THE NATIONAL MINISTER OF HEALTH OF THE

REPUBLIC OF SOUTH AFRICA

THE DIRECTOR GENERAL OF THE NATIONAL DEPARTMENT OF HEALTH

THE PREMIER OF THE PROVINCE OF GAUTENG

THE DIRECTOR GENERAL OF THE PROVINCE OF GAUTENG

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH IN THE PROVINCE OF GAUTENG

THE HEAD OF DEPARTMENT OF THE GAUTENG HEALTH DEPARTMENT

Dear Sirs,

**PERSONAL LIABILITY OF EMPLOYEES AND OFFICE HOLDERS ARISING OUT OF THE LIFE ESIDIMENI ARBITRATION AWARD IN RE: GAUTENG MENTAL HEALTH MARATHON PROJECT**

We address this letter to you and refer specifically to the Moseneke Award produced at the conclusion of the arbitration hearings into the Life Esidimeni tragedy handed down by the Honourable Justice Dikgang Moseneke (“the Arbitrator”) on 19 March 2018.

**INTRODUCTION**

1. The Moseneke Award went into great detail setting out the roles of the various role players and specifically the individual roles of the Member of the Executive Council of the Gauteng Department of Health, Qedani Mahlangu (“Mahlangu”), former Department of Health Head of Department, Dr Tiego Ephraim Selebano (“Selebano”) and former Director of Mental Health in Gauteng, Dr Makgabo Manamela (“Manamela”) (Collectively, “the responsible office-holders”).
2. The responsible office-holders were not party to the Arbitration. They did, however, give evidence in the proceedings under oath. The Arbitrator made damning findings against the responsible office-holders and Department officials, in particular Mahlangu, Selebano and Manamela. This included findings of conduct which amounted to gross negligence, and findings of potentially deliberate and intentional conduct as well as certain credibility findings.

**THE AWARD**

1. As recorded in the Arbitration Agreement, liability was not in issue. The Government expressly accepted that "deaths were not natural but caused unlawfully and negligently” as a result of negligent conduct on the part of its employees and officials and liability for the loss of the affected families fell to the Government.[[1]](#footnote-1)
2. The Arbitrator in his award recorded that all elements of delictual liability and of the entitlement of all claimants to equitable redress were admitted. The sole issue for determination by the Arbitrator was therefore the ambit, content and quantification of "*equitable redress*".[[2]](#footnote-2)
3. The Arbitrator made an Award of: -

5.1 R200 000 comprising common law damages of R20 000 for funeral expenses and R180 000 in general damages for shock and psychological trauma. This amount in general damages had been tendered by Government at the conclusion of the hearing of evidence;[[3]](#footnote-3)

* 1. an amount of R1 million to each of the claimants as appropriate compensation for Government's unjustifiable and reckless breaches of the constitutional rights of those affected (“constitutional damages”);

5.3. various other non-monetary rulings

 **GOVERNMENT'S CLAIM AGAINST THE INDIVIDUAL OFFICIALS**

1. In our law, where more than one person may be held liable for a wrongful act, these wrongdoers are considered jointly and severally liable to any claimants for the resultant harm. These are referred to as "joint wrongdoers".
2. The position of joint wrongdoers is regulated by legislation in the form of the Apportionment of Damages Act ("the Act").[[4]](#footnote-4) The Act provides in relevant part: -

 Proceedings against and contributions between joint and several wrongdoers –

 S 2 (6)(a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, ... recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage or such an amount as the court may deem just and equitable having regard to the degree in which the other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded

 ...

 (c) any joint wrongdoer from whom a contribution is claimed may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff."(emphasis added)

1. The effect of these provisions is that they allow a party who has been found liable in a civil claim, and has paid the entirety of the compensation ordered, to look to other individuals who were not a party to the proceedings and who were also allegedly liable *(the joint wrongdoers) to recover a contribution for their fair share of the compensation paid in its entirety by one of the wrongdoers*.
2. The significance of these provisions should be immediately apparent. Under the Arbitration Award, the Government accepted full liability and payment for the compensation ordered. In principle, in accordance with the Act, Government may therefore look to those whom it alleges were joint wrongdoers for a contribution. In this instance that would include the individual officials and decision-makers who were also responsible for the harm arising out of Project Marathon for a contribution towards the compensation which Government has paid.
3. We reiterate that the claim against joint wrongdoers under the Act lies in the hands of Government. In this case the Government is the National and Gauteng Provincial Government as defined in the Arbitration Agreement. There is no reason why Government, and therefore the fiscus, should bear sole responsibility for payment of this compensation in circumstances where individuals were likely to have been grossly negligent or even to have acted intentionally. This applies with greater force in the present instance as the compensation paid by Government comes from the fiscus and therefore ultimately the people of South Africa. There is therefore not only an economic basis but also a clear public interest in the recovery of at least a portion of that compensation from others whose wrongful acts caused the harm.
4. Of course, the responsible officials will be entitled to, and will likely, contest their liability in proceedings brought against them as joint wrongdoers. This is in accordance with their rights under the Act, as quoted above. However, the fact that these officials may defend such action is not a reason for failing to bring it. As the findings of the Moseneke Award reveal, it is extremely unlikely that they will be able successfully to defend such proceedings brought against them.
5. The above submission is premised on the Arbitration Award being made an order of court and we submit that there is no good reason for any of the parties to the arbitration to oppose making the Award an order of court. The Parties addressed herein are called upon to take immediate steps to do so (assuming that such steps have not already been taken, in which case we request the full details of the action taken).
6. Should Government refuse or fail to take these reasonable steps to enforce its rights under the Act and the Constitution, and in particular to initiate proceedings for recovery of a contribution towards the compensation from the responsible individual officials, the Democratic Alliance gives notice that it will pursue such remedies as are available to it in the public interest. This may include taking steps to review any decision not to take the appropriate action or the failure to take a decision and/or to compel it to do so.

**CONCLUSION**

1. The Government has a right, and arguably an obligation, to seek a contribution for the compensation arising from the Award which it has paid out from the individual officials responsible as joint wrongdoers in terms of the Act.
2. Government must act within a reasonable time in doing so and we submit that a period of 60 (sixty) days from date hereof constitutes adequate time to take such legal advice as Government may see fit and to commence proceedings. The Democratic Alliance requests that Government advise it what steps it has taken to pursue the recovery of a contribution towards the compensation within this time period.
3. We expressly draw your attention to the fact that there is a statutory prescription period under the Act of 1 year from the date of judgment after which any claim on the part of Government against its joint wrongdoers will prescribe. It is therefore of considerable importance in the public interest that Government acts deliberately and diligently in pursuing these rights against Mahlangu, Selebano and Manamela as the responsible office holders who were jointly responsible for the terrible consequences so carefully recorded in Mr Justice Moseneke’s Arbitration Award.

Yours faithfully

Mr. Jack Bloom MPL

Shadow MEC for Health in Gauteng

Democratic Alliance

1. Arbitration Agreement: clause 6.7. [↑](#footnote-ref-1)
2. Arbitration Award: para 8 and 9. [↑](#footnote-ref-2)
3. Arbitration Award: para 211. [↑](#footnote-ref-3)
4. Apportionment of Damages Act, 34 of 1956. [↑](#footnote-ref-4)