIKGANG MOSENEKE

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WITNESSES:

1. PROCEDURAL ISSUES
2. OPENING ADDRESS BY ALL LEGAL REPRESENTATIVES

TESTIMONY BY

15

3. PROF MALEGAPURU WILLIAM MAKGOBA

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09 October

SESSION 1

ARBITRATOR, JUSTICE MOSENEKE: Dumelang! We welcome you. This is a formal arbitration sitting to inquire into both deaths of several people, and the number will become clear as we move on who passed on after they have been transferred from a care-giving institution named Esidimeni or Life Esidimeni. The representations here and for the sake of clarity and for everyone else who is here present, I am going to allow counsel to do their usual thing that we do in arbitrations, for each of them to put their names on record because we also are building a record and to have them say who they represent.

And immediately thereafter, we will proceed to deal with a number of preliminary, legal issues, questions that ought to be settled and that will be followed by opening statement by the counsel of the different parties. And after these opening statements, we will then proceed to start hearing evidence.

So please, do bear with us. There will be preliminary issues which lawyers normally call interlocutory issues; simply a fancy name for processes in between the main process and those issues will be cleared out now and counsel are aware of what they are and immediately thereafter, I hope we will then move on to the substantive evidence and we will hear in a short while which will be the first witness that will be heard today. We have had applications from the media to record these proceedings live and it is in public interest. We believe and we have agreed and allowed that to happen. There may be days and there may be witnesses who may be require protection which the law permits. We will inquire into a claim of privacy by a witness

and deliberate on it and thereafter decide whether to continue to keep the media in attendance, but the default position is that the media is and we hope will be here and to hear out all the stories that are going to be told painful as they are.

So you are welcome to come and set up and if there is a matter of objection we will
5 certainly ask the media to leave so that we deal with request for a closed hearing, if there is any. Going back then to where I said earlier, we are going to start off by having counsel, introduce themselves and say which parties they represent and as I said then afterwards then move on to two interlocutory questions.

Shall we then start from my right, I would like counsel to rise in each case and say
10 which party they represent:

ADV. TEBOGO HUTAMO: Thank You Justice, my name is Tebogo Hutamo from the Johannesburg bar on brief by Werkmans Attorneys on behalf of the government.

ADV. DIRK GROENEWALD: Thank you Justice, my Name is Dirk Groenewald,
15 Counsel for Hurter Spies for the deceased Jaco Stols, Thabo Monyane and David Mpofu. Thank you.

ARBITRATOR, JUSTICE MOSENEKE: Thank you ever so much.

ADV. PATRICK NGUTSHANA: Thank you Justice, My name Is Patrick Ngutshana, I am one of the two core evidence leaders that are assisting this commission in the
20 preparation and the presentation of some evidence that may be led.

ARBITRATOR, JUSTICE MOSENEKE: Thank you Mr Ngutshana.

ADV. YINA: Thank you Justice, my name is Nontlantla Yina, I am the core evidence leader (inaudible).

ARBITRATOR, JUSTICE MOSENEKE: Thank you counsel Yina.

ADV. ADILA HASSIM: Thank you Justice, my name is Adila Hassim, I am here today with my junior Me. Stein and we are instructed by Section 27 on behalf of the families of the 55 deceased.

5 **ARBITRATOR, JUSTICE MOSENEKE:** Thank you Advocate Hassim.

ADV. LILLA CROUSE: Justice Moseneke, my name is Lilla Crouse and I am from Legal Aid South Africa. I am here with my learned friend Mr Skibi and he is with me to address you on the issue of who we represent, if you will allow us that.

ARBITRATOR, JUSTICE MOSENEKE: Advocate Crouse, thank you. Excuse me, I
10 will revert to you in a short while in order to allow you to deal with that, but first from counsel I would like to inquire whether there has been a pre-arbitration hearing held in this matter and if so, and there is a signed minute, I would request that it be handed up to me please.

ADV. TEBOGO HUTAMO: Yes Justice, there is a signed minute. It's is been
15 provided, I think Obakeng will give us the signed minute just now. We will provide it to you.

ARBITRATOR, JUSTICE MOSENEKE: Very well, arrangements should be made to have the minute handed up to me. It will become necessary to deal with the interlocutory issues, and so I would like it to be handed out to me so that we can get
20 on with that. That then brings us back to the Legal Aid Board Legal Aid South Africa as I should say, Advocate Crouse.

ADV. LILLA CROUSE: Thank you Justice Moseneke, unfortunately the incon... in number 7 ...intervened.

ARBITRATOR, JUSTICE MOSENEKE: Can you just let me say that counsel must remember to switch on their mics please as they rise. And we have to decide whether you would like to rise or sit frankly... I am quite comfortable that you seat if you choose to seat, it's going to be three weeks together. Do you choose to seat or stand? I am more comfortable talking while standing actually. It might be true of you too but counsel is welcome to do whatever they are comfortable with.

ADV. LILLA CROUSE: My court experience doesn't allow me to sit just yet, maybe I will still get that right Justice Moseneke. The Ombud's recommendations in number 17, states that all affected people, persons and families must be engaged in this alternative dispute resolution. Now I together with my learned friend Mr Skibi represent Legal Aid South Africa as I indicated to you and it's our belief that all persons fitting this description should be properly represented in this process. I believe the term alternative dispute resolution is now been changed to appropriate dispute resolution and I submit that something that we should keep in mind, but this alternative or appropriate dispute resolution process is before this forum and there is currently no legal representation for the third group of people as per paragraph 2.3 and then entitlement criteria in the terms of referent. The third group is described in the terms of reference as Life Esidimeni mental health care users and their families who survived the Gauteng mental health marathon project but who were caused trauma and morbidity inter-alia. So that is the group that we would want to suggest that we represent and by definition and thankfully so, this is the much larger group than the other two groups. We know from the Ombuds report in chapter 12 thereof, that at the start of this project there were 1,812 mental health

care users at Life Esidimeni different facilities and we also know sadly that about 100 of these mental health care users passed away. Therefore this group that we propose to represent should be close to 1700 people and some 300 of them were children at the start of the project. Now at this stage we are not ready to give this
5 forum any specific group of people we represent. We have people coming to us but we don't have a proper group of brief. The reason for this is we were only briefed on late Thursday the 5th of October.

And at the time available, we haven't been ready to put all the names together, but we've worked through all the documentations and we are ready to proceed if the
10 court allow us. We are, in our opinion, the survivors needs representation because they have suffered as a result of what I can only call a cattle drive move to the NGOs that was not registered and did not have the capacity or the expertise to deal with them and other deceased mental health care users. Now according to Ombud's report, these patients or users were involved in multiple moves, not only once, to
15 other Esidimeni facilities and to other NGOs and some of them were dumped at unregistered NGOs. At the trauma of seeing other mental health users waste away and even die at an alarming rate and this must have caused anguish and trauma. Then the families also didn't know where they were moved to and for such vulnerable persons as these, mental health care users, even more so for children,
20 this must have caused a severe trauma. Now at this stage we are unable to place this larger group before this arbitration into sub groups but we would hopefully be able to do that before the end of these proceedings. Now issues that would play a role in the readers, maybe I should keep that open if you will allow me for the

opening address. But in our opinion, it would be just an equitable and appropriate if we will be allowed to continue in these proceedings seeing that the parties clearly state in the pre-orb minute that they recognise the tragedy and the trauma experienced by the mental health care users and their families and that the common goal will be adjust agreeable and expedient solution to be found. Now at this stage we are asking either to be acting in the position of a curator for this group and to act in their best interest or in public interest to act on their behalf and we submit that it will be in the arbitrators powers to regulate this process and allow us to be part of this. Those are my suppressions.

10 **ARBITRATOR, JUSTICE MOSENEKE:** Very Well. That is the starting point, Counsel with they (inaudible). You are fully aware of the terms of reference which in effect are an arbitration agreement. Because arbitration is a matter of (inaudible) sorry. You are aware of the terms set of reference which in effect are an arbitration agreement, which really means that if you had to have more people, who qualify in terms of 2.3 of the terms of reference, they would, you would, at least on their behalf, acting as a curator at this stage until they identified should subscribe to and accept the terms and condition of the arbitration agreement. And I would like that to come clearly on record that you do. Even on behalf of clients that you are yet to identify, because at this stage you are acting for a category of people rather than specified people.

20 **ADV. LILLA CROUSE:** The only issue that we did have with the terms of reference was one paragraph that seemed to suggest that the parties who would come to an agreement outside the arbitrators' findings, that has been cleared up for us and we

accept that the arbitrator will make any final decision and no agreement will be binding on the arbitrator. In suffice that it has been clarified, we will abide by the terms of reference, and we also accept the pre-trial minute, a pre-arbitration minute that was about to be handed to you sir.

5 **ARBITRATOR, JUSTICE MOSENEKE:** Very well, that is a very important point.

This is, let me again for public interest from everybody, these are arbitration proceedings which are a species of alternative dispute resolution. These are not mediation proceedings and therefore the outcome would be binding in the sense that the Arbitrator is obliged to issues an award at the end of the process and that
10 award has a force of law unless for good reason set aside in a review. So ordinarily, that would be binding on all the parties. So it's just important for all of us to get it quite clear, these are not mediation proceedings they are arbitration proceedings, and therefore the outcomes is binding, and that is why the arbitrator is at large to subpoena such parties as may be necessary in order to reach the truth that might
15 be necessary to determine equitable redress anticipated in there. Thank you ever so much.

I am going to start with counsel for the state to respond to the submissions which were made by Legal Aid South Africa and more particularly whether you have any objections to their entry into this proceedings and representing survivals of what I
20 will call the 'Life Esidimeni Trauma'.

ADV. TEBOGO HUTAMO: Thank you Justice, on behalf of the government or the state, there is no objection to the Legal Aid entering into the proceedings on the

condition that those people that they seek to represent they fall within the category as identified in paragraph 2.3 of the terms of reference. Thank you.

ARBITRATOR, JUSTICE MOSENEKE: Counsel, it is your turn.

ADV. DIRK GROENEWALD: Thank you very much Justice. We have no objection
5 against the Legal Aid forming part of these arbitration proceedings. We do however
note that in terms of the terms of reference, actually excludes people, survivors
from CCRC that's the Cullinan Care and Rehabilitation Centre and survivors and
perhaps that should just be addressed perhaps between the parties at some stage
because they are also survivors that's been affected by this project. But perhaps
10 Legal Aid can look into that and see whether or not they can broaden the scope of
who they represent for the survivors there and the parties can come to some
agreement or arrangement on that at a later point in time.

ARBITRATOR, JUSTICE MOSENEKE: Very Well, thank you. Counsel from
Section 27.

15 **ADV. ADILA HASSIM:** Thank you Justice. The families of the deceased have no
objection to Legal Aid South Africa being party to these proceedings and
representing the survivors of this tragedy. The terms of reference in paragraph 2.3
already provide for the recognition and the representation of such people and we
appreciate the participation of Legal Aid South Africa.

20 **ARBITRATOR, JUSTICE MOSENEKE:** Thank you, very well. I think at this stage,
as an interlocutory matter, we certainly, I direct that the Legal Aid Board may join
these proceedings and to act for and on behalf of persons who are contemplated in
paragraph 2.3 of the terms of reference and Legal Aid is required within a

reasonable time and subject to directions of me as arbitrator to provide such details and names of the parties as they come to ascertain, but they otherwise entitled to proceed and act on their behalf until their full particulars have been ascertained and placed before the arbitration process.

5 **ADV. LILLA CROUSE:** Thank you Justice. Just the name of our organisation is changed, it's now no longer Legal Aid Board but it's now Legal Aid South Africa.

ARBITRATOR, JUSTICE MOSENEKE: Legal Aid South Africa I apologise, I will keep on calling you Legal Aid South Africa. Shall we then move on to the next part of this morning's proceedings? And these relates to some of the terms of the
10 agreement, the prehearing agreement entered into by the parties. The first of those issues relate to witnesses and the order of giving evidence in these proceedings. It appears from the pre-hearing minute that there has been agreement in relation to this matter and I am going to require the state to be the first to address its position in relations to the agreement to be found in the minute. And more particularly about
15 the availability of witnesses by the state, that relate both to the circumstances of death as well as the identity of the deceased and all survivors. Counsel for the State.

ADV. TEBOGO HUTAMO: Thank you Justice. As it has been recorded in the pre-
arb minute, the State would have two opportunities to address these proceedings;
20 the first part being in relations to the circumstances and explanation leading to the circumstances relating to the death of the mentally ill patients, and the second part will be in relation to the apology to be proffered by the state. With regard to witnesses, the state will call Professor Makgoba, who is the ombud in relation to

which these proceedings have been initiated and the second witness will be the Director General from the Office Of The Premier, Me. Phindile Baleni, and the next witness will be the Minister Of Health, Dr Aaron Motsoaledi followed by the Premier Of Gauteng, Mr David Makhura, as well as the current member of the Executive
5 Council for the Department Of Health, Dr Gwen Ramokgopa. That will be the list of the witnesses and the sequence that will be followed by the State.

ARBITRATOR, JUSTICE MOSENEKE: Thank you ever so much. Counsel, are there any responses from any of your colleagues? We now know what we didn't know before the start of the hearing. Starting with, for a change, I am going to start
10 from my left and go to the right, Legal Aid South Africa.

ADV. LILLA CROUSE: Thank you Justice, we've got nothing to add at this stage thank you.

ARBITRATOR, JUSTICE MOSENEKE: Counsel of Section 27.

ADV. ADILA HASSIM: Thank you Justice. We, of course like you have only
15 received this list this morning and this moment. We have a question of clarity, and that is whether these five witnesses will all be testifying before the witnesses of, before the families or whether some are going to be testifying before the families and some will be addressing what needs to be addressed after the families give their evidence, that's the first. The second is that the....

20 **ARBITRATOR, JUSTICE MOSENEKE:** Well if the first question Counsel, what is your submission?

ADV. ADILA HASSIM: Well, parts that's related to the following, the next submission I was going to make which is that there isn't anybody on this list of

government witnesses that was actually involved and present at the time that this happened and at the very least we would have expected that the former MEC for Health, Me. Mahlangu, would be, first of all present throughout the proceedings in order to hear the testimony of the families and then to respond thereafter.

5 **ARBITRATOR, JUSTICE MOSENEKE:** Very well. That is your submission of the first question. Do you want to go onto the second question?

ADV. ADILA HASSIM: Those are the two. We have no view on whether all five of the current address these proceedings before the witnesses or after the order is in the discretion of the Arbitrator of you Justice Moseneke. But what we are concerned
10 about is then who addresses the apology.

ARBITRATOR, JUSTICE MOSENEKE: I will go back to the State Counsel to respond to the matter. Of course, if any important witness is not on the list which is proffered by the parties voluntarily and that's true of your clients of Legal Aid South Africa or indeed of any other party, then it is open to the arbitrator or to any other
15 party to require a subpoena to be sent out. So I am just thinking whether we ought to debate now, the lists or rather look at the gaps and decide whether in fact there ought to be a request for a subpoena should there be gaps that are material. Is there anything you want to say about that?

ADV. ADILA HASSIM: My apologies, I should have addressed that at the outset,
20 one of the reasons that the pre-arbitration hearing meeting recorded the need for the exchange of the list of witnesses by the 27th of September, 2017 was in order for the parties to be able to identify those gaps and to request the voluntary appearance of witnesses and if not seek a subpoena. In the case of the families

and the clients that we represent, we would be seeking a subpoena in relation to the former MEC, in the event that she does not respond positively to an invitation to appear.

ARBITRATOR, JUSTICE MOSENEKE: Very well thank you. Counsel, your
5 submissions?

ADV. DIRK GROENEWALD: Thank you very much Justice. Justice we share the sentiments of Section 27 in respect of the witnesses and the light of the submissions of the list of witnesses from the state. More specifically Justice, I think we need to look at the terms of reference of this arbitration proceedings. What's
10 important of the terms of reference is the fact that the aim of this arbitration is to seek to get closure and redress for the family members and it's said out in paragraph 6.3.1 of the terms of reference and that will be achieved by receiving the appropriate paragraph 6.3.2 by receiving information to affected families regarding the circumstances and cause of death of their loved ones as well as the location
15 now, Justice we do not see in this list of witnesses any of the people that can testify as to what happened and in the case of the family members which we represent, the people at CCRC which is the Cullinan Care and Rehabilitation Centre. We do not see a CEO, we do not see a chief of staff, we not see any witnesses who the state intend to call to come and clarify and explain to these families why their loved
20 ones died, why their loved ones wasn't provided with food and water and that is the essence and I submit is the purpose of this arbitration, to get clarity on what happened. That is the only way that we will get closure. So, Justice to the extent that my learned colleagues will argue that we can issue subpoenas. Justice, the fact

is that these patients were transferred from one NGO to another NGO, back to the state. There was no consistency of personnel, so they cannot come up with list of people that we should subpoena these individuals. So I would want invite my colleagues to provide us with the list of the employees of this specific NGOs as well
5 as the CCRC specifically and then we can indicate who we should subpoena from there to come and testify.

ARBITRATOR, JUSTICE MOSENEKE: Very well, we will get a response from the state in a moment but again remember that once parties give lists, if there are vital gaps in the rendition of evidence, it is open to the parties to point that out. And it is
10 open to evidence leaders who I have appointed for the very reason that there may well be gaps in things that I as arbitrator would like to hear which none of the parties raises, in which event then, there is a facility to get the evidence leaders to bring that evidence in addition to what the parties themselves might have done. So the idea was to make sure that all basis are covered. We will get back to the state
15 whether they want to do it voluntarily but if you want more, you have to ask for more and I suggest the parties do it timeously. Give notice, I would like to have the CEO of Life Esidimeni or I would like to have The Head of a mortuary at a certain place. But we have to specify what we need beyond the lists that might be brought before us. And as you make submissions of course the state under steers what you are
20 saying and they can embellish and amplify their list as we go on. But I am going to go back to the counsel for the state. What are your responses to submissions that were made on this particular issue, i.e. the selection of witnesses?

ADV. TEBOGO HUTAMO: Thank you Justice. First I will like to deal with the categories of the witnesses. As I have addressed this proceedings, the first two witnesses will be giving an explanation on the circumstances leading to the death of the patients and the first witnesses being Professor Makgoba and the second being
5 Me. Phindile Baleni. And those will be the witnesses who will testify before the family members could take a stand. The remaining three witnesses being the Minister, the Premier and the current MEC, will testify after the families have been given an opportunity to present their situation. That is the sequence in respect of which witnesses will be led.

10 **ARBITRATOR, JUSTICE MOSENEKE:** Counsel, what is your response to the submission that the State ought to be pro-active and bring people who would have first-hand knowledge of the circumstances of death? Or do you think Professor Makgoba's evidence will be sufficient in that regard?

ADV. TEBOGO HUTAMO: On that aspect if I can take the justice to the minute
15 which was agreed on amongst the parties, particularly Paragraph 15.1, dealt with issues relating to witnesses which recorded that in the event of any of the parties requiring any particular witnesses, such parties should take urgent steps to issue the necessary subpoenas of those witnesses that are sort to be called and it was incumbent upon the parties to follow that processes and that procedure is available
20 in this proceedings. Subpoena proceedings could be followed and that was also repeated in the correspondence, exchanged between the attendees on behalf of the government, to the attendees to Section 27 where in it was repeated that, should they require specific witnesses, they will then have the opportunity, they should

actually proceed to subpoena those witnesses. We are not objecting to the subpoena of any of the witnesses, they are at liberty to follow that process and we will not stand in the way of those witnesses being brought before this proceedings.

ARBITRATOR, JUSTICE MOSENEKE: Very well understand, of course the State

5 could facilitate that in their words, but are you really saying look at the agreement in 15.1 and the parties must follow the agreement, which is to subpoena whoever they might want to have in addition to what you will be bringing in. Will they always know who was for instance in charge of Life Esidimeni at the time of the transfer or who would have been responsible for the specific incidences of death or who had the
10 generic duty, will they always know have the information available or should the state be facilitative in terms of the arbitration agreement?

ADV. TEBOGO HUTAMO: In that regard, if there are any difficulties in identifying specific individuals and the information which is within the knowledge of the state, the state will be able to assist. But the fact of the matter is that the party who seek a
15 specific witness will then have to take appropriate steps. We will facilitate, we will assist where we can in terms of giving information which is within the state's knowledge.

ARBITRATOR, JUSTICE MOSENEKE: Very well thank you. We just listened to submissions here on firstly the availability of witness and the state has provided us
20 with the list of persons which they intend to call, the second subsidiary question was raised was the rest of the parties seems to want more witnesses than those which are listed by the state currently, and the response of the state at this stage is to look at the pre-hearing minute and 15.1 of the minute in particular and it seems to me

that the vehicle opened the parties would be one of subpoena, unless there is any ground showing why that would be prejudicial to the parties and it does appear that the matter was discussed between the parties, and they seem to have agreed that they would alert my office of witnesses they require and identify them and where

5 these have not been fully identified, the state will be obliged in terms of the arbitration agreement to provide details of these witnesses and we, the parties will then have to resort to a subpoena process. So I am not going to hear further submissions on this interlocutory issues. Again it does, as I say the parties would require to give the office of arbitrator early notice of the part they require over and

10 above the evidence that is going to the state is tendering. The state is also the second aspect of this intend to have two parts to the evidence leading which is to have first effectual data, then followed later then by the sections and evidence on remorse which will be given by political leaders and I think from my part, it makes ample sense that they be called later after the evidence that would have been led

15 by the rest of the parties rather than at the beginning. So, as things are now, essentially that would be the ruling. One, we are going to proceed with the witnesses that the state has listed and two, parties to this proceedings can resort to the procedure anticipated in paragraph 15.1 of the pre-trial minute i.e. to sub-identify parties, they seek to be compelled to come and appear. The state attitude

20 being, they will support and help but they are not themselves going to compel or require any of the witnesses to come without subpoenas. I think that is quiet clear, subject to any submissions by counsel, I would like to move away from this particular aspect.

ADV. DIRK GROENEWALD: Justice my apologies, just have one brief comment on that. Can we get the undertaking from the State in respect of the family members at the CCRC, that they will provide us with a list of the employees at CCRC at the time of this tragedy, so that we can know and identify the individuals to be subpoenaed, 5 because as I indicated the patients are not and the family members cannot and do not know all the employees at CCRC and it's not possible for us to issue subpoenas for people we don't know, but somebody needs to come and give clarity.

ARBITRATOR, JUSTICE MOSENEKE: Counsel for the State, do you want to respond to that?

10 **ADV. TEBOGO HUTAMO:** What my learned friend seeks is information relating to people that do not fall within these proceedings, and at the beginning he outlined he has given a list of the people that are being represented and being three of those people who have been affected, so the State can not divulge information of those people that like they are not representing.

15 **ARBITRATOR, JUSTICE MOSENEKE:** I would like the parties, the two parties concerned to engage each other on this matter, and to revert to me in chambers about a possible resolution of the matter. I don't want you to stand in the way of a pre-existing arbitration agreement, so as the parties to engage with each other and revert to me in Chambers and actually in the presence of all other parties so that we 20 can try and advance that matter. Very well, good. Shall we move on then to the next issue which appears to have been resolved more than at the beginning, the record? The pre-trial conference the parties have agreed on the record is preparation.

ADV. TEBOGO HUTAMO: I beg your pardon Justice, I just wanted to get clarity with regards to the evidence that will be led on behalf of the state. As a matter of fact, the state has voluntarily engaged in this process and the proceedings is to the extent that it is an arbitration but this proceedings are not supposed to be
5 adversarial in nature, such that witnesses will have to be cross-examined. I just wanted to get clarity or direction from the Justice as to whether the evidence that will be led or the witnesses, who will be led on behalf of the state. Will they be subjected to cross-examination and if so, will the same apply to other witnesses?

ARBITRATOR, JUSTICE MOSENEKE: That depends, parties dealt with this matter
10 in their prehearing meeting?

ADV. TEBOGO HUTAMO: The matter was not dealt with and it's a matter which we had reserved for direction from the Justice.

ARBITRATOR, JUSTICE MOSENEKE: Take me to the part of the minute that deals with the hearing and the procedure during hearing. It seems to start from
15 paragraph 13, isn't it?

ADV. TEBOGO HUTAMO: Yes, paragraph 17 only makes reference to the fact that witnesses will give evidence under oath or affirmation.

ARBITRATOR, JUSTICE MOSENEKE: Well, I'll hear submissions from the other parties but frankly witnesses are witnesses, once they go under oath they submit to
20 cross examination, unless there is a compelling legal reason why not. Is it your submission that there ought to be no cross-examination?

ADV. TEBOGO HUTAMO: Regard being had to the spirit with which this proceedings are being conducted and the main objective being to find closure and

address the aspect relating to compensation. The parties should not be seen to be in a combative mode. Trying to battle it out, as it would not be ideal, the outcome of this proceedings should be a win-win situation for everyone. There shouldn't be a winner, there shouldn't be a loser. The government having taken responsibility, comes to this proceedings willing to divulge as much information as possible in order to assist and facilitate this process.

ARBITRATOR, JUSTICE MOSENEKE: Yes, I think the agreement talks to the fact that these, the parties comes here in good faith and they seek to find an equitable redress which includes closure. And I think the parties have agreed that this, that would be the primary purpose of these proceedings, but let's take a step back in order to be able to determine equitable redress, do you think evidence ought not to be tested? Should there be no questions whatsoever to any witness that might testify? Is that the submission?

ADV. TEBOGO HUTAMO: The approach that we suggest is that in the event of any matter which may require clarity, such witnesses will obviously have to be questioned. All that I submit is that clarity seeking questions should be distinguished from cross examination. And it is not the intention of the state, to cross-examine the affected family members. That is the spirit with which this proceedings are being approached.

ARBITRATOR, JUSTICE MOSENEKE: But at the court if you don't object to questions being posed to witnesses, do you? Are you concerned about whether the questions are combative or not?

ADV. TEBOGO HUTAMO: Indeed Justice.

ARBITRATOR, JUSTICE MOSENEKE: I understand that, thank you. Again we will go around and have responses to other counsel on the matter. Again another interlocutory question. Shall I start with Legal Aid South Africa?

ADV. LILLA CROUSE: Thank you very much Justice, I think paragraph 22 of the
5 Pre-minute deals to the extent that questions might be asked in so far as witnesses, witnesses are always in my opinion, treated with respect and sensitivity and we always hope that they will also treat us also with respect and sensitivity when we ask them questions but of course a witnesses can't not be questioned, whether we call it cross-questioning or whether we call it cross-examination or whether we just
10 call it questionings. We won't have the proper picture before this court unless we can ask questions to the witness and of course it will be with respect and sensitivity.

ARBITRATOR, JUSTICE MOSENEKE: Very well, thank you. Counsel for Section 27.

ADV. ADILA HASSIM: Thank you Justice. Its paragraph, the Section on
15 questioning of the witnesses in the pre-arbitration minute starting from paragraph 20 and going to paragraph 23, and in paragraph 23 it is stated that witnesses called by the government an expert witnesses may be questioned by representatives of other parties and evidence leaders. It seems to me that this is a bit of storm in a tea cup that in fact we did deal with this. It was a tricky issue during the Pre-Arbitration
20 because of the family members who are testifying and on behalf of our clients, there are some who have chosen to be present and to provide oral testimony and to tell their stories and to make themselves vulnerable to this Hearing. There are others who have provided their versions via Affidavit and so it was with due regard to those

circumstances that this discussion took place and these paragraphs rewarded the agreement and I think they speak for themselves.

ARBITRATOR, JUSTICE MOSENEKE: Yes, Evidence Leader Counsel Ngutshana.

What is your say, you are present at this meeting, what is your view of paragraph

5 23?

ADV. PATRICK NGUTSHANA: In paragraph 23 Justice, let me provide a brief background to why the words that was used there in paragraph 22 that is in relation to the families.

ARBITRATOR, JUSTICE MOSENEKE: Just speak volubly, just have regard to all

10 the interested parties in here. Just speak loudly and clearly.

ADV. PATRICK NGUTSHANA: In relation to paragraph 22, the background why the word clarity was used, coming out of the meeting, was that section 27 did indicate that the families of the deceased are quiet sensitive and we need to be sensitive to them I think when they do come here. We agreed as the parties meeting that is on the 22nd of September, that that would be the spirit within which we will approach this. But in so far as paragraph 23 is there, it speaks for itself. Nothing else was discussed about that.

15

ARBITRATOR, JUSTICE MOSENEKE: The point is a bit new ones, it states that this proceedings are not meant to be formalistic or combative.

20 **ADV. PATRICK NGUTSHANA:** Correct.

ARBITRATOR, JUSTICE MOSENEKE: Is there any disagreement about that?

ADV. PATRICK NGUTSHANA: No, there is no disagreement about that Judge. But the argument is that those witnesses which would be called by that is by

government would be questioned by that is by the parties or by the other parties.

That was the agreement and in paragraph 22 it's clear that was agreed by that is by

the parties and the background is as I explain that there was a request on behalf of

the families by Section 27 that we are dealing with a sensitive matter and the

5 families are still grieving, we need to be sensitive to that.

ARBITRATOR, JUSTICE MOSENEKE: Very well, Counsel for the State. You have

the last word on this. Is there anything else you want to say in the light of the

responses of your colleagues?

ADV. TEBOGO HUTAMO: Indeed Justice, one aspect which will then relate to the

10 question of honours to the extent that the parties have agreed that given the nature

of this proceedings being of its own kind.

ARBITRATOR, JUSTICE MOSENEKE: It's almost a new question, is it a new point

you are making?

ADV. TEBOGO HUTAMO: No, no, no. It is in response to the submissions made

15 that there is a need for cross-examination of witnesses. What has been agreed

upon was that the state will commence the proceedings. In ordinary course the

claimant will be, will have the duty to begin and the honours of proof but in light of

what the nature of this proceedings are, we have agreed that the state shall

commence in order to give that explanation. Voluntarily and in good faith and that

20 will be the case. It was not anticipated that this process will be adversarial because

if that was the understanding of the parties.

ARBITRATOR, JUSTICE MOSENEKE: Is it adversarial, is it? Why do you think it is

and what you say about paragraph 23? Whereby I invited you to take me to the part

that deals with this and you referred me to a part that was not quiet relevant. I would like to move on, it's really not an actually to point to this, I am giving you an opportunity as I am duty bound to hear on what you say paragraph 23 means. Witnesses by the state will submit to questions, that is what it says, why is it not appropriate?

ADV. TEBOGO HUTAMO: I have made the submission that the State does not have any objection when questions are been sort in order to clarify matters. Those are the submissions.

ARBITRATOR, JUSTICE MOSENEKE: Is there any other issue you'll like to make on this?

ADC. TEBOGO HUTAMO: No.

ARBITRATOR, JUSTICE MOSENEKE: I think it is fairly clear that the agreement between the parties is to be found in paragraph the section on question of witnesses. And I think these proceedings will adhere to the agreement as set out in paragraphs 20 through to paragraph 23. Having said that again, this is an alternative dispute resolution process, its aim is not formalism as it might be found in some court proceedings. Agreement is quiet clear. We are dealing with death, we are dealing with pain. We are dealing with trauma and the idea is not to be smart and legalistic as layers often want to be. The idea is to get to the truth as efficiently and as timeously as we can. And again I commend the state for having being part and agreeable to this process which will accrue to the benefit of those who might have been victims and in that spirit we must continue to go through this and find candid and honest answers so that we reach the pain and we try and resolve it.

And up to now the state has been a valuable partner and must continue to be such a partner to the end of this process. And therefore the ruling simply on interlocutory matters is that the part the proceedings will be conducted in terms of paragraphs 20 to 23 amongst others of the pre-trial minute. That gets us to the record. That is
5 where we are about to go when you raised this matter of questioning of witnesses. Are there any issues that are still outstanding about the record? I have seen the minute, I have seen the timelines and I am aware that not all of the timelines were met. I am aware that the record has been filed, because there is one in my chambers and which appears to have been properly paginated and appears to be a
10 useful record. Are there any further submissions around the record? I will like to hear parties, again I am going to start from my left.

ADV. LILLA CROUSE: Thank you Justice Moseneke. We don't have any commentary at this stage. We accept the record, we have read through it. Thank you.

15 **ARBITRATOR, JUSTICE MOSENEKE:** Doctor Hassim.

ADV. ADILA HASSIM: Thank you Justice Moseneke. We in fact, the appropriate place to begin is to point out that the one part of the record right at the very beginning, the annexures to the Ombuds report, has not been included in its complete form, there are pages that are missing and the order is also incorrect. We
20 have made copies of the annexures as they are found in the original Ombuds report, we would like to hand it in to you and to the other parties.

ARBITRATOR, JUSTICE MOSENEKE: Obakeng, there is supposed to be somebody who is like in orderly here who disappears from time to time. Can it be handed out to me or Obakeng? Thank you.

ADV. ADILA HASSIM: The second issue is in relation to documents that had been
5 requested by Section 27 for inclusion in the record. The request was made in writing
on 8th September 2017. There were repeated follow-ups culminating in the pre-
arbitration hearing, pre-arbitration meeting and which it was agreed that those
documents would be provided to Section 27 by 27th September. There are still a
number of documents that are outstanding, these relate to the service level
10 agreement with Life Esidimeni, the report by a consultative organisation called
Health Advance Institutes on compliance with the service level agreement with Life
Esidimeni, a report by KPMG on compliance with the service level agreement with
Life Esidimeni. All the planning and budgeting documents used or prepared by the
Gauteng Department regarding its contract with Life Esidimeni in 2015 and in 2016.
15 The full record of the decision of the Health Ombud, all Post Mortem Reports, and
all assessments of the NGOs prior to licensing those NGOs. Apart from this last
mentioned category, the assessments of these NGOS in the licenses in which, in
respect of which some documents were provided, none of the requests for the other
documents has been addressed by the state. We would request that those
20 documents be made available to all the parties and to your good self, without delay.

ARBITRATOR, JUSTICE MOSENEKE: The list that you have read out now, the deficit, in the light of the record which is 3500 pages already, is that what is?

ADV. ADILA HASSIM: Indeed, those are not reflected in the record at all and they document which we consider, we appreciate the hefty tones that we have before us, but we think that this hearing and the full disclosure of what to place would not be complete without these documents.

5 **ARBITRATOR, JUSTICE MOSENEKE:** Very well, thank you. It is your turn Counsel. Before I go ahead, evidence leader, is there anything you would like to counsel that you would like to say in relations to the record in particular?

ADV. PATRICK NGUTSHANA: Justice Moseneke, we will defer to the state, there is nothing for now to add on that. Some of those requested documents we have
10 tried assisting the parties to obtain them from the third parties

ARBITRATOR, JUSTICE MOSENEKE: Again, you will have to speak into the mic and loudly. Remember there are all separate custom systems so, everybody needs to hear you yes.

ADV. PATRICK NGUTSHANA: I'll bring it closer to me. I am saying in relation to
15 the documents, I will defer what the state will say. We have tried as evidence leaders to obtain or source this information from third parties that is from government specifically the project leaders and so on with whom we have been in contact from the onset.

ARBITRATOR, JUSTICE MOSENEKE: Well, whatever your source it must be part
20 of a common record isn't it?

ADV. PATRICK NGUTSHANA: That is correct.

ARBITRATOR, JUSTICE MOSENEKE: So how, what are the plans, how are you going to get those to become part of?

ADV. PATRICK NGUTSHANA: They have been promised by the evidence that is project leaders, but we have not yet obtain them so we are still looking for them. But we will defer I think, with what the state has to say about the record.

ARBITRATOR, JUSTICE MOSENEKE: Very well, Counsel.

5 **ADV. DIRK GROENEWALD:** Thank you Justice. Justice, similar as Section 27 our attorneys have written a number of letters requesting documentation from the state. However, we would limit the documents that we require from the state to the patient's files, the deceased individual's personal files, patient files, which we think is now of high importance to these proceedings because those patients' files will tell
10 us what happened to these patients before their death. Were they provided with medicine or were they taken to hospital or doctors. We need those patients' files. That is not according to me a debatable issue. We need those files. And secondly, the autopsy report of some of these family members of some of the patients that died, the family members would like to see those reports and I think its provision is
15 made for that in the terms of reference of this arbitration proceedings.

ARBITRATOR, JUSTICE MOSENEKE: Very well, thank you. Counsel for the state.

ADV. TEBOGO HUTAMO: Thank you Justice. I should indicate that the state has provided the documents which were in its possession and with regards to the other documents which have been requested. There has been a response to the request
20 in relation to those documents and such a response, the response was that the state was facilitating to obtain some of those documents. As some of the documents are with other institutions. For instance, there is a request of post mortem reports and it is common knowledge between the parties that those documents are with the

SAPS and NPA. There has been engagements which the state has initiated in order to ensure that those documents are made available. It is not to be portrayed that the state is refusing to make documents available.

ARBITRATOR, JUSTICE MOSENEKE: Very well, well the state can't refuse
5 because there is already made an agreement to provide the documents right? We
must just manage the process, I don't want be caught up in legalities which I'm duly.
There is an agreement, a pre-existing agreement it terms of the arbitration
agreement that the state will provide all the information that is relevant to this
tragedy. You have done so from the volume that has reached me. As I say they
10 3500 pages of documentation provided by the state. So I would like a process,
uncomplicated council, where again section 27, and if any of the other parties give
us a list of those documents which are seen to be not available in the record? And
there must be documents naturally relevant come into it. We may be curious about
many things that happened, but there must be documents that have relevance over
15 equitable redress and not every curiosity that we might have, that is quite important.
And the state must then look at the list and indeed if it is relevant, the document is
relevant, the state is oblige to provide it. Just that uncommon because there is such
an agreement with the state voluntarily entered into with all of the parties. If there is
any unreasonableness and state feels that the requests aren't reasonable it will
20 become another interlocutory matters. Lawyers are used to this, we come into your
huddle and see whether or not they are in fact entitled to the document that they
require and I will be required to make a ruling on whether or not the documents
ought to be provided. In other words, simply whether the documents are relevant to

the issues under dispute. We are going to leave it at that point to wrap up, the state is going to, I'm sorry, all the parties are going to give the state a list of what they say are documents which I have not been provided yet. And within a reasonable time agreed to by the parties, those documents should be made available. So to me I

5 would like to read them, and if there is a dispute over what is still outstanding it must be brought to my attention and I will make a decision on whether or not those documents ought to be granted. I see no further hands or any indication of any counsel wanting to speak, I am going to then move on. I am going to at this stage take the tea break, it's going to be for 30 minutes. Before I do so I would like to

10 remind all parties, that when we come back we expect counsel to be ready with their opening statements. And each of our counsel will have to make an opening address which lawyers know quite well, but which also helps everybody who seats in here to understand what each party seeks to do in this proceedings. That is what opening addresses are about, it's a lot of words by lawyers telling you what they

15 planned to prove and to achieve in their particular tribunal or proceedings. So that will be a nice summary of what you expect from each of the parties, and after that we then get into the details and as I understand the first witness will be Professor Makgoba, is that so? Very well, and immediately after that we will have the Ombud who unearth all of this to come and give, be the first witness in the matter. It is

20 11h15am, we will resume at 11h45am. To all of our guests and members of the public who are here, I request that you allow me at least to leave the hall in some relative silence and thereafter I hopefully Counsel will find their way out of here. It is just basic manners for me to evacuate here and then we can, and we will try and do

that for all the three weeks. I thank you, the proceedings are adjourned till 11h45am.

END OF SESSION 1

SESSION 2

5 **ARBITRATOR, JUSTICE MOSENEKE:** I apologise for keeping you waiting but we have a number of little meetings with your advocates and attorneys, that's why we adjourned longer than we have planned. I apologise for that. Shall we then start? I see we have two gentlemen here who are going to support us, and you are? Would you put your name on record Sir?

10 **MR. MICHAEL THIBEKHWANA:** Oh, my name is Michael Thibekhwana, I am the interpreter.

ARBITRATOR, JUSTICE MOSENEKE: From which language to which language?

MR. MICHAEL THIBEKHWANA: Yes, IsiZulu into English and I was told that if necessary I must also do Setswana.

15 **ARBITRATOR, JUSTICE MOSENEKE:** I see.

MR. MICHAEL THIBEKHWANA: Yes Sir.

ARBITRATOR, JUSTICE MOSENEKE: (Vernac). Thank you very much. You want to put your name on record Sir. Is there any other interpreter? Oh I see it's my left.

ME. ME. ADELE OOSTHUIZEN: Adele Oosthuizen, I am the Afrikaans interpreter.

20 **ARBITRATOR, JUSTICE MOSENEKE:** You are most welcome. Thank you. And you want to put your name on record? You're serving as an interpreter are you?

MR. JIMMY NDLOVU: Yes, my name is Jimmy, I am a sign language interpreter.

ARBITRATOR, JUSTICE MOSENEKE: Jimmy, you must have a last name, do you?

MR. JIMMY NDLOVU: Jimmy Ndlovu.

ARBITRATOR, JUSTICE MOSENEKE: Thank you Mr Ndlovu. Shall we then start,
5 as I had indicated earlier we are going to have opening statements by the various
counsel, which will be a brief statement that tells you how they see the proceedings
and what they intend doing with the proceedings, uhm that will be unfolding in
greater detail over three weeks and giving that state has a duty to begin, it is only
appropriate that I start with Counsel for the State, to lead the way.

10 **ADV. TEBOGO HUTAMO:** Thank you Justice. This proceedings have been initiated
pursuant to the report relating to the circumstances surrounding the death of
mentally ill patients in the province of Gauteng. The Ombudsman made certain
recommendations which are contained in the report, amongst those
recommendation is the recommendation 17 which anticipate this proceedings as
15 alternative dispute resolution. What will be demonstrated in this proceedings is that
the affected family members will be given an opportunity to state the situation or
circumstances which they have found themselves pursuant to the event which are
captured in the report. What the state will demonstrate in this proceedings will be
the fact that as it is on record, the state has acknowledged and accepted the
20 content of the report in its totality and it is for that reason that liability has been
considered by the state. So what this process has to engage is the aspect relating
to redress and closure to those family members who are affected by the incidents
contained in the report. The state would like to make it clear to all the affected family

members, to the entire country, and to the whole world that as a result of the incidents which have been uncovered by the report, the state took the responsibility to show that it is in fact responsible and it is responsible for the outcomes which have been uncovered in the report and it is for that reason that the state will give an explanation which should be addressed to the affected family members so that like they should be able to understand how did this situation arise.

ARBITRATOR, JUSTICE MOSENEKE: Counsel, would you just pause right there and I have just remembered that I have interpreters on both my sides. At what point would they like to intervene, clearly it won't be a word for word translation it will be an interpretation of the essence and it seems to me that I will give you each an opportunity to do that, but it won't be line by line, I will few paragraphs and the give you an opportunity. Will that work?

ADV. TEBOGO HUTAMO: Yes, that will work.

ARBITRATOR, JUSTICE MOSENEKE: Will that work? Very well. Would you like to start? ...*Interpreting...*

ME. ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: ...*Interpreting...* I am going to keep to Afrikaans and IsiZulu, and if anybody wants more, please you have to indicate otherwise we will interpret to many languages. Is that in order? ...*Interpreting...* We have an agreement we will use Afrikaans and IsiZulu for now until there are demands for more. ...*Interpreting...* Thank you. Counsel.

ADV. TEBOGO HUTAMO: Thank you Justice. The state will want to demonstrate in its explanation.

ARBITRATOR, JUSTICE MOSENEKE: Is your mic on?

ADV. TEBOGO HUTAMO: Thank you. What I was submitting is that the state will demonstrate that in its explanation, it will give an account of the events in full and that is part of a responsible government which takes responsibility for any of the mistakes that have been committed and in that regard, what the State will then proceed to give an indication of what steps were taken when this incidents were discovered and what will be also demonstrated is the fact that the State was, the State did not only react to the report by the Ombudsman, in fact, upon the discovery of some of the incidents occurring, the State had already taken measures in the form of contact being made with family members and that was clearly to demonstrate that the state is caring to all the members of the society. What transpired is that when this incidents occurred, the premier of the province did not waste any minute, he then proceeded to make contact with those family members as early as December of 2016, and that interaction occurred prior to the release of the report.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. TEBOGO HUTAMO: Thank you, it would become quite apparent as the proceedings will unfold that the state after having taken responsibility of the events which occurred, has on numerous occasion has expressed its regret for the incidents which has actually occurred. Those incidents should have been prevented

and the state expresses its remorse to what had occurred and such remorse is expressed to those who are directly affected and to the entire nation, and as it will appear later, the government of the republic of South Africa, through the Ministry of Health, the Provincial Government, with its Department of Health have taken every
5 measure to insure that those findings which have been acknowledged the findings emanating from the report are fully implemented without any question and that's a clear demonstration that the events did not occur by design, and what has happened, is really regrettable and the state is willing to ensure that it assists the family members to find closure in what had occurred. And it is also the intention of
10 the state to make every step or every effort to ensure that this incidents do not repeat itself in this country.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. TEBOGO HUTAMO: As part of the implementation process, the state is
15 taking measures to ensure that policies are being developed in order to avert any future occurrence of the type of incidence which is very unfortunate. What has to be made clear is that, the government having taken responsibility - has participated in this process voluntarily and it has also engaged affected family members before the report was released and after the report was released, and that should send a
20 message to everyone that this is a clear demonstration that this is a government which listens to its people, as it is a government for the people, by the people. Hence, the steps taken in good faith.

ARBITRATOR, JUSTICE MOSENEKE: Let me start on my left, can't be Zulu always in front.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

5 **ARBITRATOR, JUSTICE MOSENEKE:** Thank you, Counsel.

ADV. TEBOGO HUTAMO: In conclusion, the state will want to assure the affected members and the nation at large that the state will take every measure to ensure that the family members find redress and closure emanating from the incidence which occurred and which incidence are really regrettable and the state expresses
10 its remorse and the state hopes that this process will indeed achieve the purpose for which it is set up for, for the families will find redress and closure.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Thank you Counsel, thank you for those
15 opening statements which are indeed helpful. I thought you are going to stop short of saying the state commits to an equitable redress but you went right there as your last submission and much appreciated. And then I will turn to Advocate Groenewald.

ADV. DIRK GROENEWALD: Thank you very much Justice. Justice I find it
20 appropriate to start off with the quote of Hubert Humphrey who said that, "It was once said that the moral test of government, is how the government treats those who are on the dawn of life, the children, those who are at the twilight of life, the elderly and those who are on the shadows of life, the sick, the needy and the

handicapped. Now Justice, we submit that the government has accepted that they have failed this test, that they have failed to provide and to protect those most in need. Now the government in terms of the Ombudsman's report has failed to uphold our constitution, our domestic laws as well as the international conventions and as a
5 consequence thereof, 94 patients have paid the price with their lives.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. DIRK GROENEWALD: Thank you very much Justice, The Gauteng Mental Health Marathon Project will be remembered as one of the greatest causes of
10 human rights violations committed by the state since the dawn of our democracy, and remembering it we must not because of our reluctance for closure or forgiveness but because this is how we as a people pay our respect for those who have died and suffered. How we will remain vigilant to hold government accountable and how we will ensure that such atrocities do not befall our democratic state again.
15 Now Justice, the family members of the late Jaco Stols, Thabo Monyane and David Mpofu, expect from this government in this proceedings to provide them with information regarding the circumstances and cause of death of their loved ones. To give feedback to this family members of what steps the government has taken to hold those responsible accountable, and to be provided with an apology. These
20 family members, perhaps...

ARBITRATOR, JUSTICE MOSENEKE: Well, finish this family members at least.

ADV. DIRK GROENEWALD: These family members will come and testify of how they saw their loved ones die of hunger and starvation, how they were informed by

employees of the state not to get emotional when they wanted answers regarding the deteriorating health of their loved ones.

ARBITRATOR, JUSTICE MOSENEKE: Thank you.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

5 **ME. ADELE OOSTHUIZEN:** ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Thank you, I am going to go past Advocate Ngutshana for now and call you last and move on straight to Advocate Hassim.

ADV. ADILA HASSIM: Thank you Justice Moseneke. We find ourselves here today due to decisions and actions that were taken by the Gauteng Department of Health
10 in 2015. Those decisions and actions related to the termination of the contract by the department with Life Esidimeni. Life Esidimeni is a private facility that for more than 30 years, had been providing health services on behalf of the state to mental health-care users who required long term and specialised psychiatric care. The department decided to transfer the patients from Life Esidimeni to 27 NGOs around
15 Gauteng. This decision and the manner in which it was executed resulted in the death of at least 94 mental health patients according to the Health Ombud, Professor Makgoba. In these hearings we hope to have a more complete and accurate list of the actual number of deaths. These hearings are a special process in which the merits of the case giving rise to the claim is conceded, and the findings
20 of the Health Ombud are not disputed. It is in essence, a process of restorative justice. The ambit of the hearing is determined by the Terms of Reference relating to the Gauteng Mental Health Marathon Project which I will refer to as 'the project'. The Terms of Reference were agreed by all parties present. The purpose of the

arbitration is to: Facilitate, closure and redress for the affected mental health-care users and families. According to paragraph 6.3 of the Terms of Reference this includes, but is not limited to: Appropriate compensation for the affected families; The provision of information to families regarding the circumstances and cause of death of their loved ones as well as the location of their final resting place; Appropriate counselling and support services; Appropriate apologies and acknowledgment of the suffering of the families; The provision by the government of an appropriate monument to commemorate the suffering and loss caused by the project; Any other form of equitable redress the parties deem appropriate. Of the 94 plus deceased mental health-care user. Sorry Justice, should I pause here?

ARBITRATOR, JUSTICE MOSENEKE: Yes, it was quite a bit, I think we can stop there thank you. Sasha, touching your counsel that helped.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Thank you, Counsel?

ADV. ADILA HASSIM: Of the 94 plus deceased mental health-care users, Section 27 represents the families of 55. These families are entitled to equitable redress arising from this arbitration as they fall within the category of claimants described in paragraph 2.1 of the Terms of Reference. The 55 deceased mental health care users are: Felicity Adams, Diederik Johannes Botha, Terence Maphea Chaba, Frederick Colitz, Thembisile Lillian Dlamini, Mehmona Dubree, Nelly Johanna Du Toit, Joseph William Golden, Joseph Gumede, Sizwe Thabang Hlatshwayo, Daniel Charles Josiah, Maureen Khunjwa, Masweet Kozwale, Christina Llale, Mothofela

Leroabe, David Letoaba, Hendrick Ranthopi Maboe, Virginia Machpela, Matsobane John Mahloko , Christopher Makhoba, Happy Makhubela, Rasibe Rahab Mangena, Nathaniel Solly Mashigo, Mangana Eric Mashiloane, Josephina Mhlongo, Reynock Mncube, Jabulane Godfrey Mnisi, Lucky Jeremiah Modise, Christopher Mogwerane, 5 Jonas Modike, Bernika Mokaneng, Ntswelengwe Mokgethi, Sophia Manyana Molefe, Mametsi Sina Mosalo, Caswell Mosiane, Matlakala Elizabeth Motsoahae, Siyabulela Roger Msimanga, Emily Mthembu, Pio Sibusiso Mthombeni, Peter Mvundla, Vuyo Aaron Nqgondwane, Julian Anthony Peterson, Deborah Phetla, Charity Ratsoso, Dawid Johannes Senekal , Busisiwe Shabalala, Joy Nomsa 10 Simamane, Alfred Sithole, Bhekumuzi Sithole, Phoebe Jesween Marcia Soudom, Charles Stewart, Johanna Tladi, Motshabisi Michael Thlolwe, Julia Kedibone Tsawe, and Cindy Van Rooyen. The family...

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

15 **ADV. ADILA HASSIM:** Thank you. The families of 17 deceased will provide oral testimony in the arbitration. The remainder have provided affidavits detailing their experience and loss. In addition, the following witnesses will testify on behalf of the families: Me. Cassy Chambers who is the Operations Director of The South African Depression and Anxiety Group (SADAG). Dr Talatala, a Specialist Psychiatrist and 20 the President of SASOP, The South African Society of Psychiatrists. He was the President during the period of this project. Me. Coralie Trotter – A Clinical psychologist who led a team of 20 clinicians who assessed the families to determine the nature of the suffering and trauma that they endured as a result of the project.

The following summarised facts are common cause. On 21 October 2015, the Gauteng Department announced that it would terminate its contract with Life Esidimeni.

ARBITRATOR, JUSTICE MOSENEKE: I think you're going to have to pause for a
5 while there. Do you want to go first for a change?

ME. ADELE OOSTHUIZEN: ...*Interpreting*...

MR. MICHAEL THIBEKHWANA: ...*Interpreting*...

ARBITRATOR, JUSTICE MOSENEKE: Counsel.

ADV. ADILA HASSIM: Thank you. The following summarised facts are common
10 cause, on 21 October 2015, the Gauteng Department announced that it would
terminate its contract with Life Esidimeni. The initial decision had been taken much
earlier and communicated to a meeting between the department, a representative of
Life Esidimeni and the managers and psychiatrists at the public psychiatric hospitals
on 4 March 2015. So disquieting was this announcement that it prompted the
15 heads of each psychiatric hospital unit in Gauteng to detail what they described as
'grave concerns', which they detailed in writing to the provincial department on 28
April 2015.

MR. MICHAEL THIBEKHWANA: ...*Interpreting*...

ME. ADELE OOSTHUIZEN: ...*Interpreting*...

20 **ARBITRATOR, JUSTICE MOSENEKE:** Counsel.

ADV. ADILA HASSIM: Thank you. In June 2015, SASOP, The South African
Society of Psychiatrists also wrote to the department setting out their concerns
regarding the risks posed by the intended transfer of Mental Health Care Users.

Representations were made to the department by family representatives, SADAG and the South African Federation of Mental Health. The Department proceeded with its course of action. The majority of families represented in these proceedings were not contacted prior to the move of their loved ones. Most discovered their loved ones had been moved after the fact. Many were not contacted at all, and once they discovered their family member had been moved through one means or another, were left to scramble to find the location of the family member. This often took days and even weeks.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

10 **ME. ADELE OOSTHUIZEN:** ...*Interpreting...*

ADV. ADILA HASSIM: Thank you. So on or around 30 June 2016, there was a mass-discharge of mental health care users to NGOs, homes and hospitals. Mental health care users were loaded onto buses and bakkies and distributed – or in the language used by the department ‘decanted’, to various facilities across the province. The MEC of Health reported on a number of occasions that users did not have their belongings or even a change of clothes with them. She also reported that many mental health care users left Life without their IDs or medical records. We also know that many of the NGOs did not have contact details for family members.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

20 **ME. ADELE OOSTHUIZEN:** ...*Interpreting...*

ADV. ADILA HASSIM: Thank you. From one of the reasons for this process is for us to understand why this took place, why it was necessary. The department has provided two justifications for the project. These are costs with resource constraints

and the second is, the requirement by mental health policy to deinstitutionalise mental health care users. Regarding costs, we know from the Ombud's report that the move of users out of Life Esidimeni led to a significant number of admissions to mental health hospitals including at Sterkfontein, Weskoppies and Cullinan Care and Rehabilitation Centre, at great expense. While at Life Esidimeni, the department paid R320 per person per day, at Weskoppies it would have to pay R1 960 per person per day. At Sterkfontein it would pay R1 386 per person per day, and at Cullinan it would pay R1 486 per person per day. The department paid NGOs on average R112 per person per day, the NGOs to which they were moved to as part of the project. A report from Professor Melvyn Freeman that forms part of the record of the arbitration, Prof Melvyn Freeman from the National Department of Health – this report informed the Gauteng MEC for Health that deinstitutionalisation can never be used as a cost-saving measure because deinstitutionalisation by its very nature is costly. It requires significant investment in the communities and NGOs that are meant to care for the mental health care users. So the resource constraints justification for the move of users from Life Esidimeni doesn't explain the move. With regards...

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

20 **ARBITRATOR, JUSTICE MOSENEKE:** Counsel.

ADV. ADILA HASSIM: Thank you. So the second reason provided by the department is the policy of deinstitutionalisation, the policy is called the National Mental Health Policy Framework and Strategic plan 2013 to 2020. The thing is that

while the policy framework does provide deinstitutionalisation, it also recognises that, and I quote “deinstitutionalisation has progressed at a rapid rate in South Africa without the necessary development of community-based services, this has led to a high number of homeless mentally ill people – people living with mental
5 illness in prisons and revolving patterns of care”. The policy framework further provides and I quote “these community mental health services will be developed before further down-scaling of psychiatric hospitals can proceed”.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

10 **ARBITRATOR, JUSTICE MOSENEKE:** Counsel I have to ask, how long more do you have? I want to restrict you at all just basically to arrange time.

ADV. ADILA HASSIM: Uhm it’s hard to calculate with the interpretation as well but I’ve got about a page and one third of pages to go.

ARBITRATOR, JUSTICE MOSENEKE: I think we’re going to go and finish that and
15 then take the lunch adjournment then, and then go the other submissions after that. We’re at 13h15pm, so we should be good to go. If any of you is particularly hungry, just raise your hand out high.

ADV. ADILA HASSIM: I’ll try read, present more quickly.

ARBITRATOR, JUSTICE MOSENEKE: Okay, thank you.

20 **ADV. ADILA HASSIM:** Thank you. So what about the rights and interests of mental health care users in this framework. The expert opinion of Me. Coralie Trotter who will testify during these hearings, tells us that all available psychological, psychiatric and medical knowledge regarding the factors to be taken into account when

relocating institutionalised patients was ignored. This resulted in fear, confusion, trauma and a sense of homelessness by the mental health-care users. According to Me. Trotter and her team, what makes it worse is that families were not told where their loved ones were being sent which meant that mental health care users did not
5 have the benefit of the comfort and reassurance and stability of the family once they were moved.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Counsel.

10 **ADV. ADILA HASSIM:** Thank you. So regarding the psychological and medical knowledge the experts refer to, even if those in government responsible for their health and well-being of mental health care users who are in state care, even if they were not aware of this knowledge and the risks associated with the relocation. They were informed in detail by Dr Talatala from SASOP who cautioned them of the
15 potential harm and who wrote to the department no less than five times between March 2015 and October 2015. Ultimately, SASOP together with SADAG and the South African Federation for Mental Health, and the Association of concerned family members of residence of Life Esidimeni had to bring an urgent court application. The matter was settled out of court the day before the hearing, the agreement that
20 was reflected in the settlement was an undertaking by the department to engage in a meaningful consultation process with the patients and their families in order to ensure a safe and orderly transfer that would not jeopardise the rights of the patients. As we now know, the department reneged on that agreement. As a matter

of law and constitutional rights, mental health care users are equally entitled to the protection of their rights to administered of justice and dignity, access to health services, the right to an environment that is not harmful to their health and well-being, freedom and security of their person, and the right to life. Any steps taken by
5 the department in relation to the provision of mental health care services must also provide, prioritise the needs of mental health care users and ensure that they continue to receive care that is of equal or better standard than that which they were receiving at Life Esidimeni.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

10 **ME. ADELE OOSTHUIZEN:** ...*Interpreting...*

ADV. ADILA HASSIM: Thank you. I'm in the home stretch now judge. So the burning question is, if the project was not cost-saving and it was not demanded by the policy of deinstitutionalisation given the conditions that had to first be created, then why was this necessary? What was the motivation that drove this course of
15 action? The burden of answering this, lies with the government. The sorry tale of extreme neglect, insufficient or rotten food, exposure to cold, lack of medication, over-crowding, abuse, death, late notifications of death, picking through bodies stacked upon each other in morgues, is best told by the families themselves as they will. We thank the esteemed arbitrator for his time and the government officials who
20 chose to be present. We have every hope that this arbitration will achieve its objective, to help victims overcome the damage they have suffered, to give them back their dignity and to ensure that these abuses never happen again.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Counsel, are you done?

ADV. ADILA HASSIM: I am done for now Justice.

ARBITRATOR, JUSTICE MOSENEKE: For now you are done, thank you ever so
5 much. I will like to thank both Counsels who have submitted so far, three I'm sorry
who have submitted so far and that has been helpful. We certainly, in my language
we say, "tsiye efufa ka motswang". Did you get that Counsel? No you don't, clearly
not, no that is a Sesotho, that is not Zulu. It mean even a locust needs some
subsidence in order to fly further. So I think that is what it really means. At some
10 point you got to go and find subsidence if you want to fly further on. Thank you so
much for what you have done up to now, it has been a very good start. We have an
afternoon still to work. The time is virtually 13h30pm, I suggest we have a break
only for 45 minutes. Shall we be back here at 14h15pm and I ask all of those who
have visited us who are present here today, if you can come a little earlier than
15 14h15pm so that we can actually resume. You all have heard that there is a lot of
work we have to go through, so it's got to be important that we keep time and we
keep grinding so that we get to the truth and we get to where we should get to over
the pain and the resolution of this difficult matter. But thanks for all your patience
and your respect you have shown up to now. I am adjourning up to 14h15pm and
20 let's come in a little before then. Thank you.

END OF SESSION 2

SESSION 3

ARBITRATOR, JUSTICE MOSENEKE: Could I ask for your silence please so that we can go on. We are at the point of receiving opening statement of the parties, and we have heard three opening statements so far and we are going to proceed to do that and then move on to evidence, where Professor Makgoba has been waiting
5 from morning. And I will like to get to him this very afternoon. The next turn will clearly be that of Advocate Crouse. Advocate Crouse it is your turn. The man from the recording company was here now-now, could you help with some mics, there is two mics that isn't working, would you attend to that please.

ADV. LILLA CROUSE: Thank you Justice Moseneke, I am going to attempt not to
10 repeat anything that was already said because there is a lot of overlap. By ruling of this forum this morning, Legal Aid South Africa will represent the group described under Paragraph 2.3 of the Entitlement Criteria in respect of the agreed Terms of Reference. Now this group is described as Life Esidimeni Mental Health Care Users and their families who survived the Gauteng Mental Health Marathon Project but
15 who were caused trauma and morbidity and in our estimation they consist of about 1,700 people and consist in that group of about 300 children.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ADV. LILA CROUSE: As I have indicated this morning we are still waiting for a list
20 which should be annexed as Annexure C to the Terms of Reference containing all the names of this group. And the government has undertaken to supply those names to us. But if I may, Justice Moseneke through you, ask that all the family

members of this group that are in this hall at the moment remain behind after the proceedings today to meet with my attorney.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

5 **ADV. LILA CROUSE:** Thank you. At this stage we are unable to place this very large group into sub-groupings but we will hopefully be able to do that before a decision is made. Currently we thinking that the group might have the following or there might be the following group's children, missing patients, abused patients through the relocation process, abused persons though lack of proper treatment, 10 traumatised patients through the deaths of other patients and patients who relapsed or as a result of all of this, as well as their family's trauma.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. LILA CROUSE: We think that the issues that should play a role in the redress 15 and I am going to just deal with them in three groups. The first would be that there will be a guarantee and a protection that such a slaughter of people will never ever happen again and definitely not to our group.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: I can see somebody taking a telephone call 20 right here. We have been going leisurely but these are formal proceedings and I really will urge you just to give them the respect that they deserve. Can we switch off those phones? Stay quiet and sorry can we proceed please. Thanks.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. LILA CROUSE: That they would be secondly be entitled to a sincere apology that's directed to what has happened to them in specific details.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

5 **ADV. LILA CROUSE:** And thirdly, that in so far as their constitutional rights were violated, that it should be considered what compensation should be awarded to them. In our opinion any quantum will depend on the facts applicable to each of these sub-groups for instance, were they transported by ambulance versus an open
10 bakkie bound by linen, whether the NGOs have the capacity to care for them or not, whether other mental health users died whilst in the same NGO and whether the families were aware to where our group were relocated to and practical issues such as those.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

15 **ADV. LILA CROUSE:** At Legal Aid South Africa we are passionate about the rights of poor and vulnerable people and we will attempt to protect this group to the best of our ability. So in closing, basically with this we hope to get out of this process that it will bring closure and that it will ensure that Mental Health Care Users now and in
20 future will never have to go through such tragic events again. We are glad for the state's opening address to join us in this and we will also then address compensation which would be appropriate. Thank you Justice.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Thank you Advocate Crouse, we are going to move on. Do you have submissions you would like to make by way of opening statement?

ADV. PATRICK NGUTSHANA: Thank you Justice Moseneke, there is nothing
5 much except to emphasise the pre-arbitration minute which defines the roles of the
that is the evidence leaders specifically in Paragraph 11 that our role is to identify,
call and lead witnesses not identified and called by any of the parties. We have
taken steps to identify these witnesses and we have made several approaches to a
number of these witnesses and some of them we found out that they are currently
10 on suspension but those which we have spoken to, are willing to come and assist
that is the hearing. And I emphasise specifically on paragraph 15.2 of the pre-
arbitration minute which says that the part of it is that parties discuss the need to
hear testimony from someone else who can speak in detail on the plans and
budget. I take it that the state witnesses will speak on plans and budget. And then it
15 goes further to say that and the implementation of the move of the HCUs that is the
Health Care Users and so on. These are the witnesses we have identified and
these are witnesses who are responsible, there is some of them with what actually
occurred with this moment. There is nothing much more Justice.

ARBITRATOR, JUSTICE MOSENEKE: Thank you.

20 **MR. MICHAEL THIBEKHWANA:** ...*Interpreting*...

ME. ADELE OOSTHUIZEN: ...*Interpreting*...

ARBITRATOR, JUSTICE MOSENEKE: Well let me thank all the parties in their
opening submission. This is an arbitration sui generis, it is an unusual arbitration.

And therefore, it will from time to time have requirements which are not quiet usual. The opening statements could not have been better and clearer about what we are here for and it's a reasonable resonation as I say of what we hope to achieve in the next three weeks, but we need all the time to be in mind that the idea is to get on to
5 hear out and create spaces that would lead to equitable redress and not just drive home arbitration that turns to go zoom straight to usually financial award. So we are going to, I would like to thank all of you and indeed has been very helpfully always. I would like to add in particular to say that we should acknowledge that the state part of this process and it is a partner in the search for equitable redress, we have had
10 other calamities in our country when the state would take a different position but here actually here we actually are walking the same road and I hope we will be able to keep it as it is right up to the end. And to the point where actually redressing compensation is determined and paid out. This brings us to the next part of these proceedings and that is to start hearing actual evidence, subject to any matter which
15 Counsel would like to raise now of the procedural nature, I would like to get on to Prof Makgoba. Is there any particular matter that is so pressing that you must say it now, and if there be non, I am going to proceed and I would like to get Obakeng to facilitate the presence of Professor Makgoba.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

20 **ME. ADELE OOSTHUIZEN:** ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Professor Malegapuru Makgoba, good afternoon to you Sir.

PROFESSOR MALEGAPURU MAKGOBA: Good afternoon.

ARBITRATOR, JUSTICE MOSENEKE: I am obliged to swear you in to this arbitration proceedings which occur because you so required, and in effect an implementation of your recommendation to which you will come in a moment but for now, my initial task is to ask you whether you would like to take a former oath or an
5 affirmation.

PROFESSOR MALEGAPURU MAKGOBA: I will take whichever one is simpler.

ARBITRATOR, JUSTICE MOSENEKE: The division normally is those who are not faith people want an affirmation and those who want to affirm in the name of God will take an oath.

10 **PROFESSOR MALEGAPURU MAKGOBA:** I will take the oath.

ARBITRATOR, JUSTICE MOSENEKE: You will take the oath. I would like you or ask you to raise your right hand and say I Malegapuru Makgoba, do hereby swear that the evidence you will give before this arbitration proceedings shall be the truth and nothing but the truth, and if so please, you raised your right hand already and
15 say 'so help me God.

PROFESSOR MALEGAPURU MAKGOBA: I Malegapuru Makgoba, do hereby swear that the evidence that I shall give in this arbitration shall be the truth and nothing but the truth, so help me God.

ARBITRATOR, JUSTICE MOSENEKE: Thank you. Professor Malegapuru
20 Makgoba, in fact many young people I want them to stand here and just look at your qualifications. I get a heartbeat every time I look at them. Procured from many great Universities around the world. But you have been called here by the state to come and testify around your report sub-titled is no guns 94+ silent deaths and still

counting. It is a sub-title to your report. I am not going to lead you because you have been called by the state. And unfortunately because of space, the person that will be posing the questions seats slightly to your right. He is Counsel representing the Province of Gauteng and the National Minister of Health. He is Advocate Hutamo, who seats to your right with that bright red and white tie. If I had anything to do with it I would have turned your table to be more facing the audience and I ask Obakeng and others can you turn the table, so that the professor can face more that way, and see the person he will be having the conversation with. And immediately after the questions have been posed in chief by Advocate for the state, there will be questions, which as we understand remain declarificatory or complimentary from the rest of counsel. There are many advocates here so there will be a number of questions that will probably arise from your evidence. Advocate Hutamo.

ADV. TEBOGO HUTAMO: Thank you Justice. Good afternoon Professor.

PROFESSOR MALEGAPURU MAKGOBA: Good afternoon.

15 **ADV. TEBOGO HUTAMO:** There is a bundle of document before you which is titled file 1. May you please just get to it and the first section from page 1 is a document titled 'The report into the circumstance surrounding the Death of Mentally Ill Patients Gauteng Province. Are you familiar with this document?

PROFESSOR MALEGAPURU MAKGOBA: It is my report.

20 **ADV. TEBOGO HUTAMO:** You authored the document?

PROFESSOR MALEGAPURU MAKGOBA: I authored 35 versions of this report?

ADV. TEBOGO HUTAMO: Thank you and you confirm the contents in the report?

PROFESSOR MALEGAPURU MAKGOBA: Yes, with certainty.

ADV. TEBOGO HUTAMO: Thank you. Professor, I am going to hand up two documents which is a list of names in two versions.

ARBITRATOR, JUSTICE MOSENEKE: Of course Counsel, whatever you give to the witness you are going to give to me right? Thank you.

5 **ADV. TEBOGO HUTAMO:** I think I should give you the originals.

ARBITRATOR, JUSTICE MOSENEKE: Thank you. Shall we proceed Counsel?

ADV. TEBOGO HUTAMO: Indeed so. Professor, it is common cause that the proceedings is in relation to the deaths of mentally ill patients and the Sub-title of the report reads that, 'No guns 94+ silent deaths and still counting'. Can you just
10 assist to this proceedings by giving the number of those patients who died pursuant to the project in respect of which you undertook an investigation with reference to the two list that have been handed up and just explain the difference between the two lists?

ARBITRATOR, JUSTICE MOSENEKE: Well Counsel, I would have imagined the
15 witness would have first been asked in what capacity did he write the report. Shouldn't you qualify the report in that way?

ADV. TEBOGO HUTAMO: Thank you Justice. If I can give the witness an opportunity. Professor you have just mentioned that you have authored the report referred to you in the bundle. Can you just state for the record, in what
20 circumstances were you are able to produce this report which is a subject of this proceedings?

PROFESSOR MALEGAPURU MAKGOBA: Well, I produced this report as the Health Ombud of the country, on the basis of a request or a complaint that was

made by the national health minister to my office, to investigate the circumstances of the deaths that has occurred in the Gauteng Province on Mentally Ill Patients.

ADV. TEBOGO HUTAMO: So, do I understand you to be saying that the process of investigation was at the behest of the National Government?

5 **PROFESSOR MALEGAPURU MAKGOBA:** Correct.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. TEBOGO HUTAMO: Professor, do I understand your evidence to be saying that when the minister lodged a complaint with your office, he was concerned about
10 the circumstances relating to the death of this patients?

PROFESSOR MALEGAPURU MAKGOBA: That is correct.

ADV. TEBOGO HUTAMO: And it was his desire that the truth should be uncovered in order to take appropriate measure which resulted in the circumstances of death of this patients?

15 **PROFESSOR MALEGAPURU MAKGOBA:** He requested me to investigate the circumstances that underlined I think the death of this mentally ill Patients within the province.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

20 **ADV. TEBOGO HUTAMO:** The outcome of the investigation it is the report before you?

PROFESSOR MALEGAPURU MAKGOBA: Correct.

ADV. TEBOGO HUTAMO: Can you just get to the two documents which I just handed over to you. Which appears to be a list. Can you just assist this proceedings by indicating who prepared this list and what is this list for?

PROFESSOR MALEGAPURU MAKGOBA: This list was prepared by my office,
5 and I have actually signed one of the copies so that it is authentic. And it was specifically prepared for this arbitration process but it was also prepared as a result of my title that at the time when I released the report I was still counting. So today I'm here I think to tell the public that I have counted, I have verified my counting and I shall no more count and I shall give the figures that I have counted as a result of
10 my findings. I have prepared two documents and this documents really outline the total number of patients who died during the process. 1 it's a document, this A3 page document which has a number of identifiers in it that I want to presume I think in Japanese culture, would be called top secret because it contains what we would call very highly confidential information of the patients that had died as a result of
15 the process. The shorter one which I have signed just has got the names and the genders of the patient without the details of their id, where they were located, what are the probable causes of death and so forth, it is a very simplified one. It's nevertheless still confidential but I think it is sort of a tailored version of the bigger document. And as I say, I think in Japanese speak, the bigger document is top
20 secret and the other one is confidential. So both of them are not for public consumptions, unless I think the justice and the legal team decides that will be the best but in my profession it will not be appropriate to do it that way. So this are the documents. Now let me just go, 118 people died as a result of this project. And this

is a... Remember on the first of February when I released my report, 94 people were counted who died. And at that time I said I was still counting, and there are reason why I was still counting. Now, the 118 patients who have died, all died within the control period, that is from the time when I started the investigation on the first of
5 October the previous year, to the first of February in 2017. There are 118 patients that died. Now, this 118 patients can be classified as follows: 108 of this patients were direct patient that had come from Life Esidimeni, and the 10 patients that died are people who died associated I think with the movements, the transfer and the effects of the Life Esidimeni Project. And they largely died in one NGO that was
10 never licensed, but that is a separate matter altogether. That is really what summarises this two documents.

ARBITRATOR, JUSTICE MOSENEKE: Professor, I have to take you back to the term 10 and you will be interrupted from time to time, this is very helpful, please go ahead. Especially by judges, they are the ones who intrude the most when
15 witnesses speak. I understand the 108. The 10 you said they died of effect of what?

PROFESSOR MALEGAPURU MAKGOBA: Their death came as a result of the movement or being sacrificed for the transfer of patients from Life Esidimeni. Let me give you maybe, I explain this, patients were transferred from Life Esidimeni to a rehabilitation Centre in Cullinan, which was an Established Rehabilitation Centre,
20 when this patients where moved from Life Esidimeni, The Rehabilitation Centre took out a certain number of their patients to make space for the Life Esidimeni patients and those patients are placed as I say in an NGO that was not licensed and was inappropriately staffed and did not have the resources to look after the patients,

where patients get relapsed and some of them died. That is basically what I was trying to say.

ARBITRATOR, JUSTICE MOSENEKE: So you are saying...

PROFESSOR MALEGAPURU MAKGOBA: They were not registered at Life
5 Esidimeni as patients, they were sacrificed for the people who came from Life Esidimeni into their rehabilitation Centre and put into an NGO that was located within the rehabilitation Centre but was never licensed.

ARBITRATOR, JUSTICE MOSENEKE: So Cullinan made space for those who came from Life Esidimeni and in so doing displaced people who needed care and
10 moved them to circumstances where they had to be looked after by unlicensed NGO and that lead to their demise.

PROFESSOR MALEGAPURU MAKGOBA: Correct.

JUSTICE MALEGAPURU MAKGOBA: So you say there is an obvious cause or connection?

PROFESSOR MALEGAPURU MAKGOBA: Well, I think if you ask a common man
15 in the streets, I think that is what they would say and I like to think as an Ombud, I behave like a common man.

ARBITRATOR, JUSTICE MOSENEKE: But for them being moved to make way for those who came from Life Esidimeni, they may very well be on the probability to
20 survive, is that what you are saying?

PROFESSOR MALEGAPURU MAKGOBA: I think they have been leaving for some time and there was no evidence that they are on their way out.

ARBITRATOR, JUSTICE MOSENEKE: Until they were moved.

PROFESSOR MALEGAPURU MAKGOBA: Yes.

ARBITRATOR, JUSTICE MOSENEKE: I follow thank you. You have a lot to translate. But besides we are going to go, (vernac).

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

5 **ME. ADELE OOSTHUIZEN:** ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Thank you, just before we proceed Professor, I have looked at both documents and I know they are in the hands of Counsel, my preliminary view coincides with yours of the schedule, contains material which in regard to which the patients or deceased will be entitled to protection and confidentiality. We (inaudible) names and genders would not be the same category. So my direction to Counsel at this stage is that you may not distribute the schedule, any further than yourselves and that it remains certainly not to the media, certainly not to the members of the public. Until such time that we have proper consideration of its contents and the source of confidentiality that is been claimed over it. But for now it should not be revealed to anybody. In my prima facie view and therefore my ruling is that it is kept confidential to the extent that you have it and no further extent. Let's go back to Professor Makgoba, Counsel would you proceed with your questions please?

ADV. TEBOGO HUTAMO: Professor, you have stopped counting at 118?

20 **PROFESSOR MALEGAPURU MAKGOBA:** That is correct Sir.

ADV. TEBOGO HUTAMO: Thank you Professor, there are no further questions.

PROFESSOR MALEGAPURU MAKGOBA: Can I be allowed to make three further comments that would assist I think this process?

ARBITRATOR, JUSTICE MOSENEKE: Oh yes, certainly. I think that you should, Counsel will state unless it's going to be briefed, as I am going to do that should all the other applicants, they are going to ask you quite a number of questions. But certainly I think, as I said these proceedings have been recommended by you, you
5 arguably, your report has been accepted as accurate, truthful and that it contains recommendations which all the parties embrace. I guess that is where Counsel is coming from that there no contestation around it. But I would benefit from everything you think is appropriate for you to tell certainly me as Arbitrator and the public at large. Please go ahead.

10 **PROFESSOR MALEGAPURU MAKGOBA:** Thank you Sir. I just want to make a couple of further comments, I think a lot has been made around the fact that this patients died during winter. In South Africa, I think it would have been the winter of 2016. And I have studied the pattern of death, in the country. It is true that more people seem to die during winter period than in any season of the year. However, I
15 want to make this emphases that there were 27 NGOs and more than 80% of the patients who died, died in about 5 NGOs. Now, any common sense would tell you that the winter in Gauteng could not only confine itself to 5 NGOs out of 27. There must have been something specific that needed to be identified within those 5 NGOs and what were the things that I identified when I investigated? The things
20 that I found were overcrowding in those 5 NGOs, lack of financial resources for those....

ARBITRATOR, JUSTICE MOSENEKE: I am sorry, what does 'overcrowding' there mean? It means that may patients or between patients and normal residents, is it too many people?

PROFESSOR MALEGAPURU MAKGOBA: It is many patients for the capacity of
5 the accommodation, many patients. And as I said there are poor financial resources
in those NGOs and some of them were just beginning to be NGOs, but more
importantly there was no food and I will give you maybe two examples. I don't know
whether Reverend Maboye is here, he is a father of a gentleman called Billy and he
will tell you that when he went to see his son and he bought some food for his son,
10 the son eat everything including the paper that was covering the Kentucky. That is
how hungry he was. The second one is...

ARBITRATOR, JUSTICE MOSENEKE: I just want to recall that Rev. Maboye is
here and he has raised his hand and thank you for being here Sir.

PROFESSOR MALEGAPURU MAKGOBA: And the other one is Mrs Collet, I think.
15 The wife of Fredrick Collet, who had starved and have lost so much weight that her
trousers have been tied with shoes laces and clearly this was weight loss that was
more or less induced by lack of food and starvation.

ARBITRATOR, JUSTICE MOSENEKE: Tell me again, can we again acknowledge
Me. Collet and I am sorry you are in a tearful state. I just want to record that you are
20 here and I want to acknowledge your presence. Thank you.

PROFESSOR MALEGAPURU MAKGOBA: So the whole issue of winter and death
must be looked at as that Gauteng had winter just as the rest of the Country but that
winter could not be located in only 5 places of 27 places and as I say you have to

look for what was more there. The other one that people often spoke about the weather, was that you know people died because of the cold that may be the case.

I did a survey of the weather of this areas during this period. From Vereeniging, to the East of the country which is Cullinan, I actually went to the weather bureau

5 Service for them to give me the daily weather during the months of this death and what I found was that the death did not correlate with the temperatures of the day.

Again telling you that there must have been something specific in those places where people died. For example, the coldest place in the country at that time was

Ncidibeni around Vereeniging around The Vaal area, and that is where the least

10 people died. The warmest place was in Pretoria and that is where most people died, during that winter period, just studying the weather. I just wanted to show the details

to which I think we went to try and show that, yes the weather has something to do with it, but you needed to be a little bit more specific about the weather. I think that I

the first. The second thing was this that I want to also emphasise, when people left

15 Life Esidimeni, they left in one of three parts. They were either discharged home because they were relatively fit to go home, or they were discharged to hospitals

because there was a reason for them, they could not be handled anywhere except in hospitals, and then they were discharged to NGOs. Now when you study the

pattern of death, especially between the hospitals and the NGOs, you found that of

20 the transfers that went to hospitals, only about 2.3% of them died. When you went to look at the deaths at the NGOs, about 10% died. Now if you analyse that

statistically the P value is about .0002 which is very significant statistically. There is a big different between transferring a patient from Life Esidimeni to the hospital

which is a safe place, to transferring them to an NGO which is not a safe place at the time.

ARBITRATOR, JUSTICE MOSENEKE: Professor, how does that calculation tidily with what you say in the executive summary, 95.1% deaths occurred at NGOs from those MCHCs directly transferred from Life Health Care, is that the same number or
5 are you referring to a different number?

PROFESSOR MALEGAPURU MAKGOBA: Well, I have a... Unfortunately I have had to ask the statisticians because people rely more on statistician than a Medical Doctor like myself. I have asked the statistician to do a calculations so that they can
10 bring a P value which is often regarded as more significant and this is the value that I have now but basically it confirms what I said in my initial descriptions. That there were more people that were dying in the NGOs than in the hospitals. Now what is the difference between and NGO and a Hospital? It's quality care and professional care, that's all, that's the big difference, you have got quality care and professional
15 care. I don't want to cast aspersions to the NGOs but that is the difference that you know about the hospital and an NGO. The last point I want to make is this that you may choose to think about it. On the 13th of September the former MEC went to the Legislature and made an announcement that 36 patients have died. And this was the reason for my, that led to my being asked to investigate, 36. It turned out that at
20 that time, on the 13th of September, 82 patients had already died. Now common sense would ask me or ask you how come the MEC did not know that 82 patients had died at the time she made that announcement. But here is the more difficult thing for me. I interviewed the Director of Mental Health and HOD of the department

on the 23rd of November 2015, it would be 2016. And I interview them one following each other so that they couldn't exchange information. When I ask them how many patients have died? This is in November and this thing had been a public outcry. When I ask the HOD how many patients has died he said to me 36 or 40. It's there
5 in my report, now I'm talking about November and 82 patients have floridly died, and he didn't know. Okay, you can forgive him maybe he didn't have the knowledge. I then ask the director of the Mental Health Division, how many patients have died, she said 48. I then ask 3 days later I ask the MEC after, she says well 36. Now, here you have 3 senior people in a department. First of all they don't know
10 how many patients that they serve or service have died, but they don't even sing from the same song. One says this number, another one says that number, so how could they actually potentially run a service that is credible when they themselves did not know.

ARBITRATOR, JUSTICE MOSENEKE: That perhaps Professor gets us to the
15 record keeping. The point you make, I am sure you are going to that conclusion aren't you?

PROFESSOR MALEGAPURU MAKGOBA: Basically, there was poor record keeping that at the time could not allow me to do proper statistics and that I recommended that there be an information system be set up in the province and to
20 their pride that system has been set up. I now know the number of patient that left Life Esidimeni, with better accuracy and I can do the statistics that I have done. And the verification team within the province that was set up by both the Premier and the

National Ministry has been very helpful in that regards to provide us with a basis and reliable information from where we can work out the analysis.

ARBITRATOR, JUSTICE MOSENEKE: Can you remember now more or less when was verification team set up?

5 **PROFESSOR MALEGAPURU MAKGOBA:** The verification team would have been set up, say in the... I released my report on the 1st of February, I think it would have been set up I think between the middle of February and early March that was set up. Around there.

ARBITRATOR, JUSTICE MOSENEKE: Thank you. Professor, there are going to
10 be a series of questions and I wouldn't like to take Counsel's tender. I am sure they have things they will like to clarify themselves. But before I turn it over to them, again in the executive summary 1.7, you highlight and put in bold and recommend that the Premier of Gauteng must in the light of the findings of this report, consider the suitability of MEC Tihedani Dorothy Mathlangu, to continue in her current role as
15 MEC for Health and we know that she has since left. What would have prompted this very emphatic recommendation?

PROFESSOR MALEGAPURU MAKGOBA: She was the political head and she was the person who actually ran and took the decision that lead to I think to the implementation of this project. The project was actually, it was carried a
20 masqueraded as a process of deinstitutionalisation, that is carried out in the Mental Health Act of South Africa. But if you look at it, the basic tenet of the policy said, you know you must take people to where, to an environment that was less restrictive. Now if you take them to an overcrowded place, that cannot be less restrictive and

the policy says you take them to an environment where they integrate into their societies and community. Now you go and take a child from Soweto and put them in Cullinan, there is no community in Cullinan that they know. So there were contradictions of the interpretation of what appears to be a progressive policy in a manner that I think the Political Head, I think made this decision and made it a little bit confusing. And I think I call it reckless and negligent to make such a decision. Under the cloak of a policy that is very clear, you take people to less restrictive, provide them with better health. Now if you take them from a hospital to a place that has got no professional staff to look after people who need professional staff, what can you call that in the Constitution of South Africa. You are denying people health, but never the less you have taken them to an NGO, but there are other arguments that one can provide. That's why I felt it was, I think there were some problems that maybe, her decision making process and her understanding of the policy and how it should be interpreted, made me feel that, you know...

ARBITRATOR, JUSTICE MOSENEKE: Very well, I'll come back to that depending on what Counsel ask you. I am going to let them loose on you, I think they are fairly friendly. They should be friendly towards you I think, but I am going to start, in what order am I going to start? I think I am going to start with Section 27. Before then but though, we are going to need interpretations. (Vernac).

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: ...*Interpreting...*, you are even longer than the main speakers. We have to live with this right, we have to live with it somehow.

In a multilingual society and where we want to reach people so there must be part of the process, that's is why we are taking this effort to ensure that everybody is with us and is able to follow what we are doing. (Vernac) Advocate Hassim, I suggest you cancel to your pointed question so that we can and they in backstage
5 should be interpreted as questions and then the answers in turns. The interpreters try to do both the question and the answers and my intervention and I understand that it is quite a difficult task. But perhaps we should have sharp and short questions from Counsel and get the Professor come in and get that bit interpreted and then move on along those lines. Thank you.

10 **ADV. ADILA HASSIM:** (Vernac) Good Afternoon Professor Makgoba, thank you for making yourself available for this process. May I begin with the list of the deceased that you provided, we have had an opportunity to look at your list during the adjournment. Can you explain a little bit what the process was in compiling the list, what your process, how you compiled the list ,where did you get the information
15 from?

ARBITRATOR, JUSTICE MOSENEKE: Very quickly, so that we can get the answers then interpreted.

ME. ADELE OOSTHUIZEN: *...Interpreting...*

MR. MICHAEL THIBEKHWANA: *...Interpreting...*

20 **PROFESSOR MALEGAPURU MAKGOBA:** Thank you for the translation and interpretation. First of all when I started the investigation, I appointed a team of two Health Inspectors who had to visit each of the 27 NGOs at the time. Basically looking at the conditions that were in the NGOs and also finding out who were

residents in the NGOs and who had demised in those NGOs. And I would personally follow that up with a phone call to the Directors of The NGOs and seek information and documentation as to who had passed away in the NGOs. So that was from my side and the inspectors had their own document and I'd request that

5 the information to be complemented by death certificates where they are available so that I had the authentic Information. I also received information from the Gauteng Department of Health and this came through the office of the HOD and the office of the Director of Mental Health. Just to give you an example, when they told me at the end of November that they had about 36 or 48 patients, after that interrogation

10 within 2 weeks I received a list from them of 80 patients that had died. So I wondered how it could change from 48 to 80 within a fortnight. So there must have been a calamity that took place within fortnight in Gauteng. But I received constant information from the Gauteng Department of Health and I crosschecked it with my own data, with the data of the Health Inspectors to compile a list that was

15 reasonable and I would follow most of this things with phone calls. And sometimes I got Section 27 bringing lists of people who had died and I'll try to verify that and sometimes I would get relatives of patients who said I am looking for my son or for brother, I can't find them and he was admitted at this particular hospital and let's try and look for him and I'd find them that way. So that was my first compilation but

20 actually even during that time, it was obvious that some NGOs were very economical with the truth. Especially about the death. And that's part of the reason I said I hadn't finished counting, because I get the sense that somehow I am not been given everything I am supposed to be given. Once we set up the data

verification team, that went around and created a new database, they also I think discovered that there was a list of people who were deceased and they sent me the list to crosscheck it against my list and I also sent them my list to see whether what I have is on their list. So what I am presenting here today, it's really a combination of those data sets, verified through the new datasets of the department's verification system and I have had about maybe 4 or 5 meetings with them to go through the data, to insure that we classify the people appropriately. That's how I have arrived at the list that I have arrived at.

ARBITRATOR, JUSTICE MOSENEKE: Okay, before you go on Counsellor, I know you are right on your top. Shall we go and again I ask the interpreters to get to the core of the messages. Okay, very well.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Thank you, Counsel.

ADV. ADILA HASSIM: Thank you. Professor Makgoba, would you agree with this statement that what exacerbates this tragedy is the way in which the Mental Health Care Users and their families were dealt with after death. For example not knowing where their loved ones, whether they died, when they died, where they were buried and the process of record keeping is a continuation of the approach to this entire saga even before death, would you agree with that statement?

ARBITRATOR, JUSTICE MOSENEKE: Let's have the question translated quickly.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Professor?

PROFESSOR MALEGAPURU MAKGOBA: Yes, I totally agree with that. There was a total disregard I think for human dignity and human respect in terms of the patients and even after death. Many patients, may relatives did not know where
5 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 many doors and I think that was traumatic and more frustrating overtime, but that seems to be okay I think in this system during this period.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

10 **ME. ADELE OOSTHUIZEN:** ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: That was excellent, thank you interpreters, it was to the point. ...*Interpreting...* Thank you. Counsel.

ADV. ADILA HASSIM: Thank you. Professor Makgoba, it's not, I don't mean to suggest that it is your responsibility at the end and after the conclusion of your
15 mandate to compile an accurate list. But for the record, Justice Moseneke I must point out that of the 118 according to the reconciliation that Section 27 has undertaken an adjournment against the list of the 55 families of the 55 deceased that are represented here, 11 names are not included in the list of 118 and we would seek to submit those names to this process to add to the number that is in
20 the Ombud's list.

ARBITRATOR, JUSTICE MOSENEKE: You have to say that again, you are saying 118 excludes 11 that appears on your list?

ADV. ADILA HASSIM: That is correct.

ARBITRATOR, JUSTICE MOSENEKE: Well, let's interpret that and then we can have Professor Makgoba respond to that.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

5 **ARBITRATOR, JUSTICE MOSENEKE:** Professor as you answer, could it be that we have 129 people dead?

PROFESSOR MALEGAPURU MAKGOBA: Let me try and deal with this matter this way. I received a list of deceased from Section 27 and I checked through our list and corrected that list. The ones that she is talking about, I don't know. But let
10 me then come to the following: I investigated people from the period of October 2015 to the 1st of February. So the list of the deceased that I am talking about, is between that control period. There are patients who would have died after I have finished my investigation and that is not part of my brief. I am aware of that but they are not part of my brief, so the list that I have provided there has taken into account,
15 I think the corrections that were brought by Section 27 and those that fell within this control period that we agreed between ourselves and the Gauteng Department of Health and the National Health Ministry that the end of my report should mark the end of my control period, that is the number of patients. That there may be other patients, I cannot deny that because I am aware of that but they don't fall within the
20 control period that we have agreed upon.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. ADILA HASSIM: I understand that because your mandate as I said ended in February 2017. Some of the 11 indeed passed on soon after your mandate ended, others of them were during that period and my only point is that all the 11 that I am referring to fall within the scope of the terms of reference of this Arbitration. Not that
5 they fell within the scope of the terms of reference of the Ombuds Investigation.

ARBITRATOR, JUSTICE MOSENEKE: I can't understand that. You would have to say that again counsel.

ADV. ADILA HASSIM: As I understand Professor Makgoba, he is saying...

ARBITRATOR, JUSTICE MOSENEKE: We will take it in smaller slices. Do they
10 include the people who were transferred from Esidimeni within the control period?

ADV. ADILA HASSIM: If the control period is, well it depends on how we define the control period. If the control period is the terms of reference for this arbitration which is paragraph 2.1 that concerns particularly the families here, then yes that is the case.

ARBITRATOR, JUSTICE MOSENEKE: And you are saying to me really that it
15 could well be that there were people who were transferred at the critical time, as part of the Gauteng Project, but who only died later than the control period. Is that what you are telling me, what exactly?

ADV. ADILA HASSIM: No, they didn't die later than the control period but they did
20 pass on after the Ombud had concluded his process. So after the release of the report by the Ombud in February 2017, on the 1st February.

ARBITRATOR, JUSTICE MOSENEKE: I follow. I interrupted you, please continue to put your question, sorry.

ADV. ADILA HASSIM: My only, the relevance of this to this arbitration is that we would be seeking to put those names, include those names. Which means adding to the list that you have provided us with Professor Makgoba, in which case the number as it stands now would be 129.

5 **ARBITRATOR, JUSTICE MOSENEKE:** Wouldn't it be fairer, I know the interpretation has to be done and I'm sure you ladies and gentlemen can handle that quite easily. We are at a very important part of this proceedings is really to identify people who passed on. It has been the single most difficult thing in the preparation to this hearing and you come and virtually save us, in the sense that
10 you really come and give us the numbers and the details. And it turns out that in fact there are more. Shouldn't Counsel, we give the list to Professor Makgoba, and then ask him to use the same verification process and it could come back to us not in person but in a report, and say that I have looked at the persons who asked to add onto the 118 and I do, and say whatever his findings are. Because he seems to
15 have resources to check on who is alive and who is not.

ADV. ADILA HASSIM: Justice, we would be satisfied with that if the Professor is would be willing to do that.

PROFESSOR MALEGAPURU MAKGOBA: Justice, I have done that exercise, I have got the list but I want to distinguish between the terms of reference of what
20 you are doing from the terms of reference of what I had to do. So, what I had to do was to work within a control period that was agreed between myself, the Minister and the Premier of Gauteng, that this is your control period, identify everybody that you can authenticate including those from Section 27, which I have done. That's the

list that I have given here. That there is a terms of reference that include others beyond my own term of reference. It's something that I believe has to be resolved between you but I do have the list up to September because I am following this without it being part of my investigation. So, it's possible that if I sending the list, I
5 can simply even tell you that this are all in the list, but it's up to you who you include and exclude. I was just telling you that which is related to my report, my terms of reference and when I left.

ARBITRATOR, JUSTICE MOSENEKE: Yes, we can resolve that within our parameters of the agreement. For starters Counsel, I think we should determine are
10 this people living or not living, and two, they would have died in circumstances which are connected to the deinstitutionalisation that we are talking about in the Ombuds report and that we envisage also in the arbitration. Once that verification is there, I am saying this only because they are not on this list which I intend using as an arbitrator. And I would like your names to be checked if you like by The Ombud
15 and come back to us and say yes. They died in these circumstances.

ADV. ADILA HASSIM: I understand your concerns Justice Moseneke, what I can say is that all of those 11 affidavits of those families are included in the records which sets out when they were transferred, and when and where they have died and how they fall within this parameter.

20 **ARBITRATOR, JUSTICE MOSENEKE:** Very well. Can we give the Professor a list and the affidavits and he comes back to us in a statement that would form part of the record. I don't think there should be undue anxiety, but I just want to make sure

that in fact I have the right number. That is important for this hearing and for the making an award. And the Multiply Effect that is concerned.

ADV. ADILA HASSIM: Indeed the numbers matter. And we have had great difficulty getting an accurate figure which is why I am making a bit of a point of it
5 right now. I will leave it there.

ARBITRATOR, JUSTICE MOSENEKE: I will keep quiet for a while and allow my two assessors I am tempted to say to interpret what we have been saying.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

10 **ARBITRATOR, JUSTICE MOSENEKE:** Counsel, do you have any further questions for the Professor?

ADV. ADILA HASSIM: I am afraid I do. I'll try not to prolong it. Professor in your evidence in chief you said that one NGO was not licensed, do you remember the name of that NGO?

15 **PROFESSOR MALEGAPURU MAKGOBA:** Siyabadinga

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...* Sorry I didn't hear it.

PROFESSOR MALEGAPURU MAKGOBA: Siyabadinga

ME. ADELE OOSTHUIZEN: So sorry.

20 **ARBITRATOR, JUSTICE MOSENEKE:** It's quite simple actually, Siyabadinga.

ME. ADELE OOSTHUIZEN: Siyabadinga, okay.

ADV. ADILA HASSIM: Professor, in your evidence you also said that some were in your words just becoming NGOs, can you explain this?

PROFESSOR MALEGAPURU MAKGOBA: Yes, some were recently established NGOs such as Precious Angels, where 20 patients died. It was hardly a month old or two months old I think when this whole process was taking place. It was led by somebody who has no experience of Mental Health whatsoever. And so one can
5 understand some of the disasters that occurred in that NGO and in fact it was closed through the intervention of the Minister Of Health and I must add there were 5 other NGOs that were closed during the process when it was taking place to prevent further death that could occur in those NGOs because they did not qualify in a number of criteria.

10 **MR. MICHAEL THIBEKHWANA:** ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. ADILA HASSIM: Had Precious Angels been provided with a license, had they been licensed by the Department meaning that they would have been accredited as meeting the requirements for the service that they were to provide?

15 **PROFESSOR MALEGAPURU MAKGOBA:** Well in this process, receiving a license did not mean you have accredited because to NGOs that were licensed without proper assessments and accreditation. But indeed from the information we have and the evidence we have, they were licensed in one location but the patients ended up in another place that was not licensed. So, you get a license for a house
20 Section B and then when the patients come you transfer them to Section A. Section A has not been licensed, I think you can decided what you want to call that. But that's what was happening I think in this whole process of licensing that made it very difficult for me I think during the investigation.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. ADILA HASSIM: Thank you. You also referred to the initiative you took to prove the reason that was provided that it was winter and that's why there were a
5 great number of deaths. But these were not homeless people, they were in state care and were sent to NGOs to be cared for, are you saying to this hearing that there were NGOs that just had no form of heating?

PROFESSOR MALEGAPURU MAKGOBA: Well, I suppose that would be the logical conclusion to come to. Let me give you a little story that does not appear in
10 my report. When patients stayed at Life Esidimeni, I think before 2007, they discovered that patients were actually dying during winter and what happens is that I think some of this mentally ill patients, they would go into their rooms, not bothered that there were blankets or anything like that. Some of them would actually go into their rooms and get outside and stay there the whole night and do whatever they
15 were doing. And there was more deaths during the winter at time. And the (inaudible) goes around 2007, they brought what they call heating kits into Life Esidimeni and they discovered a drop in the death rate. They could never measure it to me, because I wanted the figure as to what it, but anecdotally they saw a drop in the death when they introduced heating. And the reason why I went into this
20 investigation was because of that anecdote to say when there is sound heating something happens because I think this people at night they do all sorts of things. Now, fortunately at Life Esidimeni there were people who always to monitor them, in the NGOs, once people went to bed, everybody went to bed including even the

people who was supposed to look after the patients, so at the end of the day the just did what they liked. But as I say it was curious that you could have winter and you only have 80% of the patients die in 5 places and you must try to find out why, it cannot simply be the winter. There must be something beyond the winter. And as I
5 say that's why I enlisted the weather bureau service. I actually could plot a map of the death of each patient per day and the temperature, the maximum and the minimum temperature of the day when the patient died. But I did not analyse that but the data is there to be analysed if you need to. Just to be able to dispel the myth that it's simply around winter. I think you can't generalise that view of the winter too
10 much.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ADV. ADILA HASSIM: Thank you. Professor, in your capacity as an expert would you say then that deaths from cold in these circumstances are correctly described
15 as death from natural causes?

PROFESSOR MALEGAPURU MAKGOBA: They would be, because I think cold exposure is one of causes of natural causes of death. But, I think the circumstances under which that cold comes into, it's what gives the question. It's like you can die in your sleep and that looks like a natural cause of death. But if you die in your sleep
20 in an hospital where nobody looked after you and they just found you dead the following day, that is not strictly a natural cause of death, because that cannot be explained. You were brought into the hospital to be looked after 24 hours, how

come when you passed away nobody was there. So the circumstances of the cold I think determines how you interpret the word natural and not natural.

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

5 **ARBITRATOR, JUSTICE MOSENEKE:** Counsel proceed, I don't think there should be anxiety on your part. I see anxiety, do you want to... if, I mean I can anticipate that there will be questions about Cullinan and there will be questions, other few questions, myself. We are going to go as far as we can. If we can't finish by the latest 5pm, certainly we will have to ask the Professor to come back tomorrow. But
10 don't transfer the pressure to yourself. So, do what you have to do and let's see how far we go. And then from there we would have asked the Professor to come back tomorrow if necessary. But we are doing our dimness to accommodate you, don't cramp your style.

ADV. ADILA HASSIM: Thank you Justice Moseneke, (vernac) Professor Makgoba,
15 you spoke about overcrowding in some of the facilities that you visited, what is the impact of overcrowding on the care of the Mental Health Care Users and their wellbeing?

PROFESSOR MALEGAPURU MAKGOBA: I mean, it is called staff patient ratio. It is like when you have a class of students, it's more harder to teach 60 students than
20 to teach 20 students in a class. Now, if you have to have mentally ill patients who each one of them individually are demanding patients to be cared for and you have them overcrowded and some of them may have aggressive behaviour or behaviour that you cannot easily control. I think that places a heavy burden I think on the

caring staff. Now, it becomes even worse if the caring staff is not clued up as to what to do about the patients that they are caring for. Like for example, you know if a patient has fits, there is a way in which a nurse will treat such a patient. If you take them to a carer who has no clue, as soon as somebody has a fit, they want to put
5 the person down and hold them in a manner that they may not be able to breath but they think that they are helping because the patients is shaking and they want to stop the shakes. So, the caring and the quality and the qualifications of the carers is very very important. And that's what we found universally in lacking in not every NGO but in most of the NGOs that we looked into. It was that the quality and the
10 qualifications of the carers was not something that we should be proud of as South Africans if we want to put people into NGOs.

ARBITRATOR, JUSTICE MOSENEKE: But Professor, let me come in here with something, a finding and observation that you made that worries me deeply. The stipends, you know talking about the quality of care, you recall that NGOs only
15 received financial support from the Gauteng Department of Health, three to four months after receiving patients from Life Esidimeni. This suggest that there could have been financial constraints on NGOs leading to shortage of essential resources such as food, linen and clothes. Now they think about staff patient relationship in crowding and I sit and started wondering about the devastating finding. Well, that is
20 if you are a small NGO, how do you wait for four to three months?

PROFESSOR MALEGAPURU MAKGOBA: Well, that was a factual findings that may be should be interrogated with the people who are running this project. Because there is no doubt that both the Health Inspectors and even myself during

interviews with some of the NGO directors. They were frustrated by the fact that they were promised licenses, they were asked to take patients to assist but they were not being reimbursed. In fact, some of them had to go to court, to be paid, back paid for what they had already done. But that to me was I think it was a bit of a surprise and it disturbed me. What really disturbed me was this that you undertook the project on the basis that you wanted to save money. Now saving money is not the same as denying money in order to provide a service, but I keep asking myself what can you do with paying a R1 000 to look after a mentally ill patients, you know. I mean R100 as opposed to R300. If I gave my son or daughter a R100 a day, they might kick at me these days in the modern world. So for R100 a day you cannot look after a normal person even in a developing country. Now you are going to take somebody who requires highly specialised treatment and you reduce the amount of resources that you must provide. That's cruelty of the worst kind.

ARBITRATOR, JUSTICE MOSENEKE: And you pay them 3 months, 4 months later.

PROFESSOR MALEGAPURU MAKGOBA: You don't pay them, they have to go to court and knowing lawyers you are all expensive people.

ARBITRATOR, JUSTICE MOSENEKE: Sorry, what about lawyers?

PROFESSOR MALEGAPURU MAKGOBA: You don't do thing pro-bono, so by the time they get paid they have to pay you first, so you don't know what they end up with. But really, this is the dynamic of what took place I think in this project. I think people ignored. What can anybody in South Africa do with R100 a day to an adult

who is ill, who requires high attention and high care. What can you do with R100, and if you can't do anything, why did we subject this people to that level of care.

ARBITRATOR, JUSTICE MOSENEKE: Thank you Professor, I piggybacked on a question that Counsel had asked and it turned out to be, there is some intersection
5 there about care and resources. And I think you got an answer there but I want to have it interpreted before you follow up. Shall we...

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Counsel.

10 **ADV. ADILA HASSIM:** Thank you Justice Moseneke, I am just trying to find my place again.

ARBITRATOR, JUSTICE MOSENEKE: You have asked about overcrowding.

ADV. ADILA HASSIM: That's right, overcrowding and you asked the next question in my line so I can move on and answer was provided. So can I then move on to the
15 issue of medical records, I understand your findings to say that many patients were transferred without Medical records. What was the explanation for that, why medical record or medication didn't accompany the patients in the process of transfer? The consequence of it is obvious?

PROFESSOR MALEGAPURU MAKGOBA: I think it needs to be translated first
20 before I answer.

ARBITRATOR, JUSTICE MOSENEKE: Yes.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

PROFESSOR MALEGAPURU MAKGOBA: Okay, let me start from the beginning.

Life Esidimeni patients were in Life Esidimeni, but this are the patients of the Gauteng Province. So the records of the patients should have been with the Gauteng Department of Health right from the start. Now let's assume that they did
5 not have the records. When I interviewed people from Life Esidimeni and several doctors, they agreed that not all the patients were given their records but they agreed that they were given summary notes and records that would have been enough for a medically or a Health Related Qualified Person to be able to interpret. So there was never an issue that there were no absolute records. The records were
10 there but they were given in a manner besides that they are either summaries of records that could be interpreted by any properly qualified people.

ARBITRATOR, JUSTICE MOSENEKE: Records were given to NGOs?

PROFESSOR MALEGAPURU MAKGOBA: They were given to patients who are going to NGOs, I think that is in the evidence that is given by people from Life
15 Esidimeni. But as I said the original record should have been duplicated and have been kept by the Gauteng Department of Health, because this are their patients. They are only residing at Life Esidimeni at the behest of Life Esidimeni but the two records have to be kept by them. They should answer why did they not have the records, because they are the owners of the patients. You remember there's a
20 statement during this battle where the MEC is recorded to have said, I am not closing Life Esidimeni, I am just taking my patients. Now you cannot take your patients if you do not have their records, why did she not have them at that time. So I think this are issues that maybe should be probed but I don't think it was for me at

that time. I believe they should have had, and from Life Esidimeni they were given enough record that was summaries enough for them to be able to do what they are supposed to do. Let me come to a much more difficult one, If I give a medical record or a summary of a medical record to somebody who is not qualified to read a
5 medical record, what will they do with it. And that is a problem that I think has to be explored. That is why I am saying, the different between the hospital and an NGO is that when you come with a record that a doctor has written with their bad handwriting and you take to the hospital, other Doctors struggle and they put it under a microscope to read it. If you take it to an NGO and they can't read it, they
10 just assume that it doesn't mean anything and they do nothing out of it. So there are all this little things that we need to understand. That's why I am saying....

ARBITRATOR, JUSTICE MOSENEKE: Where would the medication have come from Professor?

PROFESSOR MALEGAPURU MAKGOBA: The what?

15 **ARBITRATOR, JUSTICE MOSENEKE:** Where would the medication have come from? Who was obliged to supply the medication?

PROFESSOR MALEGAPURU MAKGOBA: They were all supplied with enough medication for 3 (inaudible), I think it is all on record. They didn't leave Life Esidimeni without medication. They left with enough medication to sustain them.

20 **ARBITRATOR, JUSTICE MOSENEKE:** No, I mean subsequent the initial medication.

PROFESSOR MALEGAPURU MAKGOBA: Well, the medication subsequently should have come from the NGO in collaborations with the districts, because this

patients are placed in districts and the districts are the basic tenet of the National Health System or our National Health System where when a patient come, primary health care of anything whether it is Mental Health or any other health should be provided by the district. So when I receive the patient in my district as a Doctor. I
5 must report them to the District Managers, so that they can assist me with whatever services I needed. That's what should have happened. Now, again it brings back a point I can also now also emphasize, if you go to Sedibeng where few people died, the Managers in the district and the people in the NGOs worked very well. If you come to Pretoria or Tshwane as it is called now, it was the worst where there was
10 no collaboration between the District Managers and actually the NGOs. In fact some of the District Managers there didn't even know which NGOs existed until patients were dying and then they were called in as emergencies rather than in a very preventative proactive manner.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

15 **MR. MICHAEL THIBEKHWANA:** ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Counsel. The plan to all of us to go to 5pm and to stop then, so please go ahead and let's see how far that takes you to.

ADV. ADILA HASSIM: Thank you Justice Moseneke. Professor Makgoba, page 18 of your report, you record the following and I will like to read it to you. You say there
20 was a general climate and culture of fear and disempowerment observed amongst staff members. To challenge or engage with authority or principals as they refer to them during interrogation. There was a fear even to name the so called principals, so no principal was named. That is a quote from your report. Page 18 of your report,

and if it will help you to recall it. Can you explain this? It doesn't feature too much more as I recall in the rest of the report. This question of a general climate and culture of fear in the department?

PROFESSOR MALEGAPURU MAKGOBA: I think if you go into the list of people
5 that I interviewed from the department. If my memory serves me well I interviewed
25 staff from the Gauteng Department of Health. Maybe I should exclude the MEC,
the HOD and the Director, so it would be about 22. When I spoke to this people
across the board they express this fear of failure to challenge authority to stand up
for their responsibility because I suppose if you grow up in Apartheid you would
10 understood. They always feel that people were their bosses. ...*Interpreting...* You
don't come to a job because you have got a responsibility, you are a servant of your
boss and they instruct you. And when you I ask them, but didn't you see that there
was something wrong with this project, all of them without exceptions said they
could see that there was something wrong. And you ask them why did you not
15 challenge this process, they say how dare I do it? You know, if so and so couldn't
challenge the MEC, who would I be to challenge them. I might be fired, or I might be
disciplined or something like that, so you found that very pervasive throughout the
staff, throughout the thing. So I asked them, if you couldn't challenge your boss,
couldn't you go behind your boss or above your boss or couldn't you go to other
20 institution like the Human Rights Commission to complain that something wrong
was taking place here in our department. And they were still fearful because they
felt that they would be caught. And as you go up the ladder, you discover that the
closer they were to the top the more fearful they were. For example the Deputy

Directors, were very fearful of the Director and in fact now when you see them, they say it is not me, it's the person above me that I was responding to, I was just taking instructions. So, you ask yourself if we have a country where we are all just taking an instruction, it will end up that we are all taking instructions from the President, let me out it that way. How can we have a country that actually runs because we are all afraid of the President, we are all taking instruction from him? Because it all goes to the Hierarchy. Everybody was afraid of the next person above, and you ask them why did you not take responsibility, no I was very fearful. And as I say, I found that pervasive in this department. And I may say, it is actually pervasive in our country.

They fear to challenge authority and then the reluctance to take the responsibility when things go wrong because then somebody above you is responsible and not you. But remember that when we advertise a job, in fact there was a time when I answer MEC who made a decision and she said the collective. Now, there is no job when you apply and they say what is the experience of the collecting that they are going to work with. You apply for a job as an individual and you are supposed to make your decision as an individual not as a collective. It doesn't mean you consult with your colleagues, but to come and make that a reason for why things happened that I am not responsible because there is a collective. I think it's a, you know you are trading on a very thin ice. But I find that very very common and I keep telling people, nobody advertises a job and say we need people who have got collective experience for this job. There are no such positions in South Africa even when we use this word collective.

MR. MICHAEL THIBEKHWANA: ...Interpreting...

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: Thank you. I can't resist Professor Makgoba saying to you, it is probably one of the saddest parts of your findings and your observations and the price for that fear is what is death.

5 **PROFESSOR MALEGAPURU MAKGOBA:** Well, I think it's a pervasive irresponsibility.

ARBITRATOR, JUSTICE MOSENEKE: That in this case led to death which appears now to be 129 people. Because those who charged with responsibilities could not step up to say, I may not, or cannot or should not do this or allow this to
10 happen. I'm quite startling and uncomfortable. Remember, in law you are required to obey only lawful orders, nothing else but lawful orders. Unlawful orders are not worthy of observance. Anyway, it is easier said than done, I understand that. Counsel!

ADV. ADILA HASSIM: Professor you said that the Officials that you interviewed
15 without exceptions said that they had concerns, but they were afraid to speak up. Were the MEC, the HOD and/or the Director aware of the risks, or did they have concerns? I mean, so on the one hand there were all these officials without exception had concerns but didn't want to challenge their superiors. Did the superiors have no concerns?

20 **PROFESSOR MALEGAPURU MAKGOBA:** I think it must be translated first.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

PROFESSOR MALEGAPURU MAKGOBA: I did raise this matter with the MEC and her response to me was that, she didn't think that anybody feared her and if they did, they should have put it in writing to her and no one ever did that. She conducted her meetings and she allowed people to raise issues and if they didn't raise issues she assumed that they agreed with her. Which is a sort of an answer but that's all I could get from her. I think the HOD I think, did say to me that people in the department will never name anybody who has repeated with them. They would refer to each other as principals or as chiefs. So you never know which chief actually issued instruction, but there is a chief somewhere asking you to do something. So there are this kinds of issues. I don't think it's because they were not aware but my sense is that when you run a department with that kind of culture, actually sometimes you feel that you are in control. But I don't know whether that is what they felt. But I sensed that when people run departments where there is fear and they are aware of it, they think that people are cohesive because they are doing something good. But that is just my speculation rather than my finding effect.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: We have 10 minutes to go.

ADV. ADILA HASSIM: Perhaps if I can just wrap up this sub-questions on this topic and then we can leave it there, thank you. Professor in your report, in annexures to your report, what we see is that at least the MEC, but clearly MEC and the two senior Officials that you referred to had to have been aware of the risks and the concerns. I say this with reference to a firstly annexure 4A to your report which is a

document that was prepared by Professor Melvin Freeman and in which he provides brief history of de-institutionalisation in South Africa and points out many risks with the proposed transfer. That is Annexure 4A. But also...

ARBITRATOR, JUSTICE MOSENEKE: There is a page in the Annexure Bundle
5 that we handed out this morning.

ADV. ADILA HASSIM: In the Annexure Bundle, it is 83.

ARBITRATOR, JUSTICE MOSENEKE: Thank you.

ADV. ADILA HASSIM: That's the first Annexure which to refer to, the second Annexure is Annexure 5 which begins on page 90.2 of the Annexure Bundle and it
10 is an email from a Mr Mosenogi to the MEC, attached to which is a letter from senior officials and the letter is dated February 2016, and the letter raises again concerns that the names are not signed on. There are no names of the senior officials who raises concern at the end of this. But it is communicated as concerns from the implementing agents let's say within the Department. And the recommendation at
15 the very end of this long letter is to respectfully request in the words of this letter that the MEC considers and alternative proposal.

ARBITRATOR, JUSTICE MOSENEKE: And it ends up with God bless you.

ADV. ADILA HASSIM: Correct. Finally, the third Annexure I wish to refer to is Annexure 8A, at page 90.16 of the Annexure Bundle, that is a memorandum from
20 the clinical heads of Psychiatric Hospitals in Gauteng, it's dated 28 April 2015 and it in great detail explains the risks and the concerns and the potential harm that will follow from the decisions of the MEC. So those are three Annexures that I am referring you to put to you the following.

ARBITRATOR, JUSTICE MOSENEKE: Just before you do. Professor, they have summarised the Annexures in the little Bundle they are giving you?

PROFESSOR MALEGAPURU MAKGOBA: I know them by name. I am fine.

ARBITRATOR, JUSTICE MOSENEKE: (Vernac). Please go ahead Counsel.

5 **ADV. ADILA HASSIM:** What I am putting to you is that the MEC and The two senior officials were indeed aware of the consequences of their decision and actions.

PROFESSOR MALEGAPURU MAKGOBA: I agree totally, they were conscious, they were warned. Some of them actually did try and to change their minds. Like the
10 HOD, I think getting into discussion I think with Section 27 at some stage and trying to resolve the matter and after meeting with the relatives and the families changing his mind realising that the way the project was being conducted was not something that should carry forward. And there was another extensive warning from the experts like SASOP it's called the South African, and there were all this other Civil
15 Society, you know SADAG and all of them came there with constructive advice as to how to handle this transfer of this very highly vulnerable population. And all of them were either ignored or they were turned down or the were subverted in some form or another until, I think as part of the evidence the HOD felt I think in one of the interviews that you may listen to or even in the report say that, he felt ignored and
20 side-line, says that junior people below him were being instructed rather than him and he felt paralysed. So, yes I think there was enough warning across the board from all if I may use the word Patriotic South Africans who cared about this project that it be done very well. Nobody was opposed to the process of de-

institutionalisation. It was the manner in which it was being done not respecting as I say human dignity, you know the rights of people and so forth that they were concerned about it. Let's do the project but let's do it in a phased manner of a particular period so that we can do it all collectively and we do it together as South African, but as I say all of this things were either just ignored or they were rubbished or they were just subverted, until people felt, you know disowned. I mean, in that Annexure when it goes further, Mr Mosino he actually was brought into the project as a Project Manager because the director was not doing a good job. And when he realised that the project should have been done differently, and he went to the MEC and said I think we can do this differently, and you know what the MEC said, are you employed by this department or are you employed by Life Esidimeni? So are you becoming a spokesperson for Life Esidimeni or are you employed by the Gauteng Department of Health. So it was until he realised that the situation was untenable. And as is happens, Mosenogi and the HOD were together, they thought that they could pull a change in direction of this project but it didn't work. So they lost the battle and the consequences are what we are seeing. But let me also say this just to complete. You know of all the risks that were shouted by the experts, if you read all their contribution, nobody predicted death. It was about they wouldn't teach well, there will be no beds. Nobody said to the MEC, you know people are going to die here. That word does not exist in any and in fact I suspect they did not realise that. So death came as a big surprise and that is why I think shook everybody, because it was not something that was predicted. I think in all the

contributions that they have made. So if you want to call them experts, they had some good predictions but not all.

ARBITRATOR, JUSTICE MOSENEKE: Well Professor, look at the conclusion of Dr Madingwe, supported by no less than one, two, three, four, five, six, seven heads of
5 Clinical Department Psychiatry. He comes close to that, the conclusion, remember, in which to reiterate that our support for the de-institutionalisation of Mental Health Care Users, as envisioned in our National Mental Health Policy Framework and Strategic Plan. We however gravely concerned that the decision to reduce beds of
10 love does not follow the process outlined, then he goes on. We know that this decision will have a devastating impact on the health and social wellbeing of mental health users. The health system and members of the community. That's pretty close isn't it, devastating impact on the Health and Social Wellbeing of the Mental Health Care. It's true that there is no mention of death but I thought that comes quiet close. And these are 7 very senior people, Heads of Psychiatry who write to the MEC and
15 nothing comes out of it.

PROFESSOR MALEGAPURU MAKGOBA: I totally agree but as I said there was total disregard for any advice that came whether from experts, civil society, concerned South Africans and everything. Nothing would change I think the direction. Remember that even at the beginning of the project it was always
20 understood that this was going to be a phased project up until 20 something, 20 something about five or seven years or so. And suddenly it changed and nobody could answer why it suddenly had to change such that within 2 months, close to 1,300 very sick patients had to be transferred in the manner in which they were

transferred to NGOs that were not prepared, not trained by their own words, if you read evidences in the report most of the NGOs said they were not prepared. They were not trained, they were not ready. But then some of them saw it as a business as one of the people. So, there was what competition in people you know, let me
5 take money. In fact somewhere in the report, the HOD says, some Of the NGOs could not resist taking more patients because if you take more patients, you multiply your R100 per day by the number of people that you got. So, there was an element of it that lost the ethos of care to the ethos of making money but that, you know, they didn't say so in many words but that is what you capture when you discuss and
10 listen to the evidence that people gave.

ARBITRATOR, JUSTICE MOSENEKE: Professor, thank you. I am going to allow this important part to be translated. And after which Counsel, I intend to adjourn, it is 17h03pm and sadly we will have to invite you back tomorrow Professor. There will be questions from some of the other Counsel in sitting around here and just
15 surprising you are a pivotal person and we are really here at your instigation, if you will.

ME. ADELE OOSTHUIZEN: ...*Interpreting...*

MR. MICHAEL THIBEKHWANA: ...*Interpreting...*

ARBITRATOR, JUSTICE MOSENEKE: I would like to thank everyone that is here
20 today, and to Counsels certainly, last but certainly not the least Professor Makgoba, who has initiated and done all the good work around here. We have to recall you Sir and tomorrow we are starting at 9:30am. You are going to be asked questions by Counsel at least 3, and there will be a re-examination by the state and that should

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take us hopefully till around 11h00am maybe longer but we will see how it goes. To everybody who has been again thank you. ...*Interpreting*... Just allow me the bear minimum to be able to walk out, I tried lunch time and there were far more people ahead of me so I had to wait all the way. Just allow me at least to leave the place
5 and after the pandemonium can break up. Without undue formalism please. Okay, proceedings are adjourned till tomorrow at 09h30.

END OF SESSION 3