REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Consolidated Case Number: 48226/12
Previous Case Numbers: 31324/12
31326/12
31327/12
48226/12
08108/13

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

_____ _____
DATE SIGNATURE

In the matter between:

BONGANI NKALA	First Applicant
SIPORONO PHAHLAM	Second Applicant
MAPHATSOE KOMPI	Third Applicant
THEMBEKILE MNAHENI	Fourth Applicant
MATONA MABEA	Fifth Applicant
MOKHOLOFU BOXWELL	Sixth Applicant
ALLOYS MNCEDI MSUTHU	Seventh Applicant
MYEKELWA MKENYANE	Eighth Applicant
MASIKO SOMI	Ninth Applicant
ZWELENDABA MGIDI	Tenth Applicant
MTHOBELI GANGATHA	Eleventh Applicant
LANDILE QEBULA	Twelfth Applicant
PHUMELELO SOLITASI SIYOCOLO	Thirteenth Applicant

TEKEZA JOSEPH MDUKISA	Fourteenth Applicant
MICHAEL LITABE	Fifteenth Applicant
JOSEPH LEBONE	Sixteenth Applicant
LIPHAPANG AKIME LEBINA	Seventeenth Applicant
ZAMA GANGI	Eighteenth Applicant
MALUNGISA THOLE	Nineteenth Applicant
MONOKOA THOMAS LEPOTA	Twentieth Applicant
MZAWUBALEKWA DIYA	Twenty-first Applicant
MSEKELI MBUZIWENI	Twenty-second Applicant
ZANEYEZA NTLONI	Twenty-third Applicant
TOHLANG PAULOSI MAKO	Twenty-fourth Applicant
NANABEZI MGODUSWA	Twenty-fifth Applicant
THULENKHO KUSWANA	Twenty-sixth Applicant
MALEBURU REGINA LEBITSA	Twenty-seventh Applicant
MATAASO MABLE MAKONE	Twenty-eighth Applicant
MATSEKELO CISILIA MASUPHA	Twenty-ninth Applicant
MATIISETSO MASEIPATI JESENTA NONG	Thirtieth Applicant
BANGUMZI BENNET BALAKAZI	Thirty-first Applicant
WATU LIVINGSTON DALA	Thirty-Second Applicant
ZWELAKE DALA	Thirty-Third Applicant
DYAMARA JANUARY JIBHANA	Thirty-Fourth Applicant
MANTSO HENDRICK MOKOENA	Thirty-Fifth Applicant
MBIKANYE ALFRED SAWULE	Thirty-Sixth Applicant
ZONISELE JAN NKOMPELA	Thirty-Seventh Applicant
ISHMAEL TSIKWANE MOTLEKE	Thirty-Eighth Applicant

THABO EDWIN NTSALA	Thirty-Ninth Applicant
MALEPA PUSO	Fortieth Applicant
NOEBE JARA TAU	Forty-First Applicant
ELIA MOTLALEPULA PHETANE	Forty-Second Applicant
MOTLALEPULA MOKOENA	Forty-Third Applicant
SEKHOBE LETSIE	Forty-Fourth Applicant
TSHEHLA SOLOMON HLALELE	Forty-Fifth Applicant
MONA ASHTON MELAO	Forty-Sixth Applicant
NKOSI SELATA SELATA	Forty-Seventh Applicant
EDGAR NTJANA NTJANA	Forty-Eighth Applicant
MAHOLA EMMANUEL SELIBO	Forty-Ninth Applicant
EZEKIEL MUTSANA MASUPHA	Fiftieth Applicant
MALEFETSAME MOHLAKASI	Fifty-First Applicant
MTHETHELELI NELSON SATU	Fifty-Second Applicant
VUYANI ELLIOT DAWUBE	Fifty-Third Applicant
MATELA HLABATHE	Fifty-Fourth Applicant
ZIMOSHILE BOZO	Fifty-Fifth Applicant
ZAMUKULUNGISA DYANTI	Fifty-Sixth Applicant
MALUSI BOVU	Fifty-Seventh Applicant
AGRIPPA DLISANI	Fifty-Eighth Applicant
MNCEDISI DLISANE	Fifty-Ninth Applicant
SIQHAMO HOYI	Sixtieth Applicant
LUVOKO MADINDALA	Sixty-First Applicant
MTUTUZELI MTSHANGE	Sixty-Second Applicant
MONDE MXESIBE	Sixty-Third Applicant

MZWANELE BUNYONYO	Sixty-Fourth Applicant
MZIKAYISE NQOSE	Sixty-Fifth Applicant
BUZILE NYAKAZA	Sixty-Sixth Applicant
PATRICK SITWAYI	Sixty-Seventh Applicant
XOLISILE BUTU	Sixty-Eighth Applicant
ZOLISA JEJANA	Sixty-Ninth Applicant

And

HARMONY GOLD MINING COMPANY LIMITED **(Registration number M1950/038232/06** **First Respondent in case no. 48226/12 and First Respondent in case no. 31326/12)**	First Respondent
EVANDER GOLD MINES LIMITED (previously KINROSS MINES LIMITED) **(Registration number M1963/006226/06** **Second Respondent in case no. 48226/12 and Fifth Respondent in case no. 31326/12)**	Second Respondent
LESLIE GOLD MINES LIMITED **(Registration number 1959/001124/06** **Third Respondent in case no. 48226/12)**	Third Respondent
RANDFONTEIN ESTATES LIMITED **(Registration number 1889/000251/06** **Fourth Respondent in case no. 48226/12 and Sixth Respondent in case no. 31326/12)**	Fourth Respondent
ARMGOLD/HARMONY FREEGOLD JOINT VENTURE (PROPRIETARY) LIMITED **(Registration number 2001/029602/07** **Fifth Respondent in case no. 48226/12 and Third Respondent in case no. 31326/12)**	Fifth Respondent
AVGOLD LIMITED (previously TARGET EXPLORATION COMPANY LIMITED) **(Registration number 1990/007025/06** **Sixth Respondent in case no. 48226/12 and Fourth Respondent in case no. 31326/12)**	Sixth Respondent
UNISEL GOLD MINES LIMITED **(Registration number 1972/010604/06**	Seventh Respondent

Seventh Respondent in case no. 48226/12)

LORAINE GOLD MINES LIMITED Eighth Respondent
(Registration number 1950/039138/06
Eighth Respondent in case no. 48226/12)

WINKELHAAK MINES LIMITED Ninth Respondent
(Registration number 1955/003606/06
Ninth Respondent in case no. 48226/12)

BRACKEN MINES LIMITED Tenth Respondent
(Registration number 1959/001126/06
Tenth Respondent in case no. 48226/12)

ANGLOGOLD ASHANTI LIMITED (previously
VAAL REEFS EXPLORATION AND MINING COMPANY
LIMITED) Eleventh Respondent
(Registration number 1944/017354/06
Eleventh Respondent in case no. 48226/12
and Respondent in case no. 31327/12)

FREE STATE CONSOLIDATED GOLD MINES
(OPERATIONS) LIMITED Twelfth Respondent
(Registration number 1937/009266/06
Twelfth Respondent in case no. 48226/12)

GOLD FIELDS LIMITED (previously EAST
DRIEFONTEIN GOLD MINING COMPANY LIMITED
AND DRIEFONTEIN CONSOLIDATED LIMITED) Thirteenth Respondent
(Registration number 1968/004880/06
Thirteenth Respondent in case no. 48226/12
and First Respondent in case no. 31324/12)
GOLD FIELDS OPERATIONS LIMITED
(previously WESTERN AREAS
GOLD MINING COMPANY LIMITED) Fourteenth Respondent
(Registration number 1959/0032096/06
Fourteenth Respondent in case no. 48226/12
and Sixth Respondent in case no. 31324/12)

NEWSHELF 899 (PROPRIETARY) LIMITED Fifteenth Respondent
(Registration number 2007/019941/07
Fifteenth Respondent in case no. 48226/12
and Fourth Respondent in case no. 31324/12)

BEATRIX MINES LIMITED Sixteenth Respondent
(Registration number 1977/002138/06
Sixteenth Respondent in case no. 48226/12)

FARWORKS/682 LIMITED (previously
KLOOF GOLD MINING COMPANY LIMITED) Seventeenth Respondent

**(Registration number M1964/004462/06
Seventeenth Respondent in case no. 48226/12)**

DRIEFONTEIN CONSOLIDATED (PROPRIETARY) LIMITED Eighteenth Respondent
**(Registration number 1993/002956/07
Eighteenth Respondent in case no. 48226/12)**

GFI MINING SOUTH AFRICA (PROPRIETARY) LIMITED Nineteenth Respondent
**(Registration number M2002/031431/07
Nineteenth Respondent in case no. 48226/12
and Third Respondent in case no. 31324/12)**

VILLAGE MAIN REEF LIMITED Twentieth Respondent
**(Registration number M1943/005703/06
Twentieth Respondent in case no. 48226/12)**

BUFFELSFONTEIN GOLD MINES LIMITED Twenty-first Respondent
**(Registration number M1995/0100726/06
Twenty-first Respondent in case no. 48226/12)**

BLYVOORUITZICHT GOLD MINING COMPANY LIMITED Twenty-second Respondent
**(Registration number M1937/009743/06
Twenty-second Respondent in case no. 48226/12)**

DOORNFONTEIN GOLD MINING COMPANY LIMITED Twenty-third Respondent
**(Registration number M1947/024709/06
Twenty-third Respondent in case no. 48226/12)**

SIMMER AND JACK MINES LIMITED Twenty-fourth Respondent
**(Registration number 1924/007778/06
Twenty-fourth Respondent in case no. 48226/12)**

DRDGOLD LIMITED Twenty-fifth Respondent
**(Registration number 1895/00926/06
Twenty-fifth Respondent in case no. 48226/12)**

EAST RAND PROPRIETARY MINES LIMITED Twenty-sixth Respondent
**(Registration number M1893/000773/06
Twenty-sixth Respondent in case no. 48226/12)**

ANGLO AMERICAN SOUTH AFRICA LIMITED Twenty-seventh Respondent
**(Registration number 1917/005309/06
Twenty-seventh Respondent in case no. 48226/12)**

AFRICAN RAINBOW MINERALS (previously ANGLOVAAL MINING LIMITED) Twenty-eighth Respondent
(Registration number 1933/004580/06

Twenty-eighth Respondent in case no. 48226/12)

RANDGOLD AND EXPLORATION COMPANY LIMITED Twenty-ninth Respondent
(Registration number 1992/005642/06
Twenty-ninth Respondent in case no. 48226/12)

GFL MINING SERVICES LIMITED Thirtieth Respondent
(Registration number 1997/019961/06
Second Respondent in case no. 31324/12)

GFI JOINT VENTURE HOLDINGS (PROPRIETARY) LIMITED Thirty-first Respondent
(Registration number 1998/023354/07
Fifth Respondent in case no. 31324/12)

AFRICAN RAINBOW MINERALS GOLD LIMITED Thirty-second Respondent
(Registration Number 1997/015869/06
Second Respondent in case no. 31326/12)

And

THE TREATMENT ACTION CAMPAIGN NPC and SONKE GENDER JUSTICE NPC Amicus curiae

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Judgment

Mojapelo DJP et Vally J

INTRODUCTION

Background

[1] Gold mining began on the Witwatersrand in 1886. It has grown over the years spreading to other parts of the country (significantly the Free State). In due course it became a significant contributor to the growth of the gross domestic product of South Africa and rewarded handsomely those who invested in it. The South African currency was for a long time based to a large extent on the value of this internationally sought precious metal. As this case demonstrates, simultaneous with that growth, the industry

left in its trail tens of thousands, if not hundreds of thousands, of current and former underground mineworkers who suffered from debilitating and incurable silicosis and pulmonary tuberculosis (TB). Many mineworkers also died from the diseases.

[2] Soon after the commencement of gold mining the risk of underground mineworkers being adversely affected by exposure to silica dust and thus suffering from silicosis, which was initially called *"phthisis",* became manifest. There are other occupational lung diseases in the industry, but silicosis and to a lesser extent TB are the two that are of concern in this case.

[3] From as early as 1902 several Commissions of Enquiry ("Commissions") were appointed by the government to investigate the causes and prevalence of silicosis. These Commissions found the inhalation of excessive silica dust to be the sole cause of silicosis. The Commissions recommended that dust control and dust elimination measures be introduced. [1] There were other studies and investigations, including some by the mining industry itself, which made similar findings. These developments sketch and lay down a wide carpet of information that became available and accessible to those involved in the gold mining industry.

[4] This case is about the attempts by the mineworkers employed in the gold mining industry and their dependants to obtain compensation as a result of the mineworkers having contracted silicosis or TB.

[1] See for instance the 1902 Weldon Miners' Phthisis Commission; South African Native Affairs Commission of 1903 (Report: 1903 – 1905), 1994 Leon Commission, Commission of Inquiry into Safety and Health in the Mining Industry; Several parliamentary select committees (at least ten) and state industry reports also looked at the incidence of silicosis in the gold mining industry. Several legislative interventions and regulations were promulgated (not less than fifteen Acts of Parliament between 1912 and 1946 followed by the Occupational Diseases in Mines and Works Act 78 of 1973 ("ODIMWA"). Occupational lung diseases (including silicosis) have also been the subject of several national and international conferences and studies.

The Application

[5] The applicants seek to bring a class action on behalf of current and past underground mineworkers who contracted silicosis or TB, and on behalf of the dependants of mineworkers who died of silicosis or TB contracted while employed in the gold mines.

[6] The applicants seek an order for certification of one consolidated class action comprising of two classes, namely a silicosis class and a TB class, against companies operating in the gold mining industry. It is their proposal that the single class action proceed in two stages, stage one during which issues common to both classes shall be determined and stage two during which individual issues are to be determined. They refer to this as the bifurcated process. Save for the twenty-ninth respondent, Randgold and Exploration Co Ltd ("Randgold"), the application is strenuously opposed by all the gold mining companies which are cited as respondents. Randgold abides by the decision of this court.

[7] It is common cause that the potential class members may range in numbers from seventeen thousand (17 000) to approximately five hundred thousand (500 000). The bulk of them belong to the silicosis class. The mining companies, who are all potential defendants, represent almost the entire gold mining industry in South Africa. The scope and magnitude of the proposed silicosis and TB claims is unprecedented in South Africa. The action, if it proceeds, will entail and traverse novel and complex issues of fact and law.

[8] The applicant mineworkers and putative class members are hereafter referred to as “the mineworkers”; the applicants who are widows of former mineworkers will be referred to as “dependant applicants”, and the respondents are referred to as “the mining companies”. Where there is reference to only the applicants and not to the putative class members, they will be referred to as “applicant mineworkers” and where there is a reference to a particular mining company only it will be referred to by its name, for example, Anglo American South Africa Ltd (the twenty-seventh respondent) will be referred to as “Anglo American”.

Legal representatives and consolidation of application

[9] The application is a consolidated one. Its magnitude and the range of legal representatives involved is unprecedented. It can only be properly appreciated by having regard to its peculiar history. Initially five separate applications were brought. The first three separate but similar applications commenced in August 2012 by Abrahams Kiewitz Attorneys (“Abrahams”). They were against three mining companies. In December 2012, Richard Spoor Inc Attorneys (“Spoor”) commenced with an application against many mining companies. Finally in March 2013 the Legal Resources Centre (“LRC”) brought an application against one mining company. All five applications were consolidated into one in August 2013.

[10] The relief sought in the notice of motion was amended on more than one occasion. The relief sought in the five applications was harmonised and is reflected in the consolidated notice of motion. In the light of this history, there is, quite understandably, more than one founding affidavit in the papers. However, the mineworkers’ case was neatly crystallised in the replying affidavits. In addition to the

answering affidavits, the mining companies filed further affidavits. Some of them were in response to the replying affidavits of the mineworkers. The court thus had to deal with more than the traditional set of affidavits. As a result, the court accepted and dealt with the cases of the parties as made out in all the affidavits. The mining companies had no difficulty with this.

[11] The mineworkers withdrew the entire application for certification against the twentieth respondent, Village Main Reef Ltd ("Village") and the twenty-first respondent, Buffelsfontein Gold Mines Ltd ("Buffelsfontein"). They also withdrew the application for certification of the TB class against the twenty-fifth respondent, DRDGold Ltd ("DRD") and the twenty-sixth respondent, East Rand Proprietary Mines Ltd ("ERPM").

Silicosis

[12] Silicosis is an occupational lung disease which is contracted by mineworkers who work underground in gold mines. It is caused exclusively by the inhalation of crystalline silica dust. Crystalline silica is a common mineral, also known as quartz, which is found in the gold mines. Silica dust is generated and raised into the air by many of the processes associated with mining, such as blasting, drilling and the handling and transport of rock and soil containing crystalline silica.

[13] The process through which crystalline silica dust causes silicosis may be described briefly as follows: When the smallest particles of crystalline silica are raised into the air as part of dust in the mining process, and mineworkers are exposed to such dust, the mineworkers inhale the crystalline silica particles. Once inhaled the dust particles are deposited in the alveolus region of the lung. Once deposited in the

alveolus, the particles attack the lung cells and thus damage the lung tissue resulting in scarring or fibrosis of the lungs.

[14] Silicosis is an irreversible, incurable and painful lung disease. It is characterised by fibrosis of the lungs, which entails the replacement of normal tissue with connective ("collagenous" or "scar") tissue that obstructs and impairs the normal functioning of the lung.[2] It can be a completely disabling disease, and in many cases it is fatal.

[15] Silicosis is a latent and progressive disease. The onset of its symptoms and disability can ensue several years after exposure. A person may be diagnosed with silicosis for the first time long after such person has worked in the gold mines. The most common form of silicosis is "chronic silicosis". This form typically takes more than fifteen (15) years for symptoms to appear. When symptoms of the disease appear within ten years, then silicosis would be regarded as "accelerated silicosis". Recent studies suggest an increase in "accelerated silicosis". Silicosis is described as a progressive disease because its symptoms worsen over time, even after exposure to crystalline silica dust has stopped. Ongoing medical monitoring and treatment of current and former employees of gold mines is thus required to manage and limit the harmful impact of the silicosis disease and its complications.

[16] This has particular significance in the context of a migratory labour system, which served in the South African gold mining industry, where the labour sending areas were far removed from the location of the mines. By the time the person is diagnosed, such a

[2] Radiologically, silicosis presents as widespread nodules in the lungs, measuring 2-5 mm in diameter with predominance in the middle and upper zones. In severe cases large conglomerate nodules are present in the middle and upper lung zones with associated emphysematous lung tissue changes. This severe type of silicosis is also known as Progressive Massive Fibrosis or PMF.

person may be living far from the mine where he contracted the disease. Furthermore in those far areas, where medical resources range from poor to non-existent, the condition of the affected former mineworkers will progressively worsen until he eventually succumbs to the disease.

Pulmonary Tuberculosis

[17] TB is a bacterial lung disease, which (unlike silicosis) can be treated successfully and cured if detected early. If not cured, it too, can be fatal. It is an infection of the lungs caused by a bacterium known as mycobacterium tuberculosis complex. This is the only cause of TB. The bacterium is spread from person to person by inhaling infected droplets. TB may be present in active or latent form. It is treated with antibiotics. In South Africa 80% of all drug sensitive TB cases are successfully treated.

[18] It is accepted that silica dust does not cause TB. It is further accepted that there is an association between exposure to excessive respirable silica dust and TB. The mineworkers' case on TB is that exposure to silica dust poses a lifelong risk for the development of TB, even if silicosis is not present in the lungs. It is an important distinguishing factor that while the silicosis case rests on the common cause fact that silica dust causes silicosis (and is its only cause), the TB case rests on the contention that the inhalation of silica dust increases the risk of contracting TB. Silica dust is not the only factor that increases the risk, for instance, tobacco smoking, positive HIV status, cramped and poor living conditions are also known factors that increase such a risk.

AMICI CURIAE

[19] Prior to the hearing of the certification application ("main application"), two non-governmental organisations, Treatment Action Campaign ("TAC") and Sonke Gender Justice NPC ("Sonke") applied in terms of rule 16A(5) of the Uniform Rules of Court to be admitted as *amici curiae* in the main application. The application was opposed by some of the mining companies. A separate hearing was held to consider the application of the *amici.* If admitted the *amici* intended to advance legal argument supporting the mineworkers' case for certification of the class action and to introduce evidence relevant to the main application. They also intended to address argument on the issue concerning the transmissibility of general damages to the estates of the deceased mineworkers who died before their cases reached the stage of *litis contestatio*.

[20] The *amici* intended to focus on four legal issues, namely: 1) The framework of class actions; 2) How section 173 of the *Constitution of the Republic of South Africa, Act 108 of 1996* ("the Constitution") enables the court to regulate its own process when dealing with class actions[3]; 3) The nature of the gold mining industry and the role it played in the political economy of South Africa; 4) The necessity for corporate accountability. They submitted that unlike the applicant mineworkers they wish to contend that in a class action suit where a right in a Bill of Rights has been invoked, the class action representative(s) need not apply for certification before they can proceed with a class action. This they said is based on the fact that the Constitution already provides for a class action in those circumstances.

[3] Section 173 of the Constitution reads:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[21] The *amici* sought leave to admit new evidence in the form of an affidavit by Mr. Anand Grover ("Grover"), an advocate of the Bar Council of Maharashtra who served as the United Nations Special Rapporteur on the right of persons to enjoy the highest attainable standard of physical and mental health. They also sought leave to admit into evidence the affidavits of Professor Francis Hunter Wilson ("Wilson"), an emeritus professor of economics at the University of Cape Town and of Mr. Dean John Peacock ("Peacock"), the executive director of Sonke.

[22] The applicant mineworkers addressed the need for a class action and the implications of not certifying the class action. They outlined the history of the gold mining industry, the socio economic circumstances of the mineworkers and the migrant labour system that predominated for most of the pre-1994 period. It was not apparent from the affidavits of Grover and Wilson whether they would advance new argument or adopt a position different from that already articulated by the applicant mineworkers in the main application and which would be of assistance to the court. Peacock intended to introduce evidence that considers the impact of illness and unemployment on the children and families of former mineworkers, with a particular focus on the gendered implications of occupational lung disease in areas that provide labour to the mines.

[23] After carefully scrutinising the affidavits the *amici* sought to introduce, as well as the arguments raised by them in support of their application for admission and the argument raised by the mining companies in opposition thereto, we concluded that the *amici* have an interest in the main application, and that they raised argument not raised by any other party already before court. However, we found that not all the evidence

they wished to introduce was new. Accordingly, in the exercise of our discretion, they were admitted as *amici curiae* and granted leave to file heads of argument and to make oral submissions at the hearing of the main application. The *amici* were also granted leave to introduce the affidavit of Peacock as additional evidence in the main application as this evidence was pertinent and new.[4] All the mining companies as well as the applicant mineworkers were afforded an opportunity to answer to the affidavit of Peacock. Some mining companies took advantage of this opportunity. Their answers, too, were accepted as further evidence in the main application.

CLASS ACTION IN SOUTH AFRICAN LAW

[24] The Roman-Dutch legal system, on which the development of South African law was based, was imported onto these shores sometime during or after the 1650s. That it is resilient is demonstrated by the fact that it still constitutes a substantial part of our law despite the numerous political, economic and social changes this country has historically undergone. However, it had no experience of class actions and therefore had no lessons to offer in this regard. Nevertheless, by the 1990s, when *the Constitution of the Republic of South Africa, Act 200 of 1993* ("the Interim Constitution") was adopted as the supreme law of the land, class action had, because of its utility, become an integral and regular part of many modern legal systems. South African law found itself having to confront the utility of the class action process.

[25] The Interim Constitution introduced numerous innovations into our law. One such innovation was s 7(4)(b)(iv), which, in particular, expanded the standing of a person

[4] See footnote 32 for a further explanation as to why Wilson's affidavit was not admitted as evidence

allowed to approach court. It provided for "*a person acting as a member of or in the interest of a group or class of persons*" to approach court for appropriate relief, even if the person had no real or direct interest in the relief.[5] The provision was replicated verbatim in section 38(c) of the Constitution. It allows any person (natural or juristic) to approach a court alleging that a right in the Bill of Rights (Chapter 2 of the Constitution) has been infringed or threatened. Such person may approach the court "*as a member of, or in the interest of, a group or class of persons*". The Constitution, therefore, makes special provision for class actions to be brought in cases where there are allegations of a violation of the Bill of Rights: a class action in such a case is now part of "*the supreme law of the Republic*".[6] Against this background, there is no reason, logical or practical, to deprive anyone from bringing a class action in a non-Bill of Rights case. The challenge posed by the Roman-Dutch Law unfamiliarity with the class actions was referred to the South African Law Commission ("SALC") that met it by establishing Project 88 on which it reported in 1998.

[26] Project 88 was an "*investigation into the recognition of class actions and public interest actions*". In the course of undertaking what proved to be a comprehensive investigation, the SALC carefully examined the efficacy, role and place of class actions in South African law, and in doing so it provided us with a definition of the term "class action". The definition it provided reads:

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[5] Section 7(4) of the Interim Constitution read:

> '(a) When an infringement of or threat to any right entrenched in this chapter (Bill of Rights Chapter) is alleged, any person referred to in para (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
> (b) The relief referred to in para (a) may be sought by -
> (i) a person acting in his or her own interest;
> (ii) an association acting in the interest of its members;
> (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
> (iv) a person acting as a member of or in the interest of a group or class of persons; or
> (v) a person acting in the public interest.'

[6] Section 2 of the Constitution

> "'Class action' means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act."[7]

[27] The SALC recommended that before a class action is brought the person, or group, intending to bring such an application should first apply to the court for an order certifying the proposed action. A certification application is no more than a request for permission to enter the portal of court *en masse* and for the applicant(s) to be accepted as representative(s) of the entire mass. Absent such an order, the applicant(s) seeking to institute a class action would be precluded from so doing. The need for certification is based on the time-honoured principle that the court alone should be the master of its own process, a principle that has subsequently received the imprimatur of the Constitution.[8]

[28] The SALC called on the legislature to enact legislation[9] that would direct the court's attention to the following issues when considering whether or not to certify a class action:

(a) whether there is an identifiable class of persons;

(b) whether there is a cause of action disclosed;

(c) whether there are issues of fact or law which are common to the class;

(d) whether there is a suitable representative available;

(e) whether the interests of justice require certification; and

(f) whether a class action is the appropriate method of proceeding with the action.[10]

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[7] South African Law Commission, *The recognition of Class Actions and Public Interest Actions in South Africa, Report 88*, August 1998 (SALC Report), Recommendation 8

[8] In terms of s 173 of the Constitution

[9] Included in its Report is a proposed statute that comprehensively deals with class actions

The legislature has yet to enact the proposed legislation.

[29] Life In the meantime moved on and the common law was called upon to attend to the vacuum, and give direction as to whether certification is necessary, and what factors must be considered during a certification application. These issues presented themselves in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape and Another,*[11] which commenced in the Eastern Cape Division of the High Court and concluded in the Supreme Court of Appeal ("the SCA"). The SCA accepted that certification was a necessary procedural step to be taken by the person(s) intending to launch a class action and then deemed it appropriate to compress the six issues identified by the SALC that have to be taken into account into four "*quintessential requisites*". These are:

> "(1) the class is so numerous that joinder of all its members is impracticable;
>
> (2) there are questions of law and fact common to the class;
>
> (3) the claims of the applicants representing the class are typical of the claims of the rest; and
>
> (4) the applicants…will fairly and adequately protect the interests of the class"[12]

[30] Fifteen years later the SCA was, in the matter of *Children's Resources Centre Trust v Pioneer Foods*[13]*,* once again, called upon to consider the issues relating to class action. Unlike the previous occasion, this time the SCA was presented with facts and legal issues that were more crystallised for a class action suit. This allowed the SCA to clarify and develop the law on class action. The SCA commenced by adopting the

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[10] SALC Report, Recommendation 11
[11] 2001 (2) SA 609 (E)
[12] *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at [16]
[13] 2013 (2) SA 213 (SCA)

definition of class action presented by the learned author, Rachael Mulheron, who advised that:

> "A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation."[14]

[31] In *Children's Trust* the SCA chose to elevate the issues for consideration referred to in the SALC Report (plus one other) to the status of "*requirements*" that have to be met by an applicant for a certification. It held that an applicant has to demonstrate that the following "*requirements*" are met in order to succeed in the application:

[31.1] that a class, objectively identifiable, exists;

[31.2] that a triable cause of action exists;

[31.3] that there are some issues of fact, law, or both, which are common to the relief claimed by all the potential members of the class that will have to be determined;

[31.4] that the relief sought, or damages claimed, by the potential class members flow from the cause of action and are ascertainable and capable of determination;

[31.5] that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;

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[14] *Id.* at [16]

[31.6] that the proposed representative is suitable to represent the class and conduct the litigation; and,

[31.7] whether in the particular case a class action is the most appropriate means of determining the claims, or issues (factual, legal or both) raised in the claims, of class members.[15]

[32] Concerned about the possibility of these "*requirements*" calcifying into a set of hard rules which if strictly applied could cause grave injustice, the Constitutional Court (CC) in *Mukkadam v Pioneer Foods*[16] intervened and commanded[17] that they be treated as no more than a set of relevant "*factors*" that have to be taken into account when determining whether or not the class action should be certified.[18] These should not be elevated to the status of "*conditions precedent or jurisdictional facts which must be present before an application for certification may succeed*", and the absence of a particular factor "*must not oblige a court to refuse certification.*"[19] Finally, it pronounced that in examining the prevalence or absence of each or all of the factors, the certifying court should always remain mindful of the fundamental principle, which is that the ultimate decision on whether to certify or not must be made on the basis of where the interests of justice lie. Moreover, in its quest to achieve this objective the court is not restricted to examining the factors listed in *Children's Trust*.[20]

[33] To sum up, a class action represents a paradigmatic shift in the South African legal process. It is a process that permits one or more plaintiffs to file and prosecute a

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[15] I*d.* at [26] and [28]
[16] 2013 (5) SA 89 (CC) at [36] and [37]
[17] By dint of the operation of the *stare decisis* (stand by your earlier decisions) principle
[18] *Mukaddam* at [35] and [37]
[19] *Id.* at [35]
[20] *Id*. at [47]

lawsuit on behalf of a larger group or "*class*" against one or more defendants. The process is utilised to allow parties and the court to manage a litigation that would be unmanageable or uneconomical if each plaintiff was to bring his/her claim individually. It is normally instituted by a representative on behalf of the relevant class of plaintiffs. The class action process is part of the equity developed law and is designed to cover situations where the parties, particularly plaintiffs, are so numerous that it would be almost impossible to bring them all before the court in one hearing, and where it would not be in the interest of justice for them to come before court individually.

[34] It is not only for the benefit of plaintiffs that the class action process was conceived, it is also designed to protect a defendant(s) from facing a multiplicity of actions resulting in it having to recast or regurgitate its case against each and every individual plaintiff. Furthermore, it enhances judicial economy by protecting courts from having to consider the same issues and evidence in multiple proceedings, which carries with it the possibility of decisions by different courts on the same issue. On the other hand, a class action allows for a single finding on the issue(s), which finding binds all the plaintiffs and all the defendants.

THE CERTIFICATION OF A CLASS ACTION

[35] Since the pronouncements of the SCA in *Children's Trust,* a class action can only proceed to trial if it has been certified by the court as being an appropriate means of resolving the dispute between the putative class members and the defendant(s). The SCA did not, however, restrict this prerequisite to cases where no right in the Bill of Rights has been invoked.

[36] The SCA stated that certification is necessary for the court to be satisfied that certain conditions (the court as we know referred to them as "*requirements*") are met justifying the burdening of the defendants and the court with a class action, as well as binding the putative class members with a judgment that finally resolves all, or some, of the issues between the parties.

[37] The SCA reasoned its conclusion as follows:

> "Most jurisdictions around the world require certification either before institution of a class action or at an early stage of the proceedings. The exception is Australia. The justifications are various. First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit. Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement. Lastly, the Australian experience has not proved entirely satisfactory, with numerous interlocutory applications and significant costs and delays being experienced."[21]

[38] Despite this cogent and forceful reasoning, the *amici* contend that certification is unnecessary in a case where a right entrenched in the Bill of Rights is invoked by the class action representative(s). We are unable to agree with them for two simple reasons, namely that, (i) it can lead to an abuse of court process and, (ii) that it can, as has occurred in Australia, cause numerous costly and time-consuming interlocutory skirmishes around the very issues that the certification court ought to resolve. The need for the court to protect its own process does not disappear in a matter where a right in

[21] *Children's Trust* (*supra)*, at [24]

the Bill of Rights has been invoked. Section 173 of the Constitution makes it plain that the court has inherent power to protect its own processes.

[39] The SALC recommended that a settlement reached after the class action is certified should be approved by the court for it to be valid. Neither the SCA in *Children's Trust*, nor the CC in *Mukkadam* addressed this issue. In the present case, as appears later in this judgment[22], such approval is obligatory as the provisions of the *Contingency Fees Act 66 of 1997* ("CFA") are applicable. We hold that it is in any event correct that any settlement agreement reached after certification of the class action should be subject to the approval of the court and that it should only be valid once approved by the court. This is to ensure that the settlement reached is fair, reasonable, adequate and that it protects the interests of the class.

THE MINEWORKERS' CAUSE OF ACTION

The class definitions

[40] The mineworkers seek, primarily, the certification of a single class action comprising two separate and distinct classes; a silicosis class and a TB class. The silicosis class is defined as:

> "Current and former underground mineworkers who have contracted silicosis, and the dependants of underground mineworkers who died of silicosis (whether or not accompanied by any other disease) -
>
> (i) where such mineworkers work or have worked on one or more of the gold mines listed on the attached "Annexure A" (to this judgment excluding Village and Buffelsfontein), after 12 March 1965; and

[22] See [145] below

(ii) whose claims are not among the claims which, by agreement, are to be determined by arbitration in the matter of *Blom and Others v Anglo American South Africa Limited*; and

(iii) who are not named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544."

[41] The TB class is defined as:

> "Current and former underground mineworkers who have or had contracted pulmonary tuberculosis and the dependants of deceased mineworkers who died of pulmonary tuberculosis (but excluding silico-tuberculosis), where such mineworkers worked or have worked for at least two years on one or more of the gold mines listed on the attached "Annexure A" (to this judgment, excluding Village, Buffelsfontein, DRD and ERPM) after 12 March 1965"

The classes are objectively determinable

[42] In terms of the definition of the silicosis class any mineworker, or his dependants, would have to show the following if he, or they, wish to benefit from being members of the silicosis class:

[42.1] he is a current or former underground mineworker;

[42.2] he has contracted silicosis, or has died of silicosis (whether or not accompanied by any other disease);

[42.3] he worked after 12 March 1965 on one or more of the specific gold mines listed in annexure "A" attached to this judgment (excluding Village and Buffelsfontein);

[42.4] his claim is not among the claims which are to be determined by arbitration in the matter of *Blom and others v Anglo American South Africa Limited*; and,

[42.5] he is not a plaintiff in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544.

[43] In terms of the definition of the TB class any mineworker, or his dependants, would have to show the following if he, or they, wish to benefit from being members of the TB class:

[43.1] he is a current or former underground mineworker;

[43.2] he has contracted TB, or has died of TB but excluding silicosis;

[43.3] he works or had worked after 12 March 1965 for at least two years on one or more of the specific gold mines listed in Annexure A (excluding Village, Buffelsfontein, DRD and ERPM) attached to this judgement.

[44] The criteria used to identify members of the two classes must be objective. In defining the class it is not necessary to identify all the putative class members. The class must however be defined with sufficient precision as to allow for a particular individual's membership to be objectively determined. This can be done by applying the criterion contained in the class definition to the individual’s situation or circumstances.

The class definition must also not be overbroad. If the class is too wide, a class action would be inappropriate.

[45] In the present case, the definitions are clear as well as unambiguous. Any individual who wishes to claim membership of either the silicosis or the TB class would easily know what he has to show in order to qualify for membership of either class. Similarly, this applies to dependants who wish to draw a benefit from the class action. The criterion for membership in our view is objective.

[46] With the exception of African Rainbow Minerals ("ARM") and Randgold and Exploration Company Ltd ("Randgold"), none of the mining companies raised any controversy on this issue. They accepted that at the appropriate moment in the litigation they will be able to scrutinise each and every mineworkers' claim to membership. In fact, one of the mining companies, DRD, explicitly concedes that the criterion for membership is objective.

[47] ARM and Randgold complain that a mineworker who wishes to claim membership of the classes would have to first establish through medical diagnosis that he has contracted either silicosis or TB. This, they say, makes it difficult, if not impossible, for the mineworker to claim any benefits that the membership may offer without first undergoing expert medical examination. Unless this is done his claim to membership, especially of the silicosis class, is based on his subjective belief.

[48] The objection is misconceived for at least two reasons. Firstly, the mineworker's claim to membership is not determinative of his actual membership. His actual

membership would have to be proven. To prove his membership he will have to show that he meets the criterion contained in the class definition. His actual membership is determined independently of his subjective belief. We have shown above that the definition does not have any built-in subjective criteria, such as the mineworker's subjective belief, as suggested by ARM and Randgold. Secondly, the mineworkers have consciously elected to ask for a certification that allows for or endorses a two stage process. They describe it as a bifurcated process.[23] For the moment it bears noting that the first stage involves an opt-out procedure. This means that any mineworker, or dependants of a mineworker, who fails to give notice to opt-out of the class action will be deemed to be part of it. During this stage the mineworker or his dependants need not prove actual membership of either of the classes. Thus, proof of actual membership is not a matter that should concern the trial court in the first stage of the proceedings. It is, therefore, no bar to the certification of the class action based on the class definition outlined above. Once the common issues are determined, and should the case proceed to the second stage, then the individual mineworker, or his dependants, will have to produce cogent evidence demonstrating that he contracted silicosis or TB. If he (or they) fails to do so then he (or they) simply will not have a claim. His, or their, case is no different from any other mineworker, or mineworker's dependants, who fails to prove that he worked on the mines for a period of two years.

[49] In our view, there simply is no need for the entire class membership to be determined before the common issues of fact or law can be determined, or before relevant evidence common to all class members, and which advances the cases of each class member, is entertained. This approach is consistent with the practice

[23]See [116] – [125] below

adopted in the Australian and Ontario statutes whose practical utility is well captured in the following dictum of Cummings J sitting in the Ontario Superior Court:

> "the undoubted complexity of follow-on individual issues does not detract from the merit in resolving a preliminary common issue."[24]

[50] In terms of this approach there is no need to identify individual class members during the first stage of the class action. As the learned author, Professor Mulheron reminds us:

> "It must simply be accepted that the determination of whether each individual member of the class can only properly be made at some stage after the resolution of the common issues. The class most certainly does not have to be built at the very commencement of the proceedings."[25]

The scope of the definition of the two classes

[51] There can be little doubt that the classes are defined in fairly broad terms. This is done to ensure that nobody with a legitimate claim is excluded. The make-up of the classes is restrained by the fact that the definitions only cover those mineworkers who worked underground. This, of course, excludes all those who worked aboveground, but, we are told, the circumstances of the aboveground mineworkers who may have contracted either of the diseases is significantly different from those who worked underground, thus making it necessary to exclude them. The duration of the class period contained in the definition covers a span of fifty or more years. The commencement date is 12 March 1965. This date was chosen because it coincides with the coming into force of a new regulatory regime brought under the *Mines and Works Act 27 of 1956*. If an underground mineworker had commenced working in 1965 at the age of 17 in one of the mines of the mining companies he would, as at the date of this

[24] *Wilson v Servier Canada Inc***.** 50 O.R. (3d) 219, 49 C.P.C (4th) 233 at [135]; See also: *Harrington v Dow Corning Corp* (1996) 22 B.C.L.R. (3d) 97 at [22]; *Bright v Femcare Ltd* [2002] FCAFC 243 at [153]

[25] Mulheron, R. *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart: Portland, 2004) at 337.

judgment, be 68 years old and retired a while ago. Any underground mineworker who had left before 1965 and who had contracted either of the diseases would, in all likelihood, have succumbed to the disease. Hence, 12 March 1965 was chosen by the applicant mineworkers as a cut-off point. The mining companies do not object to the need for a cut-off point but contend that it be shortened otherwise, they say, the class definition is overbroad. They also claim that an overbroad definition would produce significant problems of manageability for the trial court.

[52] A lengthy time period does not automatically translate into an overbroad definition. Moreover, by truncating the time period, one risks disqualifying many mineworkers who are still alive and were supposed to have benefited from the introduction of the new regulatory regime (but did not because of the alleged breaches by the mining companies) and from the class action even though they, like every other mineworker, may have legitimate claims against the mining companies. Under these circumstances, their exclusion would either be arbitrary or not rationally justifiable. And, it would involve them having to bring a separate class action in which they would raise exactly the same issues as those raised in the one called for in this case. In short, truncating the time-period would only result in a proliferation of the class action. That would certainly defeat the cause of justice. In sum, once it is found that there are sufficient common issues affecting the entire classes that can be determined at one hearing, or if the hearing is split into stages at the first stage, then it follows as a matter of logic that the class definitions are not overbroad. Concomitantly, it cannot be unmanageable. In other words, once it is established that there are issues, or there is evidence that is either uniform or applicable to every mineworker’s claim then the concerns of unmanageability of the class action or over-breadth of the class definition

do not feature. What we have here is that the sizes of the two classes may be very large but that does not make the class definition overbroad or the class action trial unmanageable. We agree with the observation of the full Federal Court of Australia, expressed thus:

> "It would be a strange result indeed if an issue which was clearly a substantial issue if litigated by one party ceased to be a substantial issue merely by reason of the fact that it was being litigated by many parties. If that were so, the benefits to be derived from Pt IVA (Australian rules) … namely the saving of court time, the saving of parties' costs, the efficient administration of justice and so on, would be available to a small group in a case such as this, but would be lost if the group were very large."[26]

[53] Both silicosis and TB are diseases that can be diagnosed with certainty. This means that a diagnosis of silicosis or TB excludes alternative diagnoses of obstructive lung disease or other pulmonary diseases or conditions. TB and silicosis are therefore diagnosable with a high degree of clinical and scientific certainty. This makes this aspect of the proposed class definition objectively and definitively ascertainable.

[54] The class requirement of two years of underground mine work and the employment history of the underground mineworkers makes it possible to objectively and definitively ascertain the silicosis and TB class members.

[55] The class definition further facilitates self-identification by class members by the listing of the relevant mines.[27] Irrespective of the technical nature of the relationships between the mines and the mining companies concerned, prospective class members are able to identify themselves as class members with reasonable certainty so that they can elect to opt-out of the class action at the first stage, can know whether they are

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[26] *Johnson Tiles Pty Ltd v Esso Aust Ltd* [1999] FCA 636 at [16]; See also Mulheron (*supra*) at 259-260

[27] This is to be found in Annexure A to this judgment.

bound by the judgment on common issues, and can elect to opt-in at the second stage for the determination of individual damages.

[56] That the classes are objectively determinable is manifest in four simple questions that would be posed to any mineworker: Do you have TB or silicosis? Did you work for one or more of the mining companies? Did you work for one or more of the mining companies for two years? Did you work for the mining companies during the period set out in the notices?

Claim is one in delict

[57] The mineworkers have attached a draft particulars of claim to the application. The draft reveals that the mineworkers' claim is one in delict. For a delictual action to be successful it will have to be shown by a plaintiff that (i) the defendant acted or failed to act, and (ii) the defendant's action or omission was wrongful (often dealt with under the rubric "*breach of a legal duty*"), and (iii) the defendant was at fault (often captured under the head "*negligence*"), and (iv) the act or omission of the defendant caused the damage suffered by the plaintiff, and (v) the damage endured by the plaintiff is capable of quantification. These elements of a delictual action would have to be proven with regard to each and every putative class member if that class member was to be awarded any compensation for the damages he suffered. At the outset it bears mentioning that the amount of damages suffered by each class member is, without doubt, unique to that member. This, however, is not the case with regard to the other elements of the delictual action. By their very nature the other elements raise very broad issues. What is important for this court is to consider whether there are any issues amongst those elements of the delictual action which can be dealt with as part of a

class action where a finding on them will be applicable to the case of each and every mineworker.

Alleged breach of duties by the mining companies

[58] The mineworkers aver that the mining companies breached their legal duties owed to the members of the classes arising from:

[58.1] the mining companies' common law duty of care owed to the mineworkers employed in the relevant mines to take reasonable measures to provide a safe and healthy work environment that was not injurious to their health and/or to take reasonable care for the safety of persons entering the mines;

[58.2] the statutory duty owed by the mining companies, in their capacities as mine owners to comply with the *Mines and Works Act 12 of 1911* and the *Mine Health and Safety Act 29 of 1996* and the regulations made thereunder and;

[58.3] the mining companies' constitutional obligations to the mineworkers who were employed from 1994 onwards, based on the following sections of the Constitution: s 9(4) (the fundamental right against unfair discrimination by private persons), s 10 (fundamental right to human dignity), s 11 (right to life), s 12(1)(c), s 12(2) (right to bodily integrity) and s 24 (right to an environment that is not harmful to the health and wellbeing of an individual).

[59] The mineworkers claim that the mining companies unlawfully exposed all the mineworkers to excessive levels of harmful silica dust while they were in the employ of the mining companies. They claim further that the mining companies owed the mineworkers a duty of care to ensure that their work and living places were safe. They claim that the respondents breached this duty with regard to each and every mineworker by, amongst others, failing to take reasonable steps to ensure that their work and living places were safe. This they hope to prove by producing evidence at the trial showing that the mining companies failed, amongst others, to:

[59.1] prevent or minimise the escape of dust into the air breathed in by the mineworkers by introducing appropriate engineering controls. The evidence they intend to lead will deal with the available engineering methods to control the escape of dust into the air that mineworkers were forced to breathe while at the workplace;

[59.2] dilute the silica dust that the mineworkers were forced to breathe on a daily basis. The evidence, which is highly specialised, will canvass some of the methods that were available to the mining companies to dilute this silica dust;

[59.3] introduce proper ventilation systems to evacuate the contaminated dust that was being expelled in the very restricted space that the mineworkers were required to work. The evidence will canvass the ventilation systems

that were known and available to the mining companies. Once again, the evidence will be highly specialised and technical in nature;

[59.4] provide the mineworkers with suitable respiratory protective equipment in situations where this was absolutely essential;

[59.5] monitor the effects of the exposure to the contaminated dust upon the mineworkers; and,

[59.6] maintain a healthy and safe working environment, and failed to provide healthy and safe working conditions, in their mines and to protect the mineworkers from contracting silicosis and TB, and as a result breached their duty of care towards these mineworkers.

[60] The mineworkers allege that the mining companies' negligence was not a once-off single event or incident. It was an unlawful practice or omission that was on-going, relentless, intense and profound in its impact. They say that the mining companies' neglect was industrial in scale resulting in them ultimately being forced to bear the unbearable. They wish to bring evidence to this effect to the trial action. It is evidence that goes to the heart of the mining companies' legal duty of care towards them as well as the breach of that duty.

The evidence common to every individual mineworker's case which the mineworkers intend to bring to the class actions

[61] The mineworkers intend to bring evidence to the class action trial:

[61.1] showing that the mining companies, through the Chamber of Mines ("the Chamber"), acted in concert. This is evidence which each mineworker would want to rely upon in his individual case, hence the need for it to be led once in a class action.[28] It is also evidence that no mineworker is capable of bringing to court on his own, yet it is important, if not crucial, to his case.

[61.2] showing that the Chamber, which was formed in 1890 and which is a voluntary employers' organisation to which all the mining companies belong, played a pivotal role in the gold mining industry where the mineworkers were all employed. They contend that the need to canvass the role it played is necessary, for it will attend to the issues of the duty of care owed by each of the mining companies to the mineworkers it employed and to the breach of that duty. In this regard the mineworkers intend to show in the proposed class action that the Chamber provided services "*over a wide range of technical, legal, medical, social and environmental issues*," so that they may "*co-operate and act in concert.*"[29] They intend to show that the dust levels in all of the mines "*remained roughly the same over a period of 50 years*," until 2003, yet in 1964 they already knew that:

[28] It would be evidence that each of the 17 000 mineworkers represented by Spoor would want to lead in his case

[29] *Report of the Leon Judicial Commission of Inquiry into Mine Health and Safety, 21 Oct 2003* (The Leon Commission Report), (Government Printer, 2005) at 9

> "Men employed underground on the industry's gold mines are still contracting pneumoconiosis and at a rate which compels us to regard the disease as a significant occupational hazard.
> Although the present position is much better than 50 years ago, pneumoconiosis has not yet been eliminated from South African gold mines. During the period 1920 to 1950 the average time taken by certified silicotics to contract first-stage pneumoconiosis increased from some eight years to approximately 22 years, but since 1950 little improvement has taken place and the average time today is, according to general opinion, still of the order of 22 to 24 years. As the 1950 figures relate to dust breathed over the previous 20 years or so, they appear to indicate that there has been only a small improvement in dust conditions in our mines in the past two or three decades."[30]

[61.3] showing that the evidence referred to in par [61.1] is supported by the factual averments made by Anglo American in its plea in the Blom arbitration where it is revealed that there was a unified approach by all the mining companies to the problem of dust control. The unified approach was informed by, or occurred through, the work of the Chamber which all the mining companies were a part of and participated in. The unified approach commenced upon the formation of the Chamber in 1890, continues to date and, therefore, covers the entire class period;

[61.4] demonstrating that various legislative measures were adopted that at one stroke refined the mining companies' duty of care towards the mineworkers as well as reminded them of that duty of care. Further, the evidence they intend to bring to the trial action will show that there was a general and pervasive disregard by the mining companies of their obligations as spelt out in these legislative measures. In other words there was pervasive disregard of the statutory breaches of duty of care by all of

[30] F.G. Hill, *The importance of better dust control in the prevention of Pneumoconiosis.* 20 November 1964, at 1 – 2; It can be found in *Papers and Discussions 1964-1965, Association of Mine Managers of South Africa*, pp 69-81, 1965

the mining companies, which breaches, according to the mineworkers, were general in nature and took place throughout the class period;

[61.5] of a highly technical nature some of which has been captured in academic studies undertaken many years ago;

[61.6] of reports of the various Commissions established by previous political authorities (one of them, "*The Weldon Miners' Phthisis Commission*", goes as far back as 1902), as well as the reports of the Chamber. This fact is relevant to at least one of the elements of the delictual action: that of fault or negligence on the part of the mining companies;

[61.7] showing that as far back as the early 1900s the mining companies knew, or should have known, that silicosis and other dust related occupational lung diseases were preventable through, *inter alia*, the effective use of engineering controls and good work practices. Such knowledge is demonstrated by the availability of scientific literature dating back to as early as the 1920s. The mineworkers attach some of this literature to their founding papers and what is clear from a perusal of them is that it is highly technical and not accessible to an individual mineworker;

[61.8] of the mining companies' and the Chamber's knowledge of the high incidence of silicosis and TB amongst the mineworkers since 1965;

[61.9] showing that as late as 2008 it was found that the serial and pervasive non-compliance with the legislative requirements for dust control by the mining companies continued. Some of this evidence consists of an audit conducted by the Department of Mineral and Energy Affairs, which revealed, *inter alia*:

> "… (that) there is a pervasive culture of non-compliance to legislative requirements. Inquiry after inquiry makes findings to the effect that risk assessments are not conducted, training is not done, early morning examinations are not done, equipments (sic) not maintained and the list goes on and on."[31]

[61.10] of a technical nature concerning gravimetric sampling and its lack of use by the mining companies;

[61.11] of numerous investigations that have identified that exposure to silica dust and a silicosis diagnosis are strong risk factors for TB, as well as of some epidemiological studies focusing on this correlation between silica dust exposure and silicosis and TB;

[61.12] of studies that revealed that TB is recognised as an occupational lung disease in mineworkers exposed to silica dust, and that a silicosis diagnosis increases the risk of TB by four times after adjustment for cumulative dust and tobacco. Furthermore, studies have proven that, even in the absence of silicosis, silica dust exposure increases the risk of TB, and it continues to elevate the risk even after exposure ceases;

[31] Report of the Dept. of Mineral and Energy Affairs, 2008, at p 51- 52

[61.13] showing that throughout their existence, and most importantly during the fifty year period 1965-2015, all the mining companies sacrificed the health and safety of the mineworkers in order to maximise the profits they could extract from mining operations;

[61.14] showing that mineworkers were forced to live in crowded and unsanitary conditions in what has sometimes been referred to as "*miners' barracks*", "*mine hostels*", "*mining compounds*" or "*dormitories*", which was a major contributing factor to the high rate of TB among these mineworkers;

[61.15] showing that black mineworkers' wages were much lower than their white counterparts and that these, at times, were as low as ten percent (10%) of that which white mineworkers were paid, thus compromising the black mineworkers' ability to, firstly combat the negative effects of silica dust exposure and secondly, reduce the pain and suffering they had to endure once they contracted silicosis or TB. This latter consequence is relevant to the determination of the issue of general damages that each of the mineworkers intends to claim from the mining companies but the evidence is general to each mineworker's case;

[61.16] showing that the mining companies have over a decade been promising to assist former mineworkers in accessing medical examination facilities in the rural areas and towns from where they were recruited and where they returned to since being retrenched, but have to-date failed to do so. This evidence is general and applicable to all the mining companies;

[61.17] showing that while the reports of some mining companies recognised that significant exposure to silica dust posed a grave health risk to the mineworkers, the Chamber, through its officials, has over time attempted to discredit valid medical studies documenting the epidemic rates of occupational lung diseases, such as silicosis and TB, in the mineworkers;

[61.18] showing that from their inception, and certainly through a significant part of the class period, the mining companies pursued working practices that discriminated against the black mineworkers in relation to their white counterparts, and that one consequence of this was that black mineworkers have suffered significantly higher rates of silicosis and TB than white mineworkers;

[61.19] about international best practices regarding the health and safety of workers exposed to silica dust;

[61.20] showing that throughout their employment they had no control at all over the environmental conditions under which they worked; that those environmental conditions were determined and regulated solely by the mining companies, and that this was true for all the mining companies;

[61.21] showing that the problems of silicosis and TB were always industry problems and were not restricted to any one mining company. The

prevalence of these diseases was common to all the mining companies and that not a single mining company can escape this fact;

[61.22] showing that over the last 100 years hundreds of thousands of mineworkers employed on the gold mines of the mining companies have developed silicosis and many thousands have developed TB;

[61.23] to show the failure of the mining companies to take the necessary steps to protect them from excessive exposure to silica dust was caused in part by the existence of the migrant labour system that prevailed during their employment with the mining companies. In this regard they wish to bring evidence about the role of the mining companies in establishing, encouraging and bolstering the migrant labour system. One example of this evidence consists of the opinions of academics. The opinions are derived from their extensive research on the subject which is published jointly in a respected academic journal. A taste of this evidence was presented to this court in order to demonstrate its applicability to the case of each and every mineworker. This is manifested in the following quote from the opinion evidence:

> "The migrant labour system has weakened the incentives to control dust and disease by externalizing the cost of disease, moving them away from the gold mining industry to communities and the State … Barriers to compensation are considerable and the majority of qualifying claimants have not received awards, thus reducing the substantial financial incentive to control dust that would be brought about by compensation payments and hence increased levies on mines."[32]

[32] Jill Murray, Tony Davies and David Rees, *Occupational Lung Disease in the South African Mining Industry*, Journal of Public Health Policy 32, 565-579, 2011. In their application for admission as *amici*, TAC and Sonke asked for the evidence of a renowned academic, Wilson, to be admitted as evidence in this (the certification) proceedings as it would enhance the hearing by giving context to the evidence of Murray *et al* that would be brought to the class action trial. The evidence of Wilson that they sought to introduce concerned the alleged collaboration between the mining companies and, what in sociological,

[62] Each of the applicant mineworkers in this case represented by Spoor also filed individual affidavits indicating who he is, where he worked and what his medical condition as at the date of the deposition was. The affidavits share a common theme and tell a story so familiar to each of the mineworkers that it is bound to be articulated in the same language. Thus, the following factual narration in the affidavit of Mr Bongani Nkala, the first applicant, is common to many of the affidavits:

> "…I was frequently and regularly exposed to silica dust released during day-to-day mining activities. This exposure occurred from working with and near activities such as drilling, blasting and crushing of ore and rock.
>
> The dust levels underground were generally controlled by spraying the walls with water. This was done once in the morning and after each blast that occurred during a shift. Blasting underground created a lot of dust and much of it remained in the workplace, even after the walls were sprayed with water, as we could still see it, as well as taste and smell it. There was no ventilation to control the dust levels in my workplace underground and, as a result, the watering process was the only means of dust control. The dust would remain in the air until the walls were watered, and soon thereafter, when the wall dried, the dust levels would increase again. The watering process was an ineffective means of controlling the dust levels underground.
>
> On a daily basis, I and my co-workers breathed silica dust in the following areas of the mines: in the travelling tunnels and in the worksite.
> I was never provided with any respiratory equipment. I inhaled all the dust I was exposed to.
>
> The dust levels were especially high when I would enter the mine at the beginning of my shift. I had to walk eight kilometres through the tunnels underground to get to my workspace. Lots of dust would settle on the equipment that we used and the equipment was not cleaned during or between shifts. The dust would settle on our hair, face and clothes while we worked.
>
> Prior to being permitted to work on the gold mines, I was medically tested for the presence of occupational lung diseases, including silicosis, and was deemed well

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social anthropological, developmental studies and political science literature is referred to as, "*the apartheid state*", which collaboration was part of the breach of the duty of care the mining companies owed to the mineworkers. However, TAC and Sonke specifically renounced for the moment, any intention to participate in the class action trial (i.e. if that trial action were to be certified by this court) and therefore could not guarantee that the evidence of Wilson would eventually find its way to the trial. The evidence of Wilson may well be relevant for the determination of the issue of breach of duty of care by the mining companies but as there was no guarantee that it would be presented to the trial court we deemed it inappropriate to allow its introduction in this certification proceeding.

> and fit to work underground. Thereafter, I was examined periodically for the presence of silicosis and other occupational lung diseases.
> I was diagnosed to be suffering from TB and Pneumoconiosis during my Exit Medical Examination conducted by my former employer in 1997. … As a result of this diagnosis, I was retrenched.
>
> In June 2012 I was diagnosed with silicosis…I did not have silicosis prior to working on the mines."

[63] The applicant mineworkers represented by Abrahams also deposed to affidavits in support of the application. Their evidence speaks of a general and pervasive breach of the duties of care by all the mining companies they worked for. One of them, Mr Bangumzi Bennet Balakazi, narrates the following in his affidavit:

> "I intend to institute an action for damages against AngloGold Ashanti Limited, the Respondent in this application ('AngloGold') in respect of lung disease, which I have as a result of my employ with AngloGold, or at least primarily as a result of that employment. The lung disease I have is tuberculosis and silicosis and I am advised that it arose out of my occupation, hence being referred to as an occupational lung disease. I am advised though that tuberculosis and silicosis are of a variety of occupational lung diseases to which mineworkers on South African mines are prone.
>
> I am personally aware of a large number of former mineworkers who used to work for AngloGold and who, like me, are ill. I am advised by my attorneys that there are in fact a very substantial number of former AngloGold mineworkers, running into the thousands, who fall within this category.
>
> In 1974, I started working at Vaal Reefs mine as an underground miner. During that same year I was transferred to Western Deep Levels mine. Thereafter, in 1975, I worked for Western Holdings Welkom and Impala Platinum. However, in 1976, I returned to work at Vaal Reefs mine as an underground mineworker, where I continued to work until 1991. After 1991, I carried on working at Western Areas Gold Mine between 1995 and 1997 and Randfontein Estate Gold Mine in 1999. I attach hereto a copy of my employment record issued by The Employment Bureau of Africa ("TEBA")
>
> Like most other miners, I was recruited by TEBA in 1973 at its Peddie office in the Eastern Cape. TEBA was known in the village where I lived. They'd been recruiting young men from my village. At the time of my recruitment, I was 20 years old and lived with my parents and seven siblings in a mud house in Pikoli Village near Peddie. I had only completed Standard 5 at that time- or, what I understand is now referred to as Grade 7.
>
> Because of my low level of education and the poverty in the village, I'd hoped that by working on the mine I would be able to provide for me and my family. I was a healthy person at the time of my recruitment and when I started out working on the mine.
>
> After being recruited, I left my village in a steam locomotive, known as the

"*Madlebe*". I travelled with fellow miners to Johannesburg. This was my first time travelling to a big city and I felt quite intimidated. From Johannesburg we travelled in a lorry to Orkney in what is now the Northwest Province. It was very painful for me to leave my village to work on a mine far away from home. However, I wanted to provide a better life for me and my family.

Upon arrival in Orkney we were examined and thereafter taken to the Vaal Reefs hostel. I was placed in a dormitory with 15 other men. The dormitories were separated by tribe and I stayed with 15 other Xhosa mineworkers. It was fitted out with 16 cement beds which had the appearance of tomb stones. I hated the mine hostels. The dormitory was dirty and smelly. There was a small coal stove in the dormitory as well.

The showers and toilets were in a different building next to our dormitory. I cannot say exactly how many showers and toilets there were but they were shared by about 20 dormitories. There was no privacy at all in using those facilities and everyone showered and used the toilets in full view of the others.

I underwent a one month training course at the training centre at the mine. I was trained how to use different mine machinery. I also received physical training to improve my abilities to endure the heat down in the underground. The training involved cycling on some machine for 4 hours, completely naked. I found it very humiliating and so did the other miners too. During the training, I cannot remember anything being said about dust and the need at all time to protect oneself against it. As far as I can remember, the training only dealt with how to prevent rock falls.

After the training I started out working as a loader, responsible for picking up the crusted rocks with a spade and then loading it onto a locomotive. I was given an overall, knee caps, a light helmet with a lamp, goggles and a mask.

My daily routine day started at 3:00 a.m. in the morning, when we were woken up by a siren. Everyone would wake up, including those for whom it was an off day. We got up, washed, ate and proceeded to work. We were then transported to the mine on a lorry because the shaft was quite a distance from the hostel. After we've clocked in, the cage took us down the shaft. Once down in the underground, it was hot and humid.

As time went on, I became a miner's assistant. I was required to follow the miner everywhere and performed whatever task he'd required of me. I spent most of my time with drillers and loaders and as a result, my job constantly put me in direct contact with dust and heat. The heat made it impractical to wear masks all the time. The hot conditions underground also made it very difficult for me to breathe with the mask on. Over time, the mask became so dusty that I could no longer use it, as it was impossible to breathe through it.

AngloGold had a system of blasting which took place during shifts. When blasting took place, miners moved to a closed-off chamber. However, soon after the blasting had finished, miners returned to the blasted area almost immediately, whilst the area was still full of dust. Fellow miners sprayed water, but it did not help much. The white miners only returned to the blast area after most of the dust had settled.

I cannot recall mine management, most of whom were white at the time, speaking to me or any of the other miners about the health risk of dust. We

just had to work and work. For the majority of my time as a mineworker, I was treated very badly by the white miners and supervisors. Most of them forced us to expose ourselves to dangerous areas and situations. When we refused to carry out their orders, being well aware of the possible harm that it might do to us, they often kicked or beat us with their fists. I was constantly being referred to as a "*kaffir*" and "*doner*".

An underground shift was normally about 8 hours during which time we worked, with only a short interval to eat, drink water and relieve ourselves. There were no toilets underground and we had to relieve ourselves on a few buckets, placed in a faraway section on our shaft level. The buckets were often full and the stench was unbearable. Before we could use the "toilet", we first had to ask for permission from the white supervisor. Sometimes my requests were denied.

By the afternoon, after a shift, we emerge from the underground to the surface with our clothes and body full of dust. I returned with my clothes and boots to the hostel. It was common for miners to take their clothes and boots inside the mine hostel since miners were responsible for washing their clothes themselves. This created further dust in the dormitories.

On my off days I further attended to washing my clothes. I went home once a year when my contract came to an end.

Over time and whilst working at Vaal Reefs, I became ill. I started to cough repeatedly, I was very tired and short of breath and I also began to sweat at night. It was subsequently discovered that I had tuberculosis and silicosis. Thereafter, in 1991 I was retrenched.

Notwithstanding my retrenchment, I commenced working for Western Areas Gold Mine between 1995 and 1997 and thereafter for Randfontein Gold Mine in 1999.

However, after I'd stopped working in the mines, I received a letter in 2004 from the Medical Bureau for Occupational Diseases (the "MBOD"), informing me that I had tuberculosis and silicosis in the second degree. …

Subsequent to the MBOD's letter, I received R28 000.00 in what I'm advised of, would have been in all likelihood compensation from the Compensation Commission for Occupational Diseases ("the CCOD").

Since then, I'd been unable to perform work that requires physical labour or effort. I receive R1 200.00 from the government as a disability grant. This is the only income my household lives on, as my wife and four children are all unemployed. I have not received any financial or other support from AngloGold, since my retrenchment or from the CCOD. Consequently, I want to claim damages from Anglo Gold because of my illness."

[64] Another applicant, Mr Watu Livingstone Dala, testifies as follows:

"…

Upon my arrival, I was taken to Vaal Reefs mine hostel. I was placed in a dormitory with 15 other men. It was fitted out with 16 beds, each with its own sponge mattress. The showers and toilets were in a different building next to the dormitory. There were about 6 showers and 6 toilets, which we shared with a lot of other mineworkers living in the other dormitories. The showers and toilets were not private and miners used it (sic) in full view of the others.

My daily routine started at 3:30am, when a mine policeman woke us up, using a loud hailer. There was also a siren to wake us up. Everyone woke up, including those for whom it was an off day. We got up, washed, ate and then proceeded to walk to the mine, which was 5 minutes away from the hostel.

Once at the mine, the cage took us down the shaft. Once underground, one immediately experienced the humidity and dust hanging in the air. During my employment at Western Deep Levels mine…We took three cages to get to that level underground. It was extremely hot at that level.

Over time, I became a winch driver. I was responsible for cleaning rocks from underneath slopes and gullies, after rock blasts. As a result, my job constantly put me in direct contact with dust and heat. Because of the rock blasts and heat, it was not practical to wear masks all the time. The hot conditions underground made it very difficult for me to breathe with the mask on. Over time, the mask became so dusty that I could no longer use it, as it was impossible to breathe through it.

During most of my shifts, I was present when rock blasting occurred. The whole place shook when it happened. It was very scary. Thereafter, there was always a lot of dust. Sometimes, you could barely see in front of you. The dust was also suffocating and got stuck in our noses and ears. Though water was used to keep the mine surface wet, it did little to minimize the levels of dust. Mine ventilation also did not do much to reduce the dust. I cannot recall mine management, most of whom were white at the time, speaking to me or any of the other miners about the health risk of dust. In fact, I remember being told by our supervisors that we should only make sure to wear the masks when there were "safety reps", meaning safety representatives inspecting the mine underground. However, those representatives were seldom visible, as they almost only appeared when there was an underground accident.

Mine management was only concerned with us having to work all the time. We worked like slaves. It was common for us to be referred to as "*kaffirs*", or "*mshunukanyoko*", meaning "*mother fuckers*". Some mineworkers were regularly kicked under their buttocks by the white supervisors and some were even hit with the fist or with objects. One white supervisor once tried to hit me but I managed to run away and escaped the attempted assault.

…

During the course of my employment with the mine, I underwent routine medical check-ups at the mine hospital. During one of those visits, around 1999 I think it was, I was told by the mine doctor that I was quite ill. Nonetheless, I was allowed to continue working underground. In 2004 though I received a letter from the Medical Bureau for Occupational Diseases ("the MBOD") stating that I had tuberculosis and silicosis in the second degree.

Again, notwithstanding that letter from the MBOD, I was allowed to continue

> working underground until 2006 where after and only then, I was transferred to the surface. I stopped working for AngloGold in 2007 when I was retrenched due to my illness. I was 45 years old at that time. I returned to the Eastern Cape to my family.
>
> However, in 2001, I received R 17 000.00 and subsequent thereto in 2007 I received a further sum of R 48 000.00.
>
> Currently, I do odd jobs and receive very little money for it. My wife and I receive two child support grants from the government totalling R560.00. I have not received any financial or other support from AngloGold Ashanti since my retrenchment or any further sums from the CCOD. Consequently, I want to claim damages from AngloGold, because of my illness."

[65] The evidence concerning their working conditions is similar or almost identical in all the affidavits deposed to by the individual mineworkers represented by Spoor and Abrahams. The averments in all the affidavits of the individual mineworkers divulge the same or similar Victorian-era like working conditions regardless of which mine the deponent worked for and during which time-period he worked for these mining companies. Another fact illuminated in many of these affidavits is that the deponent worked on more than one mine during different times of his working life, and yet he testifies to working conditions that were almost identical in each of the mines throughout his tenure as a mineworker.

[66] With remarkable consistency their evidence reveals that the mining companies stripped them of their dignity, and concomitantly compromised their health and safety, with such intensity and ferocity that they were effectively dehumanised.

[67] A further factor illuminated in all the affidavits is that almost every one of the miners was recruited by a company operating under the name and style of TEBA Ltd. ("TEBA"). It was TEBA that placed him with a particular mine and it was TEBA that kept a record of his employment with the mining companies. It appears from these affidavits that TEBA acted for and on behalf of all the mining companies. Its conduct and its

omissions were common and universal. Its conduct and its omissions are relevant to the case of each mineworker as they focus upon the issues of breach of the mining companies' duty of care as well as the unlawfulness of their conduct.

[68] Four of the dependant applicants, Ms Maleburu Regina Lebitsa ('Lebitsa'), Ms Mataaso Mable Makone ('Makone') and Ms Matsekelo Cisilia Masupha ('Masupha') and Ms Matisetso Maseipati Jesenta Nong ('Nong') represented by Spoor are the widows of mineworkers. As their circumstances are similar in material respects the affidavits they have filed share common averments. One of them, Lebitsa, testifies as follows:

> "My late husband was a former gold mineworker who worked underground (from 1972 to 1998).
>
> My late husband left work on the mines when his former employer found that he was medically incapacitated and that he was no longer able to perform his duties, In early 2005, my husband was certified to be suffering from tuberculosis and silicosis in the second degree by the Medical Bureau for Occupational Diseases (MBOD)
>
> On 30 April 2010, my husband passed away. He was 55 years of age. As per the copy of the attached death certificate…the cause of his death was Tuberculosis. I am advised that scientific research shows that the risk of dying from tuberculosis is three times higher in silicotic mineworkers that those without silicosis.
>
> My husband supported me whilst he was working in the mine. Consequent to working on the mines, he developed silicosis and, as a result, he left work on the mines due to ill health at the age of 42, long before the normal retirement age of 65 years. When he returned home from the mines his health deteriorated and, as he became weaker, his ability to support his family was severely undermined. The support he provided me was fully terminated when he passed away in 2010.
>
> Accordingly, as a result of my late husband contracting silicosis and being retrenched prior to the normal age of retirement due to his ill health, I suffered a reduction of support when he left work on the mines. Thereafter when he died, the support provided by him was completely terminated.
>
> My late husband, along with thousands of other mineworkers, had contracted silicosis as a result of their employment with Respondents' mines."

[69] Broadly speaking the testimonies of Makone, Masupha and Nong are the same as that of Lebitsa. Hence, if individual actions are to be brought they will be repeated in each case.

[70] The evidence referred to in [59], [61] – [64] and [68] above is relevant and necessary for it pertains to the issues of breach of duties of care as well as to the fault elements of the delict the mineworkers complain of. Some of the evidence consists of highly technical scientific material and each individual mineworker lacks the capacity to bring it to court on his own. However, all this evidence is applicable to each and every mineworker's case and if the thousands of mineworkers were ever able to, and actually did, litigate individually then without doubt, the same evidence would be repeatedly presented to court.

The claim against parent companies

[71] The claim against the parent companies of the respective companies that employed the mineworkers is that they had authority over, advised and guided their respective employing subsidiary company, and were aware that its subsidiary company would accept its direction, guidance or advice and that that direction, guidance or advice materially impacted upon the health of the mineworkers, especially with regard to them contracting silicosis or TB. The evidence they wish to bring against these companies is the same evidence referred to in [59], [61] - [64] and [68] plus evidence about the active involvement of the respective parent company in the affairs of its subsidiary. The latter evidence is not separate, or insulated, from the former evidence. Parent companies would have to engage with former evidence as much as the subsidiary companies would have to do so. This evidence, too, is general to all the parent companies. It would, therefore, make no logical sense to exclude them from the class action. In addition, they claim that the parent companies knew, and in some cases were part, of the decisions to implement the practices that had a material impact on the

environmental conditions to which the mineworkers were exposed, and which had a negative impact upon the health of these workers. In the case of one parent company, Anglo American, the mineworkers intend to lead extensive evidence about its reporting since 1961 on behalf of all its subsidiaries about the health of their employees as well as about its own knowledge of the correlation between silica dust exposure and the lung diseases of silicosis and TB. They further intend to show that in many respects Anglo American was a trendsetter when it came to advising on the adoption of health and safety equipment, methods and procedures. Its advice, they intend to show with credible evidence, fell woefully short of what is to be expected of a reasonable employer taking seriously its obligations to protect and advance the health and safety of the mineworkers. Parent companies on the whole would have to engage with all this evidence, which the mineworkers intend to lead in one trial action only.

Common questions of law

[72] The mineworkers also intend to plead certain simplified questions of law at the class action trial, some of which are amenable to being dealt with *in limine*, others not so, but they are all common to the case of every mineworker. These, amongst others, are:

[72.1] whether the legal convictions of the community justify the imposition of delictual liability upon the mining companies for failing to take the necessary steps to prevent the growth and spread of silicosis and TB. Some of the evidence referred to in [61] above would, no doubt, be relevant to this issue;

[72.2] whether the element of causation can be determined by application of the *res ipsa loquitor* rule;

[72.3] whether breaches of the relevant health and safety statutes and regulations constitute grounds for the imposition of strict liability;

[72.4] whether the principle of joint and several liability should apply to multiple mining companies in cases where they employed the same mineworker, though at different times, but all exposing him to excessive levels of silica dust while he was in their respective employ;

[72.5] whether or not the filing of the application for certification interrupts prescription;

[72.6] whether the breach of one or more of the constitutional rights captured in sections 9(4), 10, 11, 12(1)(c), 12(2) and 24 of the Constitution automatically gives cause for a delictual action; and,

[72.7] whether compensatory damages are available to mineworkers under sections 12(1)(c) and/or 24 of the Constitution.

[73] These legal questions are general and applicable to the case of each and every mineworker, and their determination will have a final and determinative effect on the claim of each of them.

The claims of dependants

[74] As is the case with the mineworkers, at this stage the dependant applicants are unable to provide the court with a precise number of dependants that will join in the action, save to say that the number is realistically expected to be in the tens of thousands. These dependants would have to establish the same five elements of the delict as the mineworkers, and they intend to rely on the same evidence as that on which the mineworkers rely to prove some of those elements.

Issues concerning Pulmonary Tuberculosis

[75] The mineworkers contend that there is a correlation between the exposure to high levels of silica dust and the development of TB. The question of whether the dust control measures, or whether the lack thereof, were wrongful and negligent is therefore a question that concerns both the silicosis and TB classes, as well as all the mining companies. The evidence referred to in [59], [61] - [64] and [68] is evidence the entire TB class intends to rely on. Some of the evidence will be presented by members of the TB class.

[76] However, it is common cause that TB is caused by a mycobacterium and not by inhaling silica dust and because of this the mining companies claim that the mineworkers would have great difficulty in proving with certainty that they contracted TB as a result of their exposure to silica dust during their employment at the mines. The mineworkers will not be able to show that “but for” their employment at the mines where they were exposed to excessive levels of silica dust they would not have contracted TB. For this reason they claim that there is no triable issue between them and the

mineworkers that can be resolved at a class action. The problem with this contention is that it ignores altogether the unassailable fact that before this question of causation can be raised there are other factual issues that have to be considered, and those factual issues are identical to some of the issues raised in the determination of the case of the silicosis class. It is this that inseparably conjoins the two classes and would allow for a single class action. It is no doubt true that once these common issues are dispensed with the cases of the two classes may diverge. But when and how that is to be done is a matter only the trial court can determine. It alone can determine how best the interest of justice can be served. The mineworkers have acknowledged that the issue of causation for the TB mineworkers is not an easy one. But, they rely on two recent cases where there was evidential uncertainty as to the direct or actual cause of the harm suffered, and where the courts developed the law by finding that the "but for" test is not the only method of determining the issue of causation. The two cases are *Fairchild v Glenhaven Funeral Services Ltd*[33]*,* and *Lee v Minister for Correctional Services.*[34] The majority judgment in *Lee* held that there was nothing in our law that prevented the court from approaching the question of causation by asking whether the facts proven by the plaintiff show that they were the more probable cause of the harm she suffered. By doing so the CC has expanded our perceptions of causation. What is clear from this development of the law is that the mineworkers are not incapable of proving that there is an inseparable causative link between their contracting TB and the unlawful exposure to excessive levels of silica dust while working on the mines. Their claim is that exposure to high levels of silica dust undermines the immune system which increases the risk of developing TB. The mining companies do not dispute that silicosis is associated with an increased risk of TB. In the light of the development of the law and the common cause

[33] [2002] 3 AllER 305 (HL)
[34] 2013 (2) SA 144 (CC)

facts the mineworkers have more than a fair chance of discharging their onus in this regard. Thus, as this issue of unlawful exposure to excessive levels of silica dust is common to that of the silicosis mineworkers there is no logical or practical reason to deprive the TB mineworkers from being part of the same class action. Accordingly, we find that the mining companies' resistance to combining the TB mineworkers' case with that of the silicosis mineworkers is without merit.

Are there conflicts of interests on the common issues?

[77] In any class action it is inevitable that there will be conflicts of interests between class members. This is borne out by the fact that ultimately each class member must prove his claim in its entirety if he is to succeed. However we have not been alerted to any, nor can it be said that the aforementioned general factual evidence, or the general questions of law, embody any conflicts of interest between the individual class members. Hence, a certification of the class action would translate into the following: once the common issues are determined, and assuming they favour the mineworkers' case, then each mineworker would have to develop the rest of his case on its own facts. In other words, even after the common issues are dealt with and finalised there nevertheless remains the issue of each mineworker having to prove his own case. It follows axiomatically that the stage when each mineworker would have to prove any outstanding aspects of his case, particularly those aspects peculiar to his own case, such as for example, the amount of the damages he sustained, would have to be the final stage of the class action.

[78] It is also conceivable that before that stage is reached, and after the issues common to all the mineworkers have been dealt with, there remain certain issues common to only some mineworkers. This would best be described as issues pertaining to a sub-class. Depending on how the overall general common issues are determined there could be more than one sub-class that may be identified by the trial court. Whether it will be necessary to determine the issues pertaining to each sub-class before the final stage (of each individual mineworker proving his loss) are reached is a matter for the trial court. The presiding judge would be completely at liberty to determine how best to conduct the trial once the overall common issues had been determined.

[79] The mining companies, in particular Harmony[35] and AngloGold, point out that to the extent that conditions in one mine may have been worse than those in other mines the interests of the mineworkers employed in the former mine may conflict with those of the other mines. The fact that conditions in one mine may have been better or worse than in other mines does not detract and distract from the fact that there are sufficient common issues of fact and law that allow for, at least at the first stage, a single proceeding to be held where evidence and argument common to all the mines is entertained. In our view, there can be no significant conflict of interest while these common issues and evidence are being dealt with.

[80] AngloGold also points out that since a single mineworker is bound by the processes that would be set in motion in the class action trial he would, until the final stage is reached, be precluded from settling his case on his own. Accordingly,

[35] The reference to Harmony includes Harmony Gold Mining Company Ltd (the first respondent) as well as its subsidiaries, which are: Evander Gold Mines Ltd (second respondent), Randfontein Estates Ltd (fourth respondent), Armgold/Harmony Freegold Joint Venture (Pty) Ltd (fifth respondent), Avgold Ltd (sixth respondent), Unisel Gold Mines Ltd (seventh respondent), Lorraine Gold Mines Ltd (eighth respondent) and African Rainbow Minerals Gold Ltd (thirty-second respondent).

AngloGold contends that his interest conflicts with that of the rest of the mineworkers. This contention forgets that the mineworkers are calling for the class action to be held over two stages or conducted in two phases.[36]

[81] The first would be an opt-out stage and the second one an opt-in one. During the first stage all the common issues can be addressed and assuming the findings on these issues are favourable to the mineworkers then only would the opt-in phase take effect. As this opt-in phase commences the individual mineworker would have an opportunity to refuse to be part of the class action. Hence, the potential conflict of interest AngloGold draws attention to is mitigated by this election afforded to the mineworker. Of course, once he opts-in then he would have to accept that any settlement that is concluded would be one that includes all the mineworkers, including himself. This is the price he pays, or the benefit he receives, by being part of the class action.

[82] In any event, should there be any conflicts of interest that have not been catered for or addressed in the settlement reached these can be brought to the attention of the court which will make a determination on the issue. In terms of the contingency fee agreements, which we address later in this judgment, any settlement reached on behalf of the mineworkers will have to be approved by the court. Even if the contingency fee agreements were silent on this issue, we hold that all class actions that are certified should be on the condition that any settlement agreement reached by the class representatives on behalf of the entire class must be approved by the court in order to be valid. This provides a moment for any conflicts of interest issues to be dealt with by the court before the settlement agreement is approved and implemented.

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[36] See [116] – [125] below

[83] Furthermore, as we show below, the evidence demonstrates that the large majority of the mineworkers are incapable of litigating on their own[37]. Until they are able to do so, there is nothing for them to settle. Accordingly, we are unconvinced by the arguments that the class action should not be certified because it inherently bears scope for conflicts of interest between mineworkers who want to settle and those who don't.

The common issues in the class actions may not finally determine each mineworker's case.

[84] It is obvious that not all the elements of the delictual action will be finalised once the common issues have been determined. We know for instance that as each mineworker's damages are unique to that mineworker, these will have to be individually determined. The same applies to the mineworkers' dependants' cases. The mineworkers are acutely aware of this reality.

[85] This fact was repeatedly highlighted by the mining companies in their written and their oral submissions. At one stage during the oral submissions there was a confusion as to whether this meant that even if the common issues were determined in favour of the mineworkers there would, nevertheless, be a need for a summons to be served by each individual mineworker against a respective mining company, or mining companies if more than one is to be held accountable. We believe that this perception of what might happen to the individual claims once the common evidence on some of the disputed facts is received and an appropriate finding is made, and once the common

[37] See [100] - [108] below

issues are determined, is misconceived. It is based on speculation, which no doubt is premature. We have no clue as to what facts will be disputed and what will be agreed upon after the pleadings and the pre-trial processes are complete. What we know, thus far, is that there are sufficient disputed facts common to the claims of all the mineworkers, and that the determination of these disputed facts can only be enhanced by a single hearing of the evidence common to all the claims. We also know that there are issues common to all the claims that can be determined at a single hearing, and this can be done at the initial stage of the proceedings. That is all we know.

[86] The rest will have to be left to the trial court as that court would not be hamstrung by the same information deficit that besets this court. The trial court will, no doubt, be tasked with managing the process once the class action is certified. Importantly, while the trial court is seized with the matter the mining companies will have pleaded their cases, the pre-trial processes that are available in terms of the rules of court will be finalised and that court, using its powers in terms of s 173 of the Constitution, the various rules of court and practice directives, will be able to decide on the route(s) best suited to resolve the manifold disputes that are bound to surface. It can only do that once the issues have been crystallised by the pleadings. That court has significant powers to manage the proceedings in the interests of justice. It is, furthermore, within the wit of that court to determine whether sub-classes should be formed and for the proceedings to be arranged in such a manner so as to do justice between the parties. It would be inappropriate, if not impossible, for this court, which is only concerned with certification of the class action, to plot the best route forward for the trial court, or to identify any possible sub-classes for the trial court. This court does not have the benefit of the pleas of the parties or the outcome of the pre-trial processes. Sight must never be

lost of the fact that a certifying court cannot pre-determine for the trial court what should happen at the trial. In our view, a certifying court doing so would be exceeding its remit.

[87] A very important consideration to be taken into account is that even before the pre-trial processes are finalised, the practice directives of this court allow for the case to be judicially managed so that it is trial-ready. If required and if it is in the interests of justice, there is no reason why a relevant paragraph in the practice directive should not be invoked.

[88] It must not be forgotten that the mineworkers have asked for a certification that allows for the adoption of a bifurcated process. While we discuss this in more detail below, we note here that the second stage of this bifurcated process involves the invocation of the opt-in method of identifying the total number of mineworkers who form part of the class action. This means that at the conclusion of the opt-in process the names and details of all the mineworkers who claim rights of membership to the classes will be known. There will be no need for them to issue summonses. The mining companies are already before court. All they will then need to know is who exactly the plaintiffs are. The trial court will have to fashion a process for this information to be relayed to all of them. As we say above, the trial court is more than capable of doing so.

[89] Hence, the fact that the determination of common issues in favour of the mineworkers will not finalise each mineworker's case (or that of his dependant(s)) is no bar to certifying the class action. A certification is not dependent on each mineworker's case being fully and finally determined once the common issues are determined in favour of the mineworkers. As long as it can be shown that determination of the

common issues will advance the cases of the individual mineworkers substantially, a certification of the intended class action would be justified and would be in the interests of justice. At the same time it cannot be overlooked that the cases of all mineworkers could very well be finalised if the trial court were to find against the mineworkers on one or more of the common issues. This could happen if, for example, an issue such as prescription is determined in favour of the mining companies. In this scenario, the entire cases of all the mineworkers, or of a substantial number of mineworkers, could be finalised. This possibility on its own bears significant weight in favour of certifying the class action.

Conclusion on commonality

[90] All the mining companies are accused of having committed the same wrongs – failing in their duties to protect the health of their employees, the mineworkers, when they were legally bound to do so, and as a result thereof causing them to suffer the same harm – contracting the disease of silicosis or TB. However, sight must not be lost of the fact that this case is different from the usual class action where numerous persons have the same or similar claim against a single defendant arising from a single wrong committed by the defendant. In this case numerous mineworkers have the same claim against one or more of the mining companies simultaneously, and while all their claims are attributable to a single cause, the harm nevertheless occurred at different times and in different circumstances. The mining companies placed heavy emphasis on this latter fact in their opposition to the certification of the class action.

[91] What the mining companies do not gainsay is that all the mineworkers have a similar, albeit not the same, case: that they have all worked in the mines owned,

controlled or advised by one or more of the mining companies; they have all contracted silicosis or TB; that the exposure to silica dust was the sole cause of them contracting silicosis and a major contributing factor to them contracting TB. In other words, all the silicosis mineworkers have a claim (harm suffered at the hands of one or more of the mining companies) attributable to a single cause, even though the harm they are alleged to have suffered may have occurred at different times, in different circumstances and in different mines. At the same time all the TB suffering mineworkers claim that a major, if not sole, cause of their contraction of TB lies in their exposure to silica dust which was prevalent at the mines they worked in.

[92] The mineworkers correctly point out that should the class action not be certified the evidence referred to in [59], [61] – [64] and [68] above would have to be presented in each individual case that may be brought, resulting in it being presented many times over. And, it would be presented by the same witnesses in each of the cases. On the contrary, if the class action were to be certified it would be presented only once. Hence, that constellation of evidence can only be presented in a class action trial. It is neither economical, nor in the case of any individual mineworker affordable, for him to bring it to his trial action were he to sue in his individual capacity.[38] In a class action trial the mining companies will be able to challenge all this evidence once and to the extent that they will bring direct contra evidence this, too, can be done once. The class action trial court will deal with all the evidence once and for all and will make a single finding on the issues arising from this evidence as opposed to many trial courts sitting and hearing the same evidence. It has to be borne in mind that if individual trials were ever to be held and evidence repeatedly presented in each of the cases, the findings on each case

[38] See [100] – [108] below

remain case-specific and are not binding on any subsequent case, even though the subsequent case draws on much of the same evidence as the previous one. It goes without saying that there is always the problem of different courts hearing the same evidence but coming to different conclusions or, to put it differently, making different and even mutually contradictory findings. This is as untenable as it is uneconomical. Thus, if jurisprudential coherence and integrity are to be maintained, which in the interests of the rule of law they must be, then the evidence can only be presented in a class action hearing. In other words, the evidence is only truly digestible in a class action hearing.

[93] Simultaneously, most, if not all, the mining companies indicate that they intend to raise the same defences, such as for example, the voluntary acceptance of risk by the mineworkers, and/or the claims by the mineworkers on the whole have prescribed. These, therefore, raise common issues or pose common questions best dealt with in a class action hearing.

[94] The approach adopted by the Canadian Supreme Court in *Vivendi Canada Inc v Michel Dell' Aniello* is instructive. There the court held:

> "the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members."[39]

[95] This is particularly so because:

> "the underlying (commonality) question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the

[39] [2014] R.C.S 1 at [46]

> common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.[40]

[96] In *Vivendi* the court noted with reference to similar cases that an issue will be considered common if addressing it enables all the claims to move forward. It need not be determinative of the final resolution of the case. It is sufficient that it allows the claims to move forward without duplication of the judicial analysis. This however does not preclude a class action suit.

[97] The approach in *Vivendi*, in our view, is correct for it ensures that the interests of justice predominate.

[98] Thus, in our case the class action would not only be to the benefit of the mineworkers but also to that of the mining companies which raise defences that are common to all or most of the mineworkers. These defences would be determined once and would enjoy the status of finality. At the same time, the court would be saved the inconvenience of dealing with more than one case and hearing the same evidence on the same issue. Thus, it would enhance judicial economy. Further, it would prevent the potential harm to judicial integrity caused by various courts hearing the same evidence and producing conflicting decisions from that evidence.

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[40] *Western Canadian Shopping Centres Inc v Dutton* **[**2001] 2 R.C.S. 534, at [39]; See also, *Rumley v British Columbia* [2001] 3 R.C.S. 184, at [32]

[99] Thus, we reiterate that in our judgment the receipt of the above evidence common to all the claims of the mineworkers and the determination of the issues identified above will most certainly move the litigation forward. It is accordingly in the interests of justice that they be dealt with in a single class action hearing.

There is no realistic alternative to class action

[100] The mineworkers have urged the court to consider that, in the context of this case, there is, for most victims of silicosis and TB, no realistic alternative to class action. For them, it is said, it is class action or no action at all. Class action is the only realistic option open to the mineworkers and their dependants. It is the only way they would be able to realise their constitutional right of access to court bearing in mind that they are poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are continually battling the effects of two extremely debilitating diseases. This is manifest in the following uncontested evidence of Spoor:

> *"...*It is not disputed that the majority of the class members are impoverished rural people, many of whom are in poor health, who are spread across the sub-continent and who have very limited access to the civil justice system. The very large proportion of class members who were migrant workers from Mozambique, Malawi, Lesotho and Swaziland, probably have no access to the South African justice system at all.
>
> Litigating on behalf of claimants located in remote rural areas and in neighbouring countries is particularly difficult and expensive. Communication is difficult and expensive. In many instances letters and notices must be delivered by hand, travel to and from these remote areas is slow, expensive and often unreliable. There are few if any local correspondent attorneys to rely upon and either the attorney must travel to see the client or vice versa. A simple matter such as arranging for a medical examination can take days to organize and involve claimants travelling hundreds of kilometres. All of these costs must be borne by the client (which is impossible), or they must be borne by the attorney."

[101] While the factual matrix of the position of most mineworkers is not seriously disputed by any of the mining companies, they simply deny that class action is the only viable option. They do so without advancing an alternative option that will guarantee

access to justice for the mineworkers. The mining companies argue, in the main, that the class action of the magnitude sought by the mineworkers will be unmanageable.

[102] The mineworkers accuse the mining companies of not acting in good faith. They also accuse them of doing all to escape justice. The mining companies failed to dispute the claim, or present credible evidence to doubt it.

[103] They know, claim the mineworkers, that if the class action is not authorised that most of the mineworkers and their families will not be able to access justice. It was not disputed that the majority of mineworkers have little to no access to the South African justice system as they are all impoverished or indigent and are living in the rural areas of South Africa, Mozambique, Malawi, Lesotho and Swaziland, and are in poor health. They form part of the *"(m)illions of people (that) are living in deplorable conditions and in great poverty*"[41] in this country and in the neighbouring states.

[104] We have to assume, for present purposes, that the mining companies violated their constitutional, statutory and common law rights as at this stage the mineworkers have made out a *prima facie* case in this regard. That being so, the vast majority of them who cannot sue individually would have to live with the fact that the law, with all its promises, affords them no remedy for the pain and suffering endured while battling the growth of fibrotic forests in their ever depleting lungs. If the legal system is inaccessible to them then the constitutional gift of a right of access to court,[42] is illusory. It is only

[41] *Soobramoney v Minister of Kwwazulu-Natal* 1998 (1) SA 765 (CC) at [8]. This fact is forcefully reiterated in *Moise v Greater Germiston TLC: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 485 (CC) at [14]

[42] Section 34 of the Constitution which provides:

through access to courts and other independent tribunals that justiciable disputes can lawfully be adjudicated. This makes the right of access to courts one of cardinal importance in our constitutional democracy.[43] If access to court is denied to them because the court refuses to allow them to follow a particular process, such as class action when no other is available, then the rule of law, in our view, is ruptured. Access to court is an ingredient in the making of the rule of law.

[105] This court has already addressed the issue of access to court, albeit in a different context, in a judgment concerning an interlocutory dispute between the mineworkers and one group of mining companies, Gold Fields.[44] There is no need to repeat what is said there save to say that it enjoys the full confidence of the entire court. We know, too, access to courts is fundamental to the survival of our democratic order as well as for the protection of the Constitution itself.[45] It follows that the court should be very careful not to close its doors in the face of the indigent, the weak and the meek, seeking to access justice.

[106] Correspondingly, the mineworkers challenged the mining companies to deny that their vehement opposition to the application for certification is indicative of a determination to prevent the mineworkers from receiving justice, and that they have been single-minded in their desire to escape liability for their alleged pervasive, relentless and intense neglect of the health and safety of the mineworkers. The mining companies failed to meet the challenge. For them there was only one route open to the

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> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[43] *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC) at [17]
[44] *Gold Fields Ltd v Motley Rice LCC* 2015 (4) SA 299 (GJ)
[45] *Mukkadam*, (*supra*), at [29]

mineworkers and that was individual trials for each and every mineworker who claims to have a cause of action.

[107] The mining companies persisted with this submission even though they were not able to deny that this route is only theoretically available to the large majority of the mineworkers. In effect, they do not deny that the mineworkers' right of access to court would be materially limited, if not actually denied, should the class action be refused. No justifiable reason to materially limit or deny the mineworkers their right of access to court in this way was presented to us. We find none.

[108] We hold the view that in the context of this case class action is the only realistic option through which most mineworkers can assert their claims effectively against the mining companies. This is the only avenue to realise the right of access to the courts which is guaranteed for them by the Constitution.

Class action is the most appropriate way to resolve many of the disputes that arise in the case of each mineworker

[109] This issue was raised by the mining companies, particularly Anglo American, which say that even if there are questions of fact and law which are common to claims of all the mineworkers, it is still necessary to ask if these outweigh the non-common issues of fact or law to warrant a certification of the proposed class action. Anglo American refers to this as the "*superiority*" requirement. It was argued by Anglo American that this issue of the most appropriate way to proceed was introduced into our law by *Children's Trust* as a "*requirement*" to be met for a certification application to be successful. As we have stated, according to the CC in *Mukkadam* any "*requirements*"

laid down by *Children's Trust* are no more than factors to be considered by the court in its consideration of what is in the interests of justice.

[110] In any event, we hold that once it has been established that there are sufficient common issues whose determination would advance the cases of all individual mineworkers, then there is no need for the court to engage in the exercise of examining whether these common issues outweigh the non-common ones. In such a case it has to be in the interests of justice that a class action be certified. Articulated differently, once the determination on whether there are sufficient common issues to warrant a class action is made, the question of the most appropriate way to proceed would almost certainly fall away.

[111] Furthermore, we do not read *Children's Trust* to be saying that the court must compare a class action to other available forms of litigation and be satisfied that the most appropriate way to proceed is a class action before it can certify the class action, even though it has found that there are common issues whose determination will advance the case of all individual class members. The SCA only said that there is overlap in these "*requirements*" such that "(f)*or example the composition of the class cannot be determined without considering the nature of the claim. The fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case*"[46], and left it at that. In our view, this does not mean that the SCA found that "*the most appropriate manner in which to proceed*" is a requirement that must be satisfied before the application for certification succeeds.

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[46] *Children's Trust* (*supra*) at [26]

[112] However, to the extent that it may be of benefit to the parties that we address the issue of what the most appropriate way to receive the common evidence and to resolve the common issues identified above is, we now do so.

[113] There was no suggestion by the mining companies of a process other than a class action which would be best suited for the receipt of a substantial amount of very focussed evidence of a common nature and the determination of common legal issues referred to in this judgment.

[114] At the hearing a question was addressed to the mining companies (though posed only when lead counsel for AngloGold was on his feet), as to whether, if there were many individual claims against them, they contemplated bringing any evidence that would be common to all of them. An answer was promised, but never provided. The fact of the matter is that they do not disown the possibility that they would bring evidence common to all the claims of the mineworkers whether in a class action or in numerous individual actions. At the same time, they are unable to say what process is best suited to entertain this evidence, or the common evidence the mineworkers intend to bring to a trial court.

[115] Accordingly, in our view, the institution of hundreds of thousands of separate individual hearings is not more appropriate than the proposed class action to resolve the disputes between the mineworkers and the mining companies. This is so even if the proposed class action only resolves some of the disputes between them. Accordingly,

we conclude that the proposed class action is the most appropriate way for this matter to proceed.

The bifurcated process

[116] The notice of motion envisages a bifurcated process involving two stages. The first stage will involve a hearing on all the common issues. The second stage will deal with all the individual issues.

[117] The first stage may, depending on what is revealed by the pleadings and the pre-trial processes, result in the formation of sub-groups of the two classes and the issues common to those sub-groups would have to be determined before the second stage can commence. With this approach the first stage would not necessarily be a single proceeding and would take some time to complete.

[118] Apart from dividing the class action into two main stages, the mineworkers ask that they be allowed to adopt an opt-out process for the first stage and an opt-in process for the second stage. Should we sanction this, it would mean that the mineworkers would be required to issue two notices to the putative class members – an opt-out notice and an opt-in notice.

[119] The first one would concentrate on alerting the putative class members of the class action, and would give each of them an opportunity to opt-out. The opportunity to opt-out would only be available for a limited time-period. At the end of this period the total number of class members would not be known. It is important to note that any mineworker who does not opt-out will be bound by the findings made by the court during the first stage. Should the mineworkers be blessed with any success at the first stage,

they would then issue a second notice informing the mineworkers of the outcome of the first stage, and would offer each of them the opportunity to opt-in to the class action. Again, the time-period affording the individual mineworker this opportunity would be limited. At the end of this period the total number of class members would be revealed. Any mineworker who fails or refuses to opt-in, will not be bound by the outcome of the second stage. He will still have the right to pursue his claims on his own without losing any of the benefits that would have accrued to him by virtue of the success(es) achieved by the mineworkers as a whole in the first stage. The obvious attraction of this double-barrelled approach is that it ensures that the individual mineworkers are afforded the widest possible choice.

[120] AngloGold opposes the bifurcated approach because, it claims, that it was introduced by the mineworkers to overcome the problems they had with the class action as a whole, which is that there is insufficient commonality between the mineworkers to determine any of the elements of the delictual action.

[121] This complaint is really not directed at the bifurcated process but at the claim of the mineworkers that there is sufficient common evidence and common issues to justify the certification of the class action. AngloGold, like all the other mining companies, is adamant that there is not. It is important not to conflate the issue of commonality with the adoption of a bifurcated process. Once it is found that there are sufficient common issues to warrant a certification then the option of adopting either a single process or a bifurcated one presents itself. The mineworkers have chosen the bifurcated process because they wish to take advantage of the benefits offered by both the opt-in and opt-out options. They claim that it affords the individual mineworker the widest choice

possible when confronted with the question of whether to join the class action or not. And, to the extent that it achieves this, it serves the interests of justice. The claim, in our view, has merit.

[122] Another objection of the mining companies to the combination of the opt-out and opt-in processes is that it fails to eradicate the uncertainty about the precise number of plaintiffs that are suing them. This, they point out, would affect and may even be decisive in, their answer to the question on whether they should persist with their opposition or should settle the claims.

[123] The objection is without merit. The problem of not knowing the total number of class members exists in all class actions where the opt-out system is adopted. This is bound to be factored into the quantum awarded on any settlement amount that the parties may agree on should they choose not to pursue the litigation.

[124] In any event, the mining companies are not completely ignorant of the potential number of mineworkers that will eventually stake a claim against them. These are their former employees or dependants of their former employees. They have, or should have, records of these employees. This is amply demonstrated in the testimonies of the individual mineworkers and the testimonies of the dependants of deceased mineworkers quoted above. In these circumstances, care must be taken not to exaggerate the problem of identifying the total number of actual mineworkers, or dependants of deceased mineworkers, until the litigation is finalised.

[125] It bears remembering that the mining companies may refuse to settle the claims at all, mainly because they remain convinced that the mineworkers will not succeed in proving their cause of action. The decision to settle the claims is dependent as much on

their assessment of the strength of the case of the mineworkers as well as the strength of their defence. In the result, the problem of not knowing beforehand the actual number of mineworkers or dependants of deceased mineworkers is not weighty enough for us to refuse the certification of the proposed class action, or to refuse to sanction the adoption of a bifurcated process.

Suitability of class representatives, legal representatives and their fees

Introduction:

[126] The suitability of the proposed class representatives, the lawyers and their fees are considered against the relevant legal guidelines.

[127] Firstly in ***Children's Trust***, the SCA held that the capability to conduct the litigation has a number of aspects that must be dealt with in the certification application. They include the following:

[127.1] The representatives must have the time, the inclination and the means to procure the evidence necessary to conduct the litigation;

[127.2] The representatives must have the financial means to conduct the litigation or must have the ability to procure finance to conduct it;

[127.3] The representatives must have access to lawyers who have the capacity to run the litigation properly;

[127.4] The representatives have to disclose the basis on which the lawyers are going to be funded;

[127.5] If the litigation is to be funded on a contingency fee basis, details of the funding arrangements must be disclosed to ensure that they do not give rise to a conflict between the lawyers and the members of the class.[47]

[128] Secondly in *Mukkadam* the CC held as follows:

> "…a representative in whose name the class action would be brought must be identified. The interests of the representative must not be in conflict with those of the members of the class. In addition the representative must have the capacity to prosecute the class action, including funds necessary for litigation"[48]

Suitability of Class Representatives:

[129] Upon the institution of these proceedings there were over sixty (60) proposed representatives of the two classes in this application. Some have unfortunately passed on. All the representatives are current and former employees of the mining companies, lawful representatives of estates of deceased mineworkers and dependants of the deceased mineworkers. Some of the mining companies contend that they are not suitable class representatives and have made this an issue.

[130] The role of class representatives in class action proceedings is essentially three-fold: they may be required to have personal knowledge of material facts for the purposes of establishing a *prima facie* case for certification; they are responsible for instructing the legal representatives on the conduct of the litigation on behalf of all class

[47] *Children's Trust* (*supra)* at [47] - [48]
[48] *Mukkadam* (*supra*) at [18]

members; and they play an important role in facilitating communication with other class members throughout the litigation.[49]

[131] There are more than forty five (45) silicosis class representatives, who are geographically dispersed across Lesotho, Eastern Cape and the Free State. The TB class representatives total over twenty five (25), similarly based in various parts of South Africa and the sub-continent. They will facilitate access to and communicate with class members in their areas of reach as the litigation proceeds.

[132] The class representatives have access to various employment and community networks, including trade unions, which the class representatives and their legal representatives will utilise to communicate with class members. These include the *Mineworkers Development Agency*, which has offices in Johannesburg and Maseru, and contacts in other former recruitment centres (Swaziland, Mozambique); the *Swaziland Migrant Mineworkers Association; the Association of Mozambican Mineworkers*; *the Southern African Miners Association*, which is a coalition of unions that represents a network of mineworkers in the Southern Africa region; the local trade unions that are active on the mining companies' mines, in particular, the *National Union of Mineworkers* and *the Association of Mineworkers and Construction Union;* and the *Legal Aid South Africa*, which has access to all the justice centres across South Africa.

[133] It is not disputed that the class representatives are committed to vigorously prosecuting the claims of all mineworkers as well as those of all the dependants of

[49] See Mulheron, (*supra*), at 290 – 300

former mineworkers. They fully appreciate that they owe a duty to all mineworkers as well as to the dependants of mineworkers to provide fair and adequate representation.

[134] The mining companies object to the class representatives being appointed as representative of the two classes. The objection is based on two grounds.

[135] Their first ground is that the representatives do not cover every mine and job type of mineworkers on the mining companies' mines. They say that this will result in no evidence being led relating to the conditions applicable to certain mines or certain jobs. This objection is unfounded. It is premised on the incorrect assumption that only the class representatives will give evidence in the class action. There is no requirement that all the evidence in the action be given only by the appointed class representatives. On the contrary, it is anticipated that the evidence on the common issues at the first stage of the class action will be given by a number of mineworkers some of whom are not part of the group of representatives. There will also be evidence by numerous experts and their evidence will not be specific to a single mining company or even a group of mining companies. The lack of a representative from each mine, therefore, has no bearing on the evidence to be led at the trial.

[136] Their second ground of objection is that, in respect of a few of the mining companies, none of the class representatives has a cause of action against them. This issue was raised by the third respondent, Leslie Gold Mines Ltd ("Leslie"), twentieth respondent, Village, the twenty third respondent, Doornfontein Gold Mining Co. Ltd ("Doornfontien") and the twenty sixth respondent, ERPM. The concern of these mining companies really only relates to the alternative prayer of the applicant mineworkers,

which is that should this court refuse certification of a single class action it should certify a class action for each mining company. It is unnecessary to deal with this objection in the light of the conclusion we reach in this case.

[137] Section 38(c) of the Constitution in any event permits a class action to be brought "*in the interests of*" a class by someone who is not a member of it. As was appropriately noted in *Children's Trust*:

> "In some jurisdictions, such as the United States, it is an express requirement that the representative plaintiff has a claim that is typical of the claims of the class. In Canada and Australia, whilst there is no express requirement of typicality, Professor Mulheron suggests that the jurisprudence of those countries, in regard to commonality, makes that a requirement. That question does not arise in South Africa, because s 38*(c)* of the Constitution expressly contemplates a class action being pursued by 'anyone acting as a member of, *or in the interest of*, a…class'. Accordingly, while the appellants include individuals who may be typical of the class they are seeking to represent, the other appellants may permissibly act in the interest of the class. There is no reason to differentiate in that regard between class actions based on infringement of rights protected under the Bill of Rights and other class actions."[50]

[138] A few of the mining companies contend that differences in the conditions on the various mines will give rise to conflicts of interest between the class representatives and other members of the classes. They allege that where, for example, conditions in one mine were more hazardous than in another, it would be in the interests of mineworkers who work on the latter to highlight the conditions on the former.

[139] The objection, in our view, has no merit. The question whether mine A breached its legal duties owed to its mineworkers is not affected by whether mine B did so. The breach of duties by one mining company is not determined by comparing conditions at one mine with conditions at another. It is no defence to a claim in delict that one defendant conducted itself worse or better than another. The question of the relative

[50] *Children's Trust* at [46]

conditions on different mines is even less relevant in the context of stage one of the class action, where evidence will be led on the common issues pertaining to the constitutional, statutory and common law duties of care of all the mining companies where evidence common to all of them will be received.

[140] AngloGold further contends that there is a conflict of interest among class members, the mineworkers and their attorneys because a class member who has a weak case on negligence, or on causation, or whose claim for damages is relatively small has a stronger incentive to settle than one with a strong case and a large claim for damages.

[141] In virtually any class action there is bound to be some tension between those class members with a strong claim and those with a weak claim. But this is no bar to certification of the class action nor is it a bar to the appointment of the applicants who bring the certification application as representatives of the class. There will inevitably be some trade-offs in a class action. However, the benefits of increased access to justice and judicial economy outweigh the inevitable trade-offs involved in aggregate litigation.[51] It has to be remembered that any member of the class with a particularly strong cause of action involving a large claim and who is capable of pursuing it outside of the class, is entitled to opt out of the class action.

[142] In the result, we are satisfied that the surviving applicant mineworkers are suitable to be appointed as class representatives.

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[51] *Dabbs v Sun Life Ass Co of Canada* (1999), 40 OR (3d) 429 (Gen Div) at [30]. See also *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (SCJ) at [89]

Suitability of Legal Representatives:

[143] The legal team representing the two classes consists of experienced local attorneys and counsel and they have the support services of two United States law firms, Motley Rice LLC and Hausfield LP, who have agreed to fund the litigation as well as act as consultants providing technical and legal advice for the litigation. They have expertise and experience in class action litigation.

[144] The legal team includes three firms of attorneys one of which operates as a non-governmental organisation, the LRC. The LRC has extensive experience in cases concerning public interests as well as cases involving large numbers of people. There are nine counsel representing the mineworkers, five of whom are senior counsel. There cannot be any serious argument against their competence and professionalism.

[145] In appropriate circumstances the court is available to deal with and to supervise any conflict between class members that may arise. Further, any settlement agreement would, in any event, be subject to judicial approval. This is required under the contingency fee agreements concluded between the applicant mineworkers and the legal representatives, and in terms of provisions of the CFA.[52] It is, furthermore, a requirement imposed upon them by this court. And, if deemed necessary, the trial court is at liberty to appoint a curator *ad litem* for the purposes of overseeing any settlement agreement on behalf of all, or part of, the class members.

[52]*Mofokeng v Road Accident Fund and Two Other Cases* [2012] ZAGPJHC 150 at [51], [53] – [54]; See section 4.3 of the CFA. The court's approval of a settlement agreement in a class action is required in foreign jurisdictions, such as, the USA, Canada and Australia. See, Mulheron, (*supra*) at 390 - 407.

[146] We hold that there can be no doubt as to the competence and professionalism of their legal representatives.

Legal representatives and their fees:

[147] The fee sharing arrangements between Spoor and Motley Rice, and between Abrahams and Hausfield, are challenged by the mining companies on a single ground: that they do not comply with the provisions of the CFA. It bears mentioning that the fee agreements have been submitted to the relevant Law Societies for their consideration and they, having considered the agreements, have recorded that they have no objection thereto.

[148] The only objections then that deserve consideration, are those based on the CFA. They have to be considered against the backdrop of four principled positions that have emerged. These are:

[148.1] The mineworkers and their attorneys accept that the position in our law is clear – the fee agreements must comply with the CFA, failing which they are invalid.[53]

[148.2] Should this court consider that the amended contingency fee agreements concluded by the mineworkers are in any way inconsistent with the CFA, the mineworkers and their attorneys, including the consultants, have

[53] *Price Waterhouse Coopers Inc and others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) at [41]; *Mofokeng v Road Accident Fund and Two Other Cases* [2012] ZAGPJHC 150 at [41]; *South African Association of Personal Injury Lawyers v Minister of Justice And Constitutional Development (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GSJ) at [8], [27] and [34]; *De La Guerre v Ronald Bobroff & Partners Inc and Others* [2013] ZAGPPHC 33 at [13] – [14] .The CC and SCA refused leave to appeal in both the *SAAPIL* and in the *De La Guerre* matters, see: *Ronald Bobroff & Partners Inc v De la Guerre* 2014 (3) SA 134 (CC)

placed on record that they are willing to make any adjustments to these agreements that this court may require.

[148.3] The mineworkers and the class members have the protection of section 5 of the CFA, which provides as follows:

> "5 Client may claim review of agreement or fees
> (1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section.
> (2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust."

[148.4] The mineworkers and their legal representatives have no objection to this court appointing a curator *ad litem* to oversee the recovery of fees as well as any deductions made in terms of fee agreements

[149] The applicant mineworkers and their legal representatives have amended their agreements a number of times in order to ensure that there is no conflict between the agreements and the provisions of the CFA. It is these amended agreements that they seek approval for. It is appropriate at this stage to consider whether it is necessary to order amendments to the agreements as the class action has not yet commenced. Amendments can still be effected without offending the fundamental provisions of the CFA and its underlying principles.[54] To decide whether there is any need for ordering that they be amended it is necessary to examine the objections raised by the mining companies.

[54] Consider *Tjatji v Road Accident* 2013 (2) SA 632 at [15], [19] and [23]

[150] Briefly, the complaints raised by most mining companies are:

[150.1] firstly, they contended that the Spoor agreement was impermissible in that it did not indicate that the attorneys have formed a view on prospects of success ("the prospects of success objection");

[150.2] secondly, the agreements failed to provide that the fees charged would be no more than double the ordinary fees of the attorneys or twenty-five percent (25%) of the total amount obtained by the class members, whichever is lesser;

[150.3] thirdly, the agreements failed to define what would constitute success, and what partial success, and failed to indicate what amount would be due in the event of such partial success;

[150.4] fourthly, the *pro forma* agreements impermissibly provided for the attorneys (rather than the class members) to be entitled to receipt of party-and costs; and,

[150.5] fifthly, the *pro forma* agreements failed to provide for counsel to sign the agreements.

[151] The five concerns have been addressed in the replying papers. Amended *pro forma* contingency fees agreements have been presented for approval in terms of the amended paragraph 5.3 of the notice of motion.

[152] With regard to the first objection, s 2(1) of the CFA provides that a legal practitioner may enter into a contingency fees agreement, "*if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings.*" A legal representative will presumably not take the risk inherent in contingency fee arrangements unless s/he holds the view that the client has reasonable prospects of success in the contemplated action. The amended Spoor and the amended Abrahams agreements both specifically spell out that Spoor and Abrahams are of the view that the mineworkers' case enjoys more than reasonable prospects of success. The agreements, therefore, comply with the provisions of the CFA.

[153] Both agreements provide further that if, after further investigations, the relevant attorney determines that the client does not have reasonable prospects of success, the attorney may then cancel the agreement within thirty (30) days of such investigation. In those circumstances, the client would not be liable for any costs to the attorney.

[154] As to the second objection, s 2(2) of the CFA sets out the limits on fees that may be recovered under a contingency fees agreement. It provides for a "*success fee*" which shall not be more than hundred percent (100%) of the attorney's normal fee or, if the claim is sounding in money shall not exceed twenty-five percent (25%) of the total amount awarded to the client excluding the costs awarded to the client.

[155] The amended agreements comply with these limits as follows:

[155.1] The amended Spoor agreement provides

> "6.1 The parties agree that if the CLIENT is successful in the proceedings, the fee (exclusive of disbursements) payable to the ATTORNEY shall be the lesser of-
>
> 6.1.1 200% (TWO-HUNDERD PERCENT) of the ATTORNEY's normal fee; or
>
> 6.1.2 15% (FIFTEEN PERCENT) of the total amount awarded or any amount obtained by the CLIENT in consequence of the proceedings where the CLIENT is successful, plus the party and party cost contribution payable by the other party in such proceedings,
>
> provided that the amount of the fees payable as determined by the application of this clause 6.1 shall not exceed 25% (TWENTY-FIVE PERCENT) of the total amount awarded or any amount obtained by the CLIENT in consequence of the proceedings where the CLIENT is successful.
>
> 6.2 For purposes of calculating the limit in the proviso to clause 6.1, the total award or amount obtained, shall not include any costs awarded."

[155.2] The amended Abrahams agreement provides:

> "It is agreed that, if the Client is successful in proceedings pursued in South Africa, Abrahams Kiewitz shall be entitled to recover disbursement and a success fee equal to the lesser of:
>
> 15.1 TWO HUNDRED PERCENT (200% or double) Abrahams Kiewitz' normal hourly fees as described hereunder, or
>
> 15.2 TWENTY FIVE PERCENT (25%) of the amount awarded to the Client in damages or obtained by the Client in consequence of the proceedings concerned, which amount does not include any costs."

[156] As to the third objection, the amended agreements now define "*success*" and no longer contain any reference to "*partial success*".

[157] As to the fourth objection, the agreements now contain no reference to the attorneys being entitled to payment of party and party costs. The mineworkers entitlement to such costs remains unaffected.

[158] Finally, as to the fifth objection, signature of counsel for the mineworkers is not necessary as counsel for the mineworkers do not act on contingency. The services of counsel do not fall under the contingency fee arrangements unless counsel co-signs the agreement. The amended agreements nevertheless make provision for signature of counsel. It is a provision which was not necessary to include where it is expressly clear that counsel do not act on contingency.

[159] One mining company, ARM, raised three other objections. The first relates to premature termination of mandates. In terms of the agreements, if the mineworkers choose to terminate their mandates and the accompanying contingency agreements before the date on which judgment is given or the matter is settled, the mineworkers become liable for their *pro rata* portion of the fees incurred up to the date of termination. ARM contends that this is inequitable. We do not agree. It is appropriate and equitable that a mineworker who terminates the mandate of the attorney should be liable for costs incurred up to date of such termination. By prematurely terminating the agreement, the mineworker effectively deprives Spoor and Abrahams of the opportunity of recovering their fees and disbursements from his or her award upon the successful conclusion of the case. Yet, at the same time, his success would derive from the work of the attorneys. It is only fair that the attorneys should be entitled to recover their costs from the mineworker who terminates the agreement. Furthermore, the class members are not subject to these arrangements, and need not pay any fees, should they opt-out at the beginning of the proceedings. There is nothing inequitable or inappropriate in the provision in question.

[160] ARM raises a further concern that the combined effect of the Spoor and Abrahams agreements might be that fees of up to fifty percent (50%) of the damages awarded could be claimed as fees as each could claim the maximum of twenty-five percent (25%) in respect of a given class member. The concern does not arise if each class member is to be subject to only the Spoor or the Abrahams contingency fees agreement. There is no need for the mineworker to conclude two agreements, one with Spoor and one with Abrahams. Spoor and Abrahams acknowledge expressly that, if inadvertently a mineworker concluded a separate agreement with each of them they would not both be holding him to the agreement as this would be unlawful and in breach of the CFA. Accordingly, this concern is misinformed.

[161] Finally, ARM raises a concern about the fact that the agreements contemplate that class members will be liable for the fees of the consultants, which would be covered under the rubric of “disbursements.”

[162] The consultants, Motley Rice and Hausfield, are not party to the contingency fees agreements. There is therefore no basis to hold them to the terms of those agreements. The mineworkers are the clients of Spoor and Abrahams. The consultants provide services to Spoor and Abrahams. The cost of their services, quite rightly, are disbursements incurred by Spoor and Abrahams

[163] As for how they are calculated, we are told that the consultants will charge the normal fees they charge in the United States. However, any legitimate concerns regarding their fees are addressed by them and by Spoor and Abrahams in two ways.

[164] Firstly, they have all expressly agreed that the Taxing Master, this court and the relevant Law Society will have jurisdiction over any amounts charged by consultants in respect of their fees. There are, therefore, sufficient safeguards to ensure that the fees charged as disbursements by United States consultants are within reasonable and acceptable professional limits.

[165] Secondly, and more importantly, the contingency fees agreements expressly cap the recovery of any fees payable as disbursements to the consultants together with fees recoverable by Spoor or Abrahams (as the case may be) at twenty-five percent (25%) of the total amount awarded or obtained by the mineworker. In other words, seventy-five percent (75%) of the capital awarded to the mineworker is protected and secured for him. This is no different to a situation where the consultants were made a party to the contingency fee agreements and thus subject to the provisions of the CFA. There can therefore be no legitimate concern of over-recovery by the attorneys from the capital awarded to or obtained by a mineworker

[166] In our view, the objections to the fee agreements are devoid of merit. We reject them.

The Notices

[167] The mineworkers ask that the court sanction the notices annexed to this judgment as B1 and B2. The mining companies oppose this. They claim that the notices are too complicated and inappropriate given that the large majority of the mineworkers are either illiterate or semi-literate. They, however, do not suggest any alternative wording for the notices. It is really difficult to see how the notices can be simplified. They

are brief. They say what needs to be said and no more. They are neutral and objective. They avoid any ambiguity and they will be translated where necessary. They must be seen in context of the existence of the active network of trade union and community-based organisations and associations of former and current mineworkers that we referred to in this judgment. The message in the notices will in all probability be carried with ease to the mineworkers should the process referred to in the order we make below be followed. If, for any reason, the process cannot be adhered to, or if the mineworkers and the mining companies jointly deem it necessary to augment the notices with (an) additional process(es), then they are free to do so by agreement between themselves. If, on the other hand, they are unable to do so then any party is free to call upon this court for further direction or even for an amendment of the order.

[168] In our view, the notices, as they stand, are sufficient and so too are the processes that will be set in motion to advertise them. They are designed to ensure that they are brought to the attention of the maximum number of mineworkers possible.

THE CONDITIONAL COUNTER-APPLICATION BY HARMONY

[169] Simultaneous with its answering papers, Harmony launched a conditional counter-application ("counter-application"). The counter-application is conditional upon this court certifying the class action. In that case, Harmony seeks an order directing the mineworkers to:

[169.1] deliver a report, confirmed under oath by their attorneys listing each envisaged plaintiff in the silicosis and TB class action who may have

instructed legal representatives to institute proceedings on his or her behalf;

[169.2]. furnish copies of any fee agreements, powers of attorney, letters of instructions and/or other mandate documents which may have been signed or authorised by a mineworker;

[169.3] include in their periodic reports envisaged in prayer 9 of the amended notice of motion, a list of all persons who have given or may give notice of a wish to be excluded from membership of any certified class at the first stage of the class action or to be included as members of any certified class at the second stage of the class action, together with copies of all such notices.

[170] Harmony claims that it requires this information in order to determine which claims have prescribed. It also wishes to know the identity of the mineworkers who wish to be included in the second phase.

[171] There is, in our view, no basis for Harmony to be furnished with all this information even before summons has been served. The documents and information that Harmony seeks may be obtained by it, once the action has commenced. It will obtain it by operation of the Uniform Rules of Court.

[172] All the mining companies, including Harmony, will further have access to all reports which the mineworkers file with the court on a quarterly basis as envisaged in

the application and the order. Harmony has not explained why it requires such information prior to the issuing of the class action and why the rules and procedures are not sufficient to safeguard any legitimate interest it may have in acquiring such information and documents. It is significant that none of the other mining companies seek this information in advance.

[173] As already explained, the applicants seek to proceed with class action in two stages (the bifurcated process), namely the opt-out stage and the opt-in stage. It is a peculiarity of the opt-out process that the class action defendant(s) do not know the number and identity of the potential plaintiffs. The identity of class members will be revealed at the opt-in stage. This however, does not deprive them of the opportunity to raise whatever defence they wish to raise. The defence can be raised at the appropriate stage and can also be brought by way of an amendment to the plea.

[174] The counter-application thus effectively seeks to anticipate the opt-in stage, or is a pre-discovery fishing expedition. There is neither a right nor a legitimate interest that Harmony seeks to enforce or protect that would justify the granting of the orders it seeks. Accordingly, Harmony is not entitled to the relief it seeks at this stage.

[175] In the result the counter-application stands to be dismissed with costs.

TRANSMISSIBILITY OF GENERAL DAMAGES

[176] The mineworkers ask that this court declare that any claim for general damages that a mineworker brings, or may wish to bring, against any of the mining companies is transmissible to his estate should he die before the litigation reaches the stage of *litis*

contestatio. In order to make sense of this relief it is necessary to explore the historical roots and development of our law of delict regarding the transmissibility of claims for damages (whether general or specific) to the heirs or the estate of the deceased. To begin with it is necessary to have regard to the historical development of the concept of *litis contestatio* commencing with the early Roman law.

The Roman law

[177] In its earliest period, Roman civil law followed a procedure which was divided into two separate and distinct stages: the first being *in iure* and the second being *in iudicio* or *apud indicem*. The *in iure* stage involved the assertion of a claim before the magistrate, while the *in iudicio* stage concerned the actual hearing and decision of the case by a judge or arbitrator.[55] The *in iure* stage was a preliminary proceeding which determined the validity of the plaintiff's claim.[56] A few centuries later the formulary system was introduced. During the tenure of this system the two stages were effectively kept intact albeit in a modified form. The process commenced with an oral proceeding before a praetor who after hearing from the parties provided a written *formula*, which in essence was the synopsis of the plaintiff's claim and the defendant's defence. The written *formula* was:

> "addressed to the intended judge with instructions on how he was to adjudicate. The available *formulae* were set out in the praetor's Edict and the grant of this formula marked *litis contestatio*.[57]

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[55] J.A.C. Thomas, *Textbook of Roman Law*, (North-Holland Co), 1976, at 70. The description of the system by the learned author demonstrates that the system of arbitration as we know it today is no modern invention. His description reads:

> "Returning to the individual judge, the parties might have agreed upon a name, failing that they could select one from the list (*album*) of qualified persons kept by the magistrate (i.e. praetor); if they could not agree, a name would be chosen by lot from the *album*." (At 76).

Another learned author reminds us that the judge was a private individual and not always a lawyer. (P van Wermelo, *An Introduction to the Principles of Roman Civil law*, 1976 (Juta) at para 734)

[56] Peter Spiller, *A Manual of Roman law*, 1985, (Butterworth Publishers (Pty. Ltd), at 8

[57] J.A.C Thomas, *supra*, at 84

[178] By virtue of his (it was always a male, patriarchy reigned without challenge in that era) authority to issue the written *formulae* (his "*processual powers*", in the words of the learned author J A C Thomas) the praetor was able to assume immense power over the matter. Apart from defining the issue and issuing instructions in the *formula* to the judge, he was empowered to refuse the *formula* and if he did so the matter could not proceed. His discretion in this regard was wide. Of importance, for the moment at least, is that the stage of *litis contestatio* was reached when the *formula* was obtained or delivered by the plaintiff to the defendant. In sum, the stage of *litis contestatio* was reached once the parties had identified their respective cases (the plaintiff stated the basis of his claim, the defendant identified his defence and the praetor issued the instruction to the *iudex*). Once the stage of *litis contestatio* was reached, there was no turning back for either party. They were bound by the terms set out in the *formula* and had to prove their respective cases on those terms alone. If either party was not able to do so, he would lose his case. Moreover, once *litis contestatio* was reached the plaintiff was not able to re-enact the same claim.[58] Any attempt on the part of the plaintiff to do so would be an invitation to the defendant to meet it with an exception (*exceptiones*) that would be decisive, as the praetor would have to refuse to issue the *formula* the second time.

[179] In the quest to draw meaning on the effect of *litis contestatio* the early recorders of the Roman law observed:

> "If the suggested theoretical basis of jurisdiction in the agreement of the parties and the arbitral concept of litigation be accepted, the preparation and issue of the *formula* was not unlike the making of a contract between the parties, as it were, settling the terms of which they submitted themselves to the decision of the judge

[58] This was in terms of the rule *ne bis in idem* (no one can try the same case twice or no legal action can be instituted twice for the same cause of action), *See:* P Van Wermelo, (*supra*) at para 733

> in lieu of their erstwhile rights. The effects of *litis contestatio* were accordingly of great importance." [59]

[180] The most important aspects of the stage of *litis contestatio* in the Roman law was that it was arrived at as a result of the praetor's (a third party) intervention and was fixed (or "*frozen*", in the words of some learned authors) once the praetor had identified the issues that were to be taken to the judge. The parties were not able to alter or amend the *formula,* and the judge was bound to determine the matter solely on the basis of what was stated in the *formula.*[60] Apart from "*freezing*" the rights of the parties, the *formula* went further and prescribed to the judge what issues he should make a determination on. In these circumstances, the attempt to make sense of the meaning of the concept, *litis contestatio*, by way of analogy to a binding contract, and to refer to the rights of the parties as being "*frozen*" upon the arrival of the stage *litis contestatio*[61], is logical and understandable.

[181] Roman law prevented the transmissibility of certain claims to or against heirs of a deceased but allowed the transmissibility of others. In general, claims *in rem* could be transmitted, while those *in personam* could not. Thus, for example, a claim for an *iniuriarum* (*actio iniuriarum* – a claim for relief pursuant to a wrongful and intentional damage to personality) was not transmissible to or against the heirs. However, there was an exception to this rule. It was this: regardless of whether the claim was *in rem* or *in personam*, once *litis contestatio* had taken place "*the death of either party in no way prevented the continuation of proceedings by or against his heir.*"[62] Thus, as far back as

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[59] J. A. C. Thomas (*supra*) at 104, see the authorities cited therein.
[60] *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608A-B
[61] *Litis contestatio* was then, and still is now, dealt with in the literature and case-law as "*a legal concept*" as well as "*a stage in the legal process*"
[62] J. A. C. Thomas (*supra*) at 92.

the period when the *formulary system* was in place, the Roman law allowed for the transmissibility of claims for or against heirs of a deceased litigant once the stage of *litis contestatio* had been reached and such transmissibility was not affected by the nature of the claim.

The Roman-Dutch law and the modern-day South African common law

[182] The learning and experience of the Roman law was neither lost nor dispensed with upon the collapse of the Roman Empire. Instead, it was adopted by other legal systems that followed, not least the Roman-Dutch system that came many centuries later. The concept of *litis contestatio,* the rule prohibiting the transmissibility of certain types of claims as well as its exception was embraced by the Roman-Dutch law without more. This is recorded in a case reported in 1880 dealing with a claim brought in terms of the *actio iniuriarum*,[63] namely *Executors of Meyer v Gericke*,[64] which was a claim for damages incurred as a result of a defamation. There the court observed:

> "This case raises for the first time so far as reported cases go, the important question, at what stage of an action for defamation or other personal injury the death of one of the parties puts an end to the action. It is admitted on both sides that such an action cannot be instituted after the death of the person who was guilty of the defamation or other injury, or after the death of the person defamed or injured. It is further admitted that such an action, even if instituted during the lifetime of both parties, cannot be continued after the death of either party unless the stage known as *litis constestatio* has been reached. The authorities fully support these admissions. It would indeed appear from a passage in *Grotius* (Introduction, 3, 35, 5) that that eminent writer was of opinion that the heirs of the party committing an injury are only liable if case sentence has been pronounced against the party in his lifetime, but *Groenewegen*, in his note to that passage, enlarges the liability of the heirs, by extending it to those cases in which, as he expresses it in the vernacular, "*de zake voldongen is*." This expression appears to be the Dutch equivalent for the *litis contestatio* of the Romans, for *Groenewegen* quotes a case decide in the Supreme Court of Friesland on the

[63] The *Actio iniuriarum* is basically a claim in delict aimed at protecting the dignity, reputation or personal integrity of an individual
[64] 1880 Foord 14

> 22nd of May, 1604, where it was held that no action for personal injury can be brought against the heirs of the guilty party unless the *litis contestatio* had taken place in his lifetime."[65]

[183] In that case, as the allegedly defamed plaintiff had died pre-*litis contestatio* the court held that so did his claim and refused to allow the executor of his estate to pursue the claim. The outcome was a result of a pure and simple application of the rule established in the Roman law. Bearing in mind that the Roman system of intervention by a praetor in the first stage of a case was not followed in the Roman-Dutch system, the court there held that in the Roman-Dutch system the stage of *litis contestatio* would be reached when pleadings were closed. The next reported case that had cause to focus on this issue was *Pienaar and Marais v Pretoria Printing Works Ltd and Others.*[66] It was a decision of a full-court constituting Innes CJ, and Smith and Mason JJ. The full-court there took the view that as the rule as well as the exception to the rule was embedded into the fabric of our common law by the Roman-Dutch authorities all that was needed in the case before them was one of application of the rule or its exception to the facts before them. Hence, the court found:

> "If the present firm has not been libelled, it cannot sue for damages save as successor to the old one, and as being entitled by way of cession to its rights in this respect. And it cannot possibly set up such a case, because a personal action for libel cannot be ceded. It perishes on the death of the person libelled, and it does not even pass to his heirs unless the action had been commenced before his death and had reached the stage of *litis contestatio*. That was so decided in *Meyer's Executors v Gericke*, (Foord 14), in accordance with the weight of Roman-Dutch authority."[67]

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[65] *Id.*at 15 - 16
[66] 1906 T.S. 654
[67] *Id*. at 656

[184] All subsequent cases followed this approach.[68] The courts took for granted the correctness of the doctrine and adhered to it. The position to date, therefore, remains unchanged from that expressed in 1880 in *Executors of Meyer.* As a result, the position of our modern common law, as well as that of the early Roman-Dutch law is really a facsimile of the early Roman law. However, social, economic and legal conditions that prevail today are very different from those that prevailed during the tenure of the early Roman law. One of the most important expressions of that difference is to be found in answer to the question as to when the stage of *litis contestatio* is reached. We know that in the Roman law it was when the praetor issued the *formula* and in the early Roman-Dutch law (which was implanted, without more, into our modern common law) the stage was reached when pleadings were closed. But the issue as to when pleadings are closed in our present legal system is a lot more complicated than it ever was under both the Roman law or the early Roman-Dutch law and this is an issue that is of immense significance in this case. Hence, the transplantation of the rule and its exception into our law produced its own complications and challenges.

[185] But before looking into these it is necessary to scan this issue in the context of the distinction (drawn in the Roman law and carried over into the modern-day law of delict) between a claim for patrimonial loss and one for a non-patrimonial damage. A claim for non-patrimonial damages, also referred to as general damages, is a claim for the personal injury sustained in the form of pain and suffering, loss of amenities of life and for disfigurement. But this claim does not fall within the scope of the *lex Aquilia.*[69]

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[68] *Jankowiak and Ano v Parity Insurance Co. (Pty) Ltd* 1963 (2) SA 286 (W); *Government of the RSA v Ngubane* 1972 (2) SA 601 (A)

[69] The *lex aquilia* was developed around 286 BC by the Romans. It was an action that was penal in nature and was designed to compensate a person for the damage done to his property. It is not uncommon to refer to it as "*the delict of damnum iniuria datum*" – J C Van der Walt, *Delict Principles and Cases*, Butterworths, 1979 at para 7

Roman law initially did not avail the *aquilian* remedy to a freeman for he "*did not own his body.*" [70] This was changed by the praetors who allowed the freeman to sue for the recovery of patrimonial loss incurred (such as medical expenses) by the wrongful and negligent conduct of another, but not for any intangible harm (non-patrimonial loss, or general damages, in today's terms) such as wounded feelings or pain and suffering caused to the freeman, as no price could be placed on it since, "*the body of a freeman is not susceptible of valuation.*"[71] The Roman-Dutch law, however, provided for the payment of compensation to any man who suffered harm in the form of wounded feeling, pain and suffering, disfigurement or loss of amenities of life, but it did so not by extending the scope of the *lex Aquilia* but rather by establishing an altogether self-standing independent remedy, an "*actio sui generis.*"[72] In essence then:

> "And we at once faced with the fact that it was essential to a claim under the *Lex Aquilia* that there should have been actual *damnum* in the sense of loss to the property of the injured person by the act complained of. In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between that *universitas* as it was after the act of damage, and as it would have been if the act had not been committed. Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland. As pointed out by Professor *de Villiers* the compensation recoverable under the *Lex Aquilia* was only for patrimonial damages, that is, loss in respect of property, business or prospective gains. He draws attention to the clear cut distinction between actions of *injuria* (where intent was of the essence) and actions founded on *culpa* alone. In the former case compensation might be awarded by way of satisfaction for injured feelings. In the latter all that could be claimed was

[70] *Guardian National Insurance Co. Ltd. v Van Gool N.O.* 1992 (4) SA 61 (A) at 63H

[71] Id. at 64E. See also: *Hoffa N.O. v S.A. Mutual Fire & General Insurance Co*. 1965 (2) SA 944 (C) at 950D-E. This principle has been captured in a lecture of Professor J.C. de Wet which was approvingly quoted by Holmes JA. It reads:

> "In Roman law, as we have seen, a free man, who had been wounded, could claim medical expenses and loss of earnings from the male-factor, but no claim was allowed for scars and disfigurement, the reason being that the body of a free man had no monetary value. This rule was retained in medieval secular law and also in the Canon law. Our Roman-Dutch institutional writers are, however, unanimous in allowing the victim of bodily injuries not only his medical expenses and loss of earnings but also a claim for pain and suffering (dolor) and disfigurement (cicatrix, deformitas).
>
> That a claim for pain and disfigurement was an anomaly in a system which was supposed to know only 'actiones reipersecutoriae' cannot be contradicted. Grotius realised this and admits that pain and disfigurement (are) really not capable of compensation." (*Government of R.S.A v Ngubane* 1972 (2) SA 601 (A) at 606B-C)

[72] *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 595H. A most illuminating exposition of the development of this legal rule is provided by Van Winsen J in *Hoffa* (*supra*) at 950E – 952F

> patrimonial damage, which had to be explicitly and specifically proved. The difference between the two forms of relief is emphasised by *Voet,* who states that where one and the same act gives ground for both actions, the receiving of satisfaction for the *injuria* does not bar the claim for patrimonial loss resulting from the *culpa.* The award of compensation for physical pain caused to a person injured through negligence, which was recognised by the law of Holland, constitutes a notable exception to the rule in question."[73]

[186] While the claim for pain and suffering, loss of amenities and disfigurement (non-patrimonial damage) is not part of the *Aquilian* action it is, nevertheless, brought simultaneously with an *Aquilian* action because, as Voet recognised, the facts relied upon to establish it are the same as those relied upon to claim patrimonial loss in terms of the *lex Aquilia*. It is "*one and the same act* (that) *gives ground to both actions.*" Nevertheless, unlike a claim for patrimonial damages, a claim for non-patrimonial damages has no scientifically calculable economic or monetary value, and as we saw above, for the Romans this problem was insoluble ("*the body of a freeman is not susceptible of valuation*"). Since the Roman-Dutch authorities provided for this claim, the law is required to do its best by placing a monetary value in the quest of providing satisfaction, or solace, to the plaintiff. It does so by granting the plaintiff a once-off *solatium* as compensation, or reparation for the wrong suffered.

[187] As we said above, the common law does not entitle a dependant of a deceased person, or an estate (through the executor) of a deceased person, to pursue a claim for general damages, future loss of earnings, or future medical expenses. However, the dependants of the deceased claimant can pursue claims for loss of support and actual diminution of their patrimony resulting from the wrongful conduct of the defendant, and which wrongful conduct caused the death of their breadwinner. For the dependant(s) this would include loss of support due to the death of the breadwinner as well as

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[73] *Union Government (Minister of Railways and Harbours) v Warneke* 1911 (AD) 657 at 665 - 666 (references omitted)

medical and funeral expenses incurred by that dependant(s). For the estate it would only cover damage to property as well as medical and funeral expenses incurred by the deceased and the estate:

> "The executor can sue for medical expenses incurred as a result of the fatal injuries suffered by the deceased before his death and which, on his death, vested in his estate. The executor can sue for damage to property which had been damaged or destroyed during the deceased's lifetime. The executor can recover the funeral expenses of the deceased; the reason for that is less clear, but the rule is an ancient one and is, no doubt, based on the fact that the burial of the deceased is an expense necessarily defrayed by the executor." [74]

[188] In other words, the executor can sue for any patrimonial loss the deceased suffered before his death as well as the funeral expenses which is a patrimonial loss suffered after death, and the dependants can sue for any patrimonial loss they themselves will suffer as a result of the premature death of their financial provider or breadwinner. Neither can sue for any personal injury such as pain and suffering, loss of amenities of life or disfigurement (general damages) the deceased suffered prior to his death. There is, however, an exception to the rule, which is that where the deceased had already commenced action and the claim had reached the stage of *litis contestatio* before his/her death, and the claim is continued by the executor of his/her estate, the claim for the personal injuries does not abate. In such a case, the law allows for the claim for such general damages to be transmitted to the estate. The basis for the exception is exactly the same as that under the early Roman law, which is that the rights of the plaintiff were defined and "*frozen*", at the very moment the stage of *litis contestatio* was reached. In such a case, so goes the logic, the executor of the estate has merely stepped into the shoes of the deceased. She has not acquired a claim in her own right. However, the issue as to when the stage of *litis contestatio* is reached in the modern day law is a complicated one. It is reached when pleadings are closed. But this

[74] *Lockhat's Estate v North British & Mercantile Insurance Co. Ltd.* 1959 (3) SA 296 (A) at 304B-C

is no simple matter. Guidance as to when pleadings are closed can be found in Rule 29 of the Uniform Rules of Court. It advises that pleadings are closed if all parties to the case have joined issue and there are no longer any new or further pleadings, or the time period for the filing of a replication has expired, or the parties have agreed in writing that the pleadings have closed and have filed their agreement with the registrar of the court, or the court, on application, has declared that the pleadings are closed. At that point the pleadings are treated as being closed and the proceedings are said to have reached the stage of *litis contestatio*. In everyday practice, they are normally closed as soon as the period for the filing of the replication has expired, for at that stage the issues have become identified and parties are able to commence preparation for battle. However, it is important to bear in mind that, as annoying as it can be, the law often places a caveat to its pronouncements. In this case it is this: pleadings, though closed, will be re-opened should an amendment be effected, or should the parties agree to alter the pleadings. Amendments to pleadings can be brought by any party any time before judgment is delivered.[75] Thus, as the law stands, a claim for non-patrimonial loss can be transmitted to the estate of the deceased claimant should his/her death occur after pleadings are closed. In such a case, the executor of the estate would take his/her place as the plaintiff, but should any party re-open the pleadings by amending its case or should the parties agree to alter the pleadings then the claim for non-patrimonial loss cannot be transmitted, even if by that stage his/her place had already been taken by the estate, because by this time "*the initial situation of litis contestatio falls away and is only*

[75] Rule 28 of the Uniform Rules of Court. Courts have, over the years, identified the principles underlying the granting of an application for an amendment to a pleading. These have been succinctly summarised in *Commercial Union Assurance Co Ltd. V Waymark NO* 1995 (2) SA 73 (Tk) at 77F-I. See also: *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at [9]

restored once the issues have once more been defined in the pleadings or in some other less formal manner." [76]

[189] It can be seen from this that in our system the defendant is afforded a lot more time than was given to a defendant in Roman times to spell out his defence. Furthermore, in our law even when the defendant fails to adhere to the time periods afforded to him to identify his defence he is always given the opportunity to seek condonation for his failure to adhere to those time periods. It follows that in our legal system it takes much longer for the stage of *litis contestatio* to be reached. Further, unlike the old Roman legal process, which consisted of two stages (*in iure* and *in iudicio* or *apud indicem*) ours is a single process which can be a long drawn-out affair. In the Roman legal system the arrival of the stage of *litis contestatio* was a simple and straightforward matter. As we show above, the arrival of the stage of *litis contestatio* now is anything but a simple and straight forward matter. The procedural developments that have taken place in our modern law have ensured that our legal process is significantly distinct and different from that which prevailed during the Roman times. A difference of fundamental significance is that in our law pleadings can be re-opened at any stage before judgment. This means that it can never be said with absolute certainty in any case that the stage of *litis contestatio* has been reached at a specific time. Unsurprisingly, in these circumstances, Holmes JA was prompted to refer to it as the "*alchemy of litis contestatio*"[77]

[190] Furthermore, we allow far greater time for the defendant to deliver his plea than was allowed during the Roman law and in this regard, it bears remembering that failure

[76] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [15]
[77] *Ngubane* (*supra*), at 608C

to adhere to the time-periods as set out in the rules of court for the delivery of a plea is rarely, if ever, fatal. Accordingly, the probability of a plaintiff dying before pleadings are closed is significantly higher in our system than it ever was in the Roman legal and the early Roman-Dutch law systems.

[191] To summarise. The reasoning underlying the rule – that the claim for general damages is not transmissible to her estate - is that the general damages are personal to the claimant: neither the dependant(s) nor the estate, suffer any loss or damage from the pain and suffering, the loss of amenities of life and the disfigurement endured by the deceased during her lifetime. Therefore, they can have no claim for the bodily injuries suffered by the deceased. In other words, the claim for general damages abated upon the death of the deceased. They have not abated though if the stage of *litis contestatio* was reached before her death. The position of the common law, therefore, is this: if such a claim is brought and pleadings are closed then the claim is transmissible to the deceased claimant's estate, but if they are not then the claim is not. The fact of the matter is that the common law has failed to keep pace with the procedural developments harvested over the centuries, which have been collated in the rules of court regarding pleadings and amendments thereto.

[192] It is this failing of the common law that the mineworkers turn their attention to. They claim that it has the potential to cause immense injustice, and will certainly cause immense injustice to them and their heirs in this case. They also claim that the common law infringes various provisions in the Bill of Rights.[78] To prevent any further injustice from prevailing they ask that the common law be developed. They ask that it be

[78] See [200] below

developed in such a manner as to allow them to transmit any claim for general damages that accrued as at the date of the launch of the certification application to the estate of any mineworker who passes on after that date, even though his case is a long way from reaching the stage of *litis contestatio*. All the mining companies are opposed to this court developing the common law in the manner suggested by the mineworkers. Apart from two respondents, Harmony and AngloGold, all the mining companies contend that this court should not develop the common law at all. Harmony and AngloGold contend that in the event this court authorises the class action, it should leave this issue for the trial court to determine. They proffer no sound reason as to why that court is in a better position than this one to finalise the issue.

The common law is dynamic, fluid and ever-changing

[193] It is no revelation to say that to remain purposeful and to retain its moral authority the common law should whenever necessary change to meet changing facts and circumstances. This has long been accepted and, as we will shortly show, been applied by our courts. As knowledge or ideas change, and as political, social and economic life progresses, develops and advances with time so should the law. Indeed, on more than one occasion it has done so. This approach is not alien to the Roman or the Roman-Dutch legal systems. It is embedded in the very fabric of the two legal systems. It is on this principled basis that the common law has retained its utility and its moral authority. The principle is also not exclusive to the Roman or Roman-Dutch legal systems. Innes CJ reminded us of this principle and articulated its premise in these terms:

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the Courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision,

> and when they are so important or so radical that they should be left to the Legislature."[79]

[194] This approach was basic and fundamental to the Roman law, as is evidenced by the role of the praetors' *Ius Honorable* remedy. This was recognised more particularly during Justinian's reign where in order to remain relevant to changing social conditions the law underwent some significant changes. And, as observed by Lord Tomlin, this has been true for the Roman-Dutch legal system too:

> "In the first place, the questions to be resolved are questions of Roman-Dutch law. That law is a virile living system, of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society".[80]

[195] More recently, the Appellate Division (now SCA) has reiterated this principle. In *Kommissaris van Binnelande Inkomste v Absa Bank Bpk,* Botha JA pointed out:

> "om met letterknegtige formalisme vas te klou aan stellings in die ou bronne, wat onversoenbaar sou wees met die lewenskragtige ontwikkeling van die reg om te voorsien in die behoeftes van nuwe feitelike situasies".[81]

[196] Accordingly, the need to develop the common law is not a recent phenomenon. It has been recognised and practised for a long time. In the development of the common law so that it remains relevant and purposeful to the needs of society in order for justice to prevail, courts are sometimes required to engage in policymaking, even if only in a very narrow sense of the term.[82] One of the policymaking functions is to ensure that practices which through time have become antiquated and which cause injustice are no longer allowed to stand. History demonstrates that our courts have not evaded their

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[79] *Blower v Van Noorden* 1909 TS 890 at 905

[80] *Pearl Assurance Co.v Union Government* 1934 AD 560 at 563. The judgment is that of the Privy Council; See also, *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 789 and *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 220C-G

[81] 1995 (1) SA 653 (A) at 669F-H

[82] See, Corbett M M, *Aspects of the Role of policy in the evolution of our common law*, (1987) 104 *SALJ* 52 at 54

responsibility to develop the common law in this regard. When necessary, it has embraced the challenge to create new obligations, to create new rights, to remove penalties for certain conducts, to eliminate obstacles posed by old and dated practices and to fashion new remedies.[83] This it has done by taking heed of the ever-changing "*legal convictions of the community*"[84], a concept that is now so deeply ingrained into our law that it infuses all areas of our law.

[197] This is not unique to South Africa. As observed by Lord Goff, this is the position in all common law countries:

> "It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II; it is because of it that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live."[85]

[198] In the common law world it is not unusual for judges to make law as they are from time to time required to do so if justice is to prevail. After all,

> "(t)he common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position."[86]

On this, Lord Hoffmann is more forthright:

> "To say that they [the judges] never change the law is a fiction and to base any practical decision upon such a fiction would indeed be abstract juridical correctitude. But the other question is whether a judicial decision changes the law retrospectively and here the answer is equally clear. It does. It has immediate practical consequence that the unsuccessful party loses, notwithstanding that, in

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[83] A brief but thoroughly digestible read of this development of the common law in South Africa is provided by Corbett M M (*supra*) who went on to become the Chief Justice of this country and whose contribution in developing the common law to meet the changing norms of society is exemplary. Many of his judgments were rich in scholarship and rich in thought.

[84] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A

[85] *Kleinwort Benson Ltd v Lincoln City Council and other appeals* [1998] 4 All ER 513 (HL) at 534g-h

[86] *In Re Spectrum Plus Ltd: National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 41 (HL) at [32]

> the nature of things, the relevant events occurred before the court had changed the law. "[87]

The constitutional imperative to develop the common law

[199] In South Africa this responsibility to reform and refocus the common law in order to keep it "*abreast of current social conditions and expectations*" is entrenched in the Constitution, with the added obligation that the judges do so in a manner that it is consistent with, and gives expression to, the rights articulated in the Bill of Rights. Sub-sections 8(3) and 39(2) of the Constitution explicitly enjoins the court to develop the common law to the extent that it is necessary to make it consistent with the values enshrined in the Constitution, especially those explicitly mentioned in the Bill of Rights.[88] Thus, it is the constitutionally imposed duty of this court to develop the common law in order to harmonise it with the Bill of Rights. The development must reflect the "*spirit, purport and objects of the Bill of Rights*". We are duty-bound to develop the common law so that it does not "*deviate*" from the "*spirit, purport and objects of the Bill of Rights*".[89] It is a duty we cannot abdicate.

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[87] *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AllER 449 (HL) at [23] (References omitted)

[88] Sub-sections 8(3) and 39(2) of the Constitution read:

> "8(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of s 8(2),
> (a) a court in order to give effect to a right, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and,
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1).
> 39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[89] *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at [33]; *First National Bank of SA v Min of Finance* 2002(4) SA 768 (CC) at [31]; *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at [3]

[200] The mineworkers claim that the existing common law violates their rights to equality,[90] human dignity,[91] life,[92] freedom and security of the person[93] and access to courts.[94] They say that the failing of the common law is "*a constitutional matter*" that requires redress by this court. By refusing to transmit their claim for general damages to their estates upon their deaths, the common law violates their right to "*bodily integrity*". Their right to "*bodily integrity*" is an integral part of their right to "*freedom and security of the person*."[95] Their right to bodily integrity is vindicated by them being compensated in the form of general damages by the wrongdoer, in this case the mining companies. The benefit they acquire from this is, without doubt, shared by their dependants. Denying them the opportunity to transmit this compensation of general damages to their estates effectively removes their "*right to bodily integrity*". To the extent that it does so, the common law is incompatible with, or "*deviates from*", the Constitution. They are entitled to the compensation from the wrongdoer (the mining companies) and their dependants are entitled to benefit therefrom. The fact that the harm to their "*bodily integrity*" was specific to them is not, and should not be, a bar to their right to compensation *post mortem*. That they themselves would not have received the benefit during their lifetime is of no moment. As the common law presently stands, it unjustifiably takes away from them the right to see that the beneficiaries of their estate, who in most cases are their dependants, receive the benefit of the compensation that they were entitled to, and would have received but for their premature deaths, which premature death was caused by the acts and/or unlawful omissions of the mining companies. For this reason the

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[90] Section 9 of the Constitution
[91] Section 10 of the Constitution
[92] Section 11 of the Constitution
[93] Section 12 of the Constitution
[94] Section 34 of the Constitution
[95] See: *Law Society of South Africa and others v Minister of Transport and another* 2011 (1) SA 400 (CC) at [63]; *S v Baloyi* 2000 (2) SA 425 (CC) at [11]

common law has to be developed so that they are allowed to transmit their claims to their estates upon their deaths. The argument bears considerable force.

[201] One of the mining companies, Gold Fields, reminds us that the CC has noted that the claim for non-patrimonial loss (general damages) is a claim "*for the deterioration of a highly personal legal interests that attach to the body and personality of the claimant*."[96] The *obiter dictum* of Moseneke DCJ in *Van der Merwe,* which Gold Fields rely upon reads in full:

> "On the other hand non-patrimonial damages, which also bear the name of general damages, are utilised to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include 'pain and suffering', 'disfigurement', and 'loss of amenities of life.'"[97]

[202] Gold Fields argues that the obvious conclusion to draw from this is that the CC recognised that it is not transmissible to anyone else. We do not agree. Moseneke DCJ made no comment on the constitutional compliance of the common law rule that precludes the transmissibility of general damages pre-*litis constestatio*. All that Moseneke DCJ did was describe what non-patrimonial loss is. There is nothing in the *dictum,* or in the judgment as a whole, that indicates that the Moseneke DCJ was even remotely conscious of the issue concerning the transmissibility of the general damages pre-*litis contestatio* to the estate of the deceased plaintiff who allegedly suffered at the hands of the defendant. There is no indication in the judgment that Moseneke DCJ gave

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[96] *Van der Merwe v The Road Accident Fund and Others (Women's Legal Centre Trust as Amicus Curiae* 2006 (4) SA 230 (CC) at [39]
[97] *Id*.

any thought to the impact of the evolved legal convictions of the community, and therefore came to the conclusion that the common law as it stands is consistent with the legal convictions of our community captured in the Bill of Rights. There can be no suggestion that Moseneke DCJ found the common law rule to be consistent with our modern day constitutional democracy. It is, therefore, our view, that the conclusion proffered by Gold Fields is mistaken.

[203] Another right the mineworkers invoke in support of transmissibility is the right of the dependants, especially the children, of the deceased mineworkers.[98] It is a well-established constitutional principle that whenever the rights of a child are brought to bear on a matter, the court must ensure that the best interests of the child receive paramount consideration. This is in terms of section 28(2) of the Constitution, which is nothing short of "*an expansive guarantee that a child's best interests are paramount in every matter concerning the child.* [99]

[204] The mineworkers further point out that the common law rule contravenes section 9 of the Constitution in that it arbitrarily differentiates between survivors pre-*litis contestatio* from survivors post-*litis contestatio*. None of the mining companies took issue with this claim. In short, the mineworkers claim that this issue concerns the rights of the terminally ill who may not survive the finalisation of the action. Such persons or their heirs will lose what may be a genuine claim only because they succumbed to their illness pre-*litis contestatio*. By virtue of this result, the rule of non-transmissibility pre-*litis contestatio* violates the right to equality by setting apart, and discriminating against, those who have succumbed to their illnesses (silicosis or TB) pre-*litis contestatio* from

[98] Section 28 of the Constitution

[99] *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) at [29]. See also: *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 at [71]; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at [15] – [21]

those who had been fortunate enough not to have succumbed to their illnesses pre-*litis contestatio.* This distinction is discriminatory. It is a discrimination that is unfair as well as irrational, and it is made all the more poignant when it is to a considerable extent a consequence of the legal process over which they have little control: they have minimal influence over when the stage of *litis contestatio* is reached. In the meantime, given the fatal character of their illnesses some of them would have, as many mineworkers already have, succumbed to their illnesses. In the circumstances, the legal process would have failed them by cementing the discrimination between them and their fellow claimants who were fortunate enough to have survived until the stage of *litis contestatio* was reached.

The Position in the UK, Australia And The USA

[205] The mineworkers refer to developments in other jurisdictions, particularly the UK, the USA and Australia to support their case in this regard. In these jurisdictions the legislatures intervened to put an end to the injustices caused by the common law holding that general damages can only be transmitted post *litis contestatio*.

[206] The history underlying the legislative intervention in the UK is succinctly articulated in a single paragraph in a recent judgment of the UK Supreme Court, where the following is observed:

> "Before 1846, English law did not permit actions in tort for the death of a human being. This was the combined result of two rules of common law. The first was that the right of action or a person who had been tortuously injured was a personal action, which did not survive for the benefit of the estate upon his death. This rule survived until 1934, when it was abolished by the Law Reform (Miscellaneous Provisions) Act. The second rule was that "[i]n a civil court, the death of a human being could not be complained of as an injury" by dependents claiming in their own right: Baker v Bolton (1808) 1 Camp 493 (Lord Ellenborough). This is still the rule at common law, but it was largely superseded by the Fatal Accidents Act 1846 ("Lord Campbell's Act), which created a new

> statutory cause of action in favour of certain categories of dependent, including widows. The 1846 Act was repeatedly amended, elaborated and re-enacted, and the statutory cause of action is now contained in section 1(1) and (2) of the Fatal Accidents Act 1976."[100]

[207] Similarly in Australia, it was stated in the legislature that it was necessary to intervene in order to avert the injustice that prevailed, and that many had previously been forced to endure, because of this rule precluding transmissibility of general damages pre-*litis contestatio*. It was especially highlighted that this failing was most acute in cases involving claims for pain and suffering endured by plaintiffs by virtue of them contracting dust-related diseases. The failing of the common law was eloquently captured in a speech delivered in a South Australia Parliamentary debate where it was said:

> "The way the current legislation exists, if litigation has commenced but the applicant passes away before it has been completed, that individual is not able to have that case proceeded with on their behalf for the non-economic loss. That is an absurdity. There is clearly no justice, equity or fairness in a system such as this when we are talking about a totally unique disease of this nature. This puts enormous pressure on the sick and the dying plaintiffs to press ahead as quickly as possible with their litigation, the pressure of which may greatly increase the plaintiff's distress. Sometimes they may succeed in doing that, and sometimes they may not. It is simply a lottery: sometimes it may happen, and sometimes it may not work."[101]

[208] All fifty states in the United States of America have enacted statutes to attend to the issue of wrongful death and the claim for damages for injuries sustained by the deceased. The majority of them allow for the estate of the deceased to receive the amount due to the deceased. There is no restriction in any of the statutes for the deceased to have launched his/her case for the claim prior to his/her death and for the case to have reached the stage of *litis contestatio* in order for the claim to remain valid.

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[100] *Cox v Ergo Versicherung* [2014] UKSC 22 at [6]

[101] South Australia, Parliamentary Debates, House of Assembly, 4 October 2001, 2385.

[209] These legislative interventions demonstrate that the law which prohibits the transmissibility of general damages pre-*litis contestatio* fails to reflect the *boni mores* of a modern society organised along the principle of the rule of law.

Should this matter be decided by the trial court?

[210] The mineworkers contend that this court should determine the issue now. One of the mining companies, ARM, maintains that the issue should be left to the trial court as that court will receive more evidence, and therefore will be able to make a more informed decision on the matter than this court. We disagree with ARM. All the facts that are pertinent to the determination of this issue are already known and placed before this court. The key facts are these:

[210.1] the stage when *litis contestatio* will be reached in this case, if indeed it will be reached,[102] is a very long way off;

[210.2] the mining companies agree that a large number of the mineworkers have already lost their lives as a result of contracting silicosis or TB, and that the only new evidence that the trial court will receive on this issue is that many more would have died before the stage of *litis contestatio* is reached. This new evidence will not alter the outcome of the issue – the death of a single mineworker with a legitimate claim, is sufficient evidence for this court to note the undue, unjustified and irreparable prejudice that will ensue if the issue is left undeveloped;

[102] We were informed that it is not impossible for the matter to be settled without going to trial

[210.3] the common law in its present form endorses the financial loss and social harm that the estates of the deceased mineworkers and their families endure as a result of these mineworkers succumbing to the diseases of silicosis or pulmonary TB. The mining companies are the only ones which benefit from this state of affairs and their benefit is at the expense of the deceased mineworkers and their dependants;

[210.4] it is common cause that the common law does not reflect the legal convictions of the community and violates a number of constitutional principles, and to that extent it fails to promote the "*spirit, purport and objects of the Bill of Rights*"; and,

[210.5] finally, the issues have been extensively canvassed in the pleadings before this court and comprehensively argued by all the parties.

Conclusion on transmissibility

[211] The irrefutable fact is that there exists a high mortality rate amongst the miners suffering from silicosis and TB. By May 2014 five of the applicant mineworkers in the Spoor application had passed away. Initially the LRC had instituted proceedings on behalf of twenty-four (24) plaintiffs but by the time it instituted the certification application, eight (8) of those had passed away – that constitutes a third of those plaintiffs. During the course of the hearing we were informed that the 33rd applicant mineworker, Mr Zwelake Dala, had passed away. This means that, as all these persons (and others) that have passed away pre-*litis contestatio,* if the common law is not

developed, they will have to forego their claims for general damages despite the fact that such claims can be proven even though they have passed away.

[212] It is true that the defect in the common law could be remedied by the legislature. There is, however, no possibility of our legislature doing so in the near future. It is in any event, a failing of the common law and not the statutory law that we are asked to focus our attention on. It was the judicial arm of the state that established the rule prohibiting the transmissibility of general damages to the estate of a deceased plaintiff or defendant. When the initial rule was found to be wanting, it was the judicial arm, once again, that decided to establish the exception to the rule. Now that it has come to light that the rule as well as the exception cause grave injustice and are incompatible with the legal convictions of our community and do not reflect the "*spirit, purport and object of the Bill of Rights*", it is necessary for the judicial arm to perform its obligations in terms of sub-sections 8(3) and 39(2) of the Constitution and remedy this defect. In our view, one of the reasons the sub-sections were enacted was to cater for precisely the kind of situation that prevails in this case where intervention by the legislature to remedy the huge injustice that prevails is not contemplated for the near future. These sub-sections ensure that it should not be left to the legislature to remedy all the injustices that prevail by virtue of the failings resulting from the rules established by the common law.

[213] There is no doubt that on the facts of this case a huge injustice would result if the general damages that would have been due to the now deceased class member is denied simply because he succumbed to his disease before the case he brings or intended to bring had reached the stage of *litis contestatio* The injustice is all the more

poignant when regard is taken of the fact that a denial of the benefits of general damages to the beneficiaries of the estate of the deceased class member could well result in the mining companies securing a benefit from the very harm they caused the deceased class member. Undoubtedly, the loss of the general damages (by dint of the operation of the existing common law) will, in this case, be borne by the widows and children of the deceased class member, as they would have benefited should their primary provider not have died pre-*litis contestatio*. It bears reminding that they are the indigent, the weak and the vulnerable in our society. That they should bear this loss and the respective mining company(ies) benefit from the death of their spouse and/or parent is grossly unjust, especially when regard is taken of two facts: one, the respective mining company(ies)' conduct (or wrongful omission) may be a significant contributor to the early death of their breadwinner, and two, the respective mining company(ies)' attitude and approach to the litigation has a significant influence over when the stage of *litis contestatio* is reached. In fact, to the extent that they can amend their pleadings at any time before judgment is given by the trial court they have significant, if not determinative, control over when the stage of *litis contestatio* is reached. Consequently, if the law is not developed, then in this case it would have failed the weak individuals and benefited the powerful corporates. It has to be borne in mind that while the mineworker experienced pain and suffering from the loss of amenities of life prior to his death, his widow and children too, bore some hardship by virtue of the care they were required to give to him as a result of his loss of amenities of life.

[214] The *amici*, forcefully contended that this rule of non-transmissibility of general damages pre-*litis contestatio* had, on the facts of this case, a strong gender bias in its consequence. They also produced evidence in support of this contention, which

evidence was neither challenged nor contradicted by any of the mining companies. The evidence they brought shows that the mineworkers come from rural areas ("*labour-providing areas*") where they are dependent largely upon home-based care to assist them in coping with their illnesses. Such care is ordinarily provided by their wives and daughters. The care-work is demanding and includes efforts such as carrying, lifting and bathing the mineworkers, monitoring their medication, and staying up at night to attend to their needs. These women, and in some cases girls, are often anxious about the physical deterioration of their loved ones, the mineworkers, and as a result "*have reported experiencing tearfulness, nightmares, insomnia, worry, anxiety, fear, despair and despondency, … trauma … headaches, body aches and physical exhaustion.*" In short, they too bear a heavy burden as a result of the mineworkers contracting silicosis and TB. Often, the care work requires full-time attention, effectively compelling many women and girls to forego income-generating, educational, and other opportunities. Should the mineworkers receive compensation for the pain and suffering and loss of amenities of life they endured, (i.e. general damages) these women and girls would benefit therefrom by reducing the care-work they provide. It would also indirectly compensate them for the care-work they have already provided. Should the claim for general damages dissipate because the mineworker succumbed to his illness pre-*litis contestatio* it would mean that these women and girls would be deprived, by the common law, of that which they otherwise would have received. Hence, the *amici* point out, the common law, in effect, has a gender bias to it and such gender bias, they forcefully argue, is not consonant with our constitutional values and principles. They are only denied this benefit because the common law's approach to compensation for general damages has failed to keep pace with the procedural developments of the law as a whole. There is no logical or principled reason for the common law to deny them

the benefits they would have received had their spouses and fathers not succumbed to their illnesses pre-*litis contestatio*.

[215] In the light of these circumstances and bearing in mind the injunctions of sub-sections 8(3) and 39(2) of the Constitution, it is our view that the common law has to be developed to allow for the claim for general damages to be transmissible to the estate or executor of a deceased mineworker, even though the stage of *litis contestatio* had not been reached at the time of his death. Also, the development is necessary in the light of the court's general duty to do justice by the persons affected by its orders.

[216] The development should not be restricted to the case where the plaintiff has died pre-*litis contestatio*. It should also apply to the case where the defendant or potential defendant has died pre-*litis contestatio* as the same principles as those that apply to plaintiffs apply to them.

[217] We have read the dissenting judgment of Windell J and wish to comment thereon briefly. Windell J is of the view that the development of the common law should be restricted to class actions only. We do not agree with her for the following reasons:

> [217.1] The common law precluding transmissibility of general damages pre-*litis contestatio* is part of our substantive law. It is not part of our procedural law. A class action is a procedural device. It is neither proper nor logical to make a substantive law applicable only to a particular procedural device.

[217.2] As a procedural device a class action allows the court to enter judgment that is binding on all class members who joined in the class action whether by failing to opt-out or by agreeing to opt-in. The judgment does not bind anyone who did not join the class action regardless of whether they were entitled to do so or not. Since the substantive law as developed by Windell J would only apply to class action litigants, any plaintiff(s) bringing the same case against the same defendant(s) but who refuses or fails to join the class action would not have his (their) claim(s) for general damages transmitted should he (they) die pre-*litis contestatio*. Thus in this case, should two mineworkers both sue the same mining companies with one doing so as part of the class action and one individually, and should both die pre-*litis contestatio* one would have his claim for general damages transmitted to his estate while the other not. The law as proposed, would effectively discriminate between them. Not only is there no rational or logical reason to justify this discrimination, it is patently unjust.

[217.3] The law precluding transmissibility of general damages pre-*litis contestatio* is a law of general application. It applies to all cases. It cannot be developed for some cases and not for others. In other words, it cannot be developed for delictual cases involving claims by employees or former employees against their employers or former employers for unlawfully causing damage to their health, but not developed for delictual claims brought by for example victims of motor vehicle accidents who sue the wrongdoer, or the insurance that indemnified the wrongdoer, for the unlawful harm caused by the wrongdoer. There is no rational or reasonable basis to discriminate between both delictual claims. The fact that the damages caused by a wrongdoer in the case of the motor vehicle accident may be

> covered by the Road Accident Fund is of no moment. In fact, as it presently stands, the common law does not discriminate against or in favour of any particular plaintiff or species of plaintiffs. It, without discrimination, holds that no claim for general damages is transmissible pre-*litis contestatio* and all such claims are transmissible post *litis contestatio*, including those involving motor vehicle accidents. Should such a law be found to be inconsistent with the values of our society, especially those values articulated in our Bill of Rights, its development, accordingly, has to be equally non-discriminating. This is the only way to make the law equally applicable to all and sundry. To develop the law as suggested by Windell J would mean that those plaintiffs who are part of a class action would have the new modern law on the transmissibility of general damages pre-*litis contestatio* applicable to their cases, while those who are not would have the old law on transmissibility applicable to their cases. A conclusion to this effect does not reflect the "*spirit, purport and objects*" of the Constitution. It is one that is, at the very least, not consistent with a fundamental principle expressed in s 9 of the Constitution, which is that "*everyone is equal before the law and has the right to equal protection and benefit of the law*." There may be other rights, such as the right to access to court, which may be violated by a general law that discriminates in favour of one set or group of litigants against all other litigants.

[218] By holding that the common law can only be developed in the manner we suggest below does not, in our view, mean that we have ignored the judicial caution captured in the *dictum* that judges should only develop the common law incrementally. Judicial caution in this regard, it has to be remembered, is borne out of a need to ensure that the judicial arm of the state does not trespass on the field reserved for the

legislature; the legislature is doubtlessly better placed to make laws than the judiciary is, but as we point out above judges are often required to make law for no reason other than to ensure that the law adapts to new circumstances and meets new challenges. This, we believe, is all we are doing. Moreover, the need for judicial restraint expressed in the *dictum* does not mean that we must always only develop the law piecemeal. How the law is developed depends on the circumstances that prevail at the time. Of course, if it is possible to make a small adjustment to the law in order to make it reflect the "*spirit, purport and objects"* of the Constitution, then this must be the route to follow. But if by doing so we create as many problems as we attempt to solve, or to put it differently, we create as much hardship and injustice as there already prevails in the law, then a small (or piecemeal) adjustment is to be avoided. This approach we advocate is not an innovation of ours. It has long been part of our law. More than a century ago, Innes CJ said:

> "And we should be slow to perpetuate a form of legal remedy which may work hardship, if it can be modified so as to do away with that possibility"[103]

We hold the view that this is precisely what will occur if we are to develop the common law on transmissibility of general damages only for class action suits. We have no doubt that the problems we allude to in the previous paragraph are bound to surface in practice.

[219] In our view there is no way other than the one suggested by us below to develop the common law that prohibits the transmissibility of general damages pre-*litis contestatio*. This is because this law, as we say above, is one of general application. Its failings, too, are of general application. Hence, its development has to be of general application. There simply is no middle road and there can be no half measures. Once

[103] *Blower* (*supra*) at 900

one accepts that the common law precluding the transmissibility of general damages pre-*litis contestatio* does not reflect the "*spirit, purport and objects*" of the Bill of Rights, there can be no retreat from this conclusion. One becomes bound to develop it in a manner that fully and uncompromisingly reflects the "*spirit, purport and objects*" of the Bill of Rights. Anything less, would not suffice. It would only replicate the very anomalies and injustices that result from its application in practice.

[220] In conclusion, we hold that the common law should be developed as follows:

1. A plaintiff who had commenced suing for general damages but who has died whether arising from harm caused by a wrongful act or omission of a person or otherwise, and whose claim has yet to reach the stage of *litis contestatio,* and who would but for his/her death be entitled to maintain the action and recover the general damages in respect thereof, will be entitled to continue with such action notwithstanding his/her death; and,

2. The person who would have been liable for the general damages if the death of a plaintiff had not ensued remains liable for the said general damages notwithstanding the death of the plaintiff so harmed;

3. Such action shall be for the benefit of the estate of the person whose death had been so caused;

4. A defendant who dies while an action against him has commenced for general damages arising from harm caused by his wrongful act or omission and whose case has yet to reach the stage of *litis contestatio* remains liable for the said general damages notwithstanding his death, and the estate of the

> defendant shall continue to bear the liability despite the death of the defendant.

[221] This we find is the only way to cure the common law of the arbitrariness, irrationality and unreasonableness that presently plagues it.

[222] Before closing on this subject it is necessary to deal with the issue of which stage in this litigation should the general damages that would be claimed by the mineworkers be transmissible to their estates. The mineworkers have at this stage only applied for certification of their class action. Those who want to be part of the class action have to await the outcome before they can take any further steps. Until then they are legally paralysed. Once the class action is certified they can issue summons against the mining companies. Only then would their claims be legally recognisable. The application for certification was first filed in August 2012. It is now May 2016. For various reasons the matter has taken four years to reach this stage. In the meantime many mineworkers have succumbed to their illnesses. For this reason the mineworkers have asked that, should we declare their claims for general damages be transmissible to their estates then, we should do so on the basis that it be recognised that their claims have actually commenced as from the date when the certification application was launched and not from the date when the judgment is handed down. They argue that but for the legal requirement that a class action be certified before they issue summons they would have actually done so in August 2012, or at least when the consolidated notice of motion was filed. As a result of this legal requirement all the mineworkers who have succumbed to their illnesses since the launching of the certification application would be deprived of their claim for general damages. Such deprivation is, they say, unfair and unjustifiable

as they cannot be held responsible or accountable for the delays inherent in the legal process which resulted in their case only being finalised in May 2016. The mining companies did not mount any serious opposition to the request of the mineworkers. We find great force in the argument of the mineworkers. That many mineworkers have succumbed to their illnesses since the commencement of this application for certification is an undeniable fact. There is no doubt that failure to recognise their claims for general damages as having commenced from the date of the certification application would produce an unfair and unjust result for the heirs of mineworkers who have succumbed to their illnesses after the certification application was launched but before summons was issued in the class action. We can find no justifiable reason to deny their heirs the benefit of such claims. Accordingly, we hold that the only way justice can prevail is if the declaratory order sought by the mineworkers is granted.

CONCLUSION

[223] The only way justice can prevail in the cases of the individual mineworkers or their dependants is if they are afforded an opportunity to pursue their claims by at least having significant parts of it determined through a class action. Further, in our judgment it is in the interests of the mining companies that the many common issues as well as the common evidence referred to above be dealt with in a class action proceeding. As for the practical arrangements, we hold that these can be fully and finally determined by the trial court after pleadings have closed and all the factual and legal issues have crystallised or been identified. It is not within the power of this court to prescribe to that court how it should structure its hearings.

[224] Accordingly, we reject the submissions of the mining companies that the class action is untenable and unmanageable and hold to the contrary.

[225] We wish to iterate that by holding that it is in the interests of justice that a class action be certified in this case, we do not, as was contended by the mining companies, hold that the mining companies are jointly liable for the harm suffered by an individual mineworker. Our law of delict is clear in this regard. A defendant can only be held liable for his own delict and not that of another defendant. The liability of each mining company will be determined at the second stage of the proceedings when all the mineworkers and all the dependants of deceased mineworkers have staked their claims. At that stage the claims will be pared against the respective mining company(ies) alleged to have committed the delict. Hence, each mining company will be held responsible for its own actions or unlawful omissions. But, this does not affect the fact that a substantial body of the evidence to be led against them is the same, or common, to all of them and that the evidence is relevant to the individual mineworker's case. Once this is received and the common factual and legal issues are determined, the case if necessary will proceed to the next stage where their individual culpabilities will be scrutinised and determined.

[226] Finally, it bears mentioning that at the hearing the mineworkers through their counsel voiced their frustration with the mining companies. They complained about being stonewalled without relent by the mining companies from the beginning and all the way through this litigation. They say that their frustration must be understood in the context of the fact that they are no strangers to the mining companies: they are all former employees, or dependants of former employees, of the mining companies. They

allege that the mining companies have placed every possible obstacle to having the matter adjudicated and that the mining companies have fought this application as vigorously and as aggressively as they possibly could. They have spared neither effort nor resources in doing so. They say that the mining companies have done this, despite the fact that the mining companies are not able to deny that, should this court refuse the certification and the mineworkers be forced to bring individual actions, the result without doubt will sterilise the large majority of the individual claims. They allege that the mining companies' conduct has been obstructive and deliberately undermining of the interests of justice. The mineworkers say that it is necessary for them to voice their frustration as this is only the first stage in the litigation, and they ask the court to take note of it so that the mining companies may reconsider their approach as the litigation proceeds. The mining companies chose to ignore the accusation that they have deliberately obstructed the course of justice.

[227] This is unfortunate. An accusation that a party is deliberately undermining the interest of justice is a serious one. It is one thing for counsel to exchange insults (and there was no shortage of that at the hearing) but it is another for the party to stand accused of deliberately undermining the interests of justice. It is one that is cause for disquiet. Conduct that deliberately undermines the cause of justice damages the integrity of the judicial system. Law-abiding persons, including juristic ones, should refrain from such conduct. That said, we have no doubt that the rest of the litigation will be conducted in a manner that advances rather than hinders the interests of justice.

COSTS

[228] The mineworkers seek costs against the mining companies, including costs of nine counsel. They have assured the court that the services by counsel were shared and there was no duplication. The costs will follow that pattern; and they assured the court that the combined costs of nine counsel shall not exceed the costs of three counsel. This we find is justified having regard to the complicity and the aggregated strength of opposition by the mining companies. Counsel for the mining companies, like those for the mineworkers, shared responsibility and topics in presenting the case to this court and would, if successful, all have been included in the mining companies' entitlement to costs. The costs order sought by the mineworkers is justified.

[229] Finally, we seize this opportunity to thank all the parties, including the *amici* for their assistance in this matter.

THE ORDER

[230] The order of the court is as follows:

1. It is declared that the following group of persons constitutes a class:
    1.1 Current and former underground mineworkers who have contracted silicosis, and the dependants of underground mineworkers who died of silicosis (whether or not accompanied by any other disease) -
        1.1.1 where such mineworkers work or have worked on one or more of the gold mines listed on the attached "Annexure A", after 12 March 1965;
        1.1.2 whose claims are not among the claims which, by agreement, are to be determined by arbitration in the matter of Blom and Others v Anglo American South Africa Limited; and

1.1.3 who are not named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544 (the silicosis class).

2. It is declared that the following group of persons constitutes a class:

2.1 Current and former underground mineworkers who have contracted pulmonary tuberculosis, and the dependants of deceased underground mineworkers who died of pulmonary tuberculosis (but excluding silico-tuberculosis), where such mineworkers work or have worked for at least two years on one or more of the gold mines listed on the attached “Annexure A”, after 12 March 1965 (the pulmonary tuberculosis class)

3. The attorneys of record for the applicants are certified as the legal representatives of the members of the classes for the further conduct of the class action as follows:

3.1 Abrahams Kiewitz Incorporated (Abrahams), Richard Spoor Inc. Attorneys (Spoor) and the Legal Resources Centre (LRC) are certified as the joint legal representatives of the members of the silicosis class;

3.2 Abrahams is certified as the legal representative of the members of the pulmonary tuberculosis class; and

3.3 The fee arrangements set out in annexures RS13 and RS21 to the replying affidavit of Richard Spoor are authorised in respect of the legal representatives of the classes.

4. In the further conduct of these proceedings (the class action), the following applicants, whomever are surviving at the time of the class action, are granted leave to act as class representatives –

4.1 The first to fifty-second applicants are granted leave to act as representatives of the silicosis class of which they are members;

4.2 The thirty-third, thirty-fifth, thirty-sixth and the fifty-third to sixty-ninth applicants are granted leave to act as representatives of the pulmonary tuberculosis class of which they are members.

(the class representatives)

5. It is declared that the class representatives in para 4 above have the requisite standing to bring the class action and to represent the members of the silicosis class and the pulmonary tuberculosis class in claims for damages.

6. It is directed that the following steps shall be taken to give notice of the class action to members of the classes substantially in accordance with the notice attached as “Annexure B1” (the notice):

6.1 The applicants’ legal representatives shall forthwith publish the notice:

6.1.1 as an advertisement in the newspapers listed in “Annexure D” hereto. The notice shall be published in each such newspaper once per week for a period of four (4) weeks;

6.1.2 as a radio announcement substantially in the form of “Annexure C1”, broadcast on each of the radio stations listed in **“**Annexure D**”** and in the languages stipulated therein. Such broadcasts are to be made twice daily on alternate days for a period of 4 weeks;

6.1.3 on a prominent notice board at each of the offices of the applicants' legal representatives for a period of not less than 180 days;

6.1.4 on a prominent notice board at each office of the Employment Bureau of Africa in Southern Africa for a period of not less than 180 days;

6.1.5 on a prominent notice board at each Justice Centre and public office of Legal Aid South Africa for a period of not less than 180 days;

6.1.6 on a prominent notice board at each regional office of the National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (AMCU) for a period of not less than 180 days;

6.1.7 by procuring Legal Aid South Africa to circulate the notice to each of its attorneys and candidate attorneys employed in providing legal aid in civil matters; and

6.1.8 by delivering a copy of the notice to each advice office, paralegal office and community-based organisation with which the applicants' legal representatives are familiar and which are likely, in the opinion of the applicants' legal representatives, to be approached by members of the class; and

6.1.9 on the websites of the applicants' legal representatives.

6.2 The respondents shall publish the notice:

6.2.1 on a prominent notice board for mineworkers at each mine owned, operated, controlled and/or advised by the respondents for a period of not less than 180 days; and

6.2.2 on the homepage of each respondent's website for a period of not less than 180 days.

7. The applicants' legal representatives are directed to file reports with the court on a quarterly basis setting out the steps taken to publish the notice and the progress made in identifying the members of the classes, the first such report to be filed 3 months after the date of the order.

8. It is declared that any claimant, who has claimed for general damages, and who has died or dies prior to the finalisation of his case, will have such general damages transmissible to his estate, regardless of whether he has joined the class action or not. The claim of general damages in this case shall be transmissible from the date when the certification application was launched in August 2012.

9. It is ordered that the members of the classes will be bound by the judgment or judgments in the first stage of the class action against the mining companies, unless they give written notice to Abrahams, Spoor, or the LRC by 31 January 2017, that they wish to be excluded as members of any of the classes against each or any of the respondents.

10. It is ordered that:

10.1 upon conclusion of the first stage of the class action, the members of the silicosis class must give written notice to Abrahams, Spoor or the LRC by a date to be determined by the court at that time:

10.1.1 that they wish to opt in and be included as members of the silicosis class in the second stage of the class action; and

10.1.2 which respondent or respondents they seek to hold liable in the second stage of the class action.

10.2 upon conclusion of the first stage of the class action, the members of the pulmonary tuberculosis class must give written notice to Abrahams by a date to be determined by the court at that time:

10.2.1 that they wish to opt in and be included as members of the pulmonary tuberculosis class in the second stage of the class action; and

10.2.2 which respondent or respondents they seek to hold liable in the second stage of the class action.

10.3 only members who give such notice timeously will have the benefit of and be bound by the judgments in the second stage of the class action as against the respondent or respondents that are found to be liable to them.

11. The references to respondent or respondents:

11.1 In paragraph 6.2 exclude the twentieth (20th), twenty-first (21st), twenty-fifth (25th) and twenty-sixth (26th) respondents insofar as they pertain to the notice obligations and costs in respect of the tuberculosis class

11.2 In paragraph 6.2 exclude twentieth (20th) and twenty-first (21st) respondents insofar as they pertain to the notice obligations and costs in respect of the silicosis class.

11.3 In paragraph 15 exclude the twentieth (20th), twenty-first (21st) and twenty-ninth (29th) respondents as a whole and the twenty-fifth (25th) and twenty-sixth (26th) respondents insofar as they pertain to costs of the tuberculosis class.

12. It is ordered that the respondents are jointly and severally liable for half of the mineworkers' costs of publicising the notice as set out in paragraph 6.1 above.

13. It is ordered that any settlement agreement reached by the parties shall only be of force and take effect if approved by this court.

14. The conditional counter-application of first (1st), second (2nd), fourth to eighth (4th - 8th) and thirty-second (32nd) respondents is dismissed with costs.

15. It is ordered that the respondents are jointly and severally liable for the costs of this application which costs are to include those occasioned by the employment of four senior counsel and five junior counsel.

16. The parties are granted leave to approach this court, on the same papers duly supplemented, for an order varying or amplifying the provisions of this order pertaining to notice and the costs associated with notice, in the event that this is considered necessary by any party.

_____

P. M. MOJAPELO
DEPUTY JUDGE PRESIDENT
GAUTENG LOCAL DIVISION

_____

B. VALLY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Windell J

[231] I dissent with the majority judgment on one issue only; that issue concerns the question of the transmissibility of general damages prior to *litis contestatio*. I consider it necessary to express my perspective on this aspect only, as the majority judgment encompasses my views on the certification of the class action. I agree with my brothers' interpretation of the common law and the exposition of the facts and issues. I further agree with the reasoning as to why it is incumbent for this court to develop the common law. I however, respectfully differ with the extent of the development, for the reasons that follow.

[232] The mineworkers claim damages under five separate heads: past loss of earnings; future loss of earnings; past medical expenses; future medical expenses; and general damages for pain and suffering, loss of amenities of life, disablement and reduced life expectancy. The damages claimed under two of the five heads of damage constitute special damages (past loss of earnings and past medical expenses) and will immediately be transmissible to their deceased estates in the event of death occurring after the institution of these proceedings.[104]

[233] In terms of the common law claims for general damages are not transmissible, except after *litis contestatio* has occurred during the lifetime of the injured party. The general damages claimed by the mineworkers in this instance are for pain and suffering, loss of amenities of life, disablement and reduced life expectancy as well as prospective medical expenses and future loss of income. The mineworkers seek a declarator that, in the event any class member dies after the institution of the certification application and

[104] *Lockhat's Estate v North British and Mercantile Ins Co Ltd* 1959 (1) SA 24 (D&CLD).

prior to the finalisation of the class action, such general damages as a class member would have been entitled to claim, shall be transmissible to his or her deceased estate. The development of the common law is proposed in relation to class actions only. It was only during the hearing of this matter that the proposition that the common law should also in that respect be developed in respect of all actions and not only for class actions, was raised and debated.

[234] The general development of the common law proposed by Mojapelo DJP and Vally J to provide for active and passive transmissibility before *litis contestatio,* will have far reaching implications. The mine workers' arguments were directed at class action proceedings and the implications of the common law position (that general damages are only transmissible after *litis contestatio*) on a class action. The mining companies also prepared arguments based on the relief originally sought by the mineworkers in the notice of motion. Transmissibility of general damages in all actions generally was neither dealt with nor is it relevant for the purpose of deciding this case. We have not had the benefit of well-researched arguments on the proposed far reaching development. I am accordingly hesitant to tread this complex field of the law in the absence of a proper opportunity to consider the implications that such a development may and will have on the broader community and the knock-on effect it might have on other branches of the law, for example, the law of cession[105] and on litigation in, for example, Road Accident Fund matters. Road accidents are one of the leading causes of death in South Africa. Any development that would lead to the transmissibility of actions for general damages before *litis contestatio* in general, will have an impact on

[105] See *Ngubane* supra at p 607 where the Court relied on the *maxim*- what cannot be transmitted on death, cannot be ceded in life. See however the exception in relation to *ususfructus.(Collegium Theoretico-practicum ad Pandectas).* H de Cocceii argues *(Disputationes 2 65)* that the two institutions, cession and succession differ so radically that any rule endeavouring to create a link between the two would of necessarily be incorrect.

the economic viability of the Road Accident Fund. The same policy considerations that militate in favour of the development of the common law in class actions of this nature will not necessarily be present in other situations where delictual liability accrues to a defendant.

[235] The common law rule dealing with transmissibility of general damages regulates both the active and passive transmissibility of general damages. Claims are accordingly available to the heir of the person wronged and against the heir of the wrongdoer. It is important to strike a balance between the rights of heirs of wrongdoers and the rights of heirs of persons who have been wronged. The development of the common law will have implications for the deceased estates (and hence the heirs) of any wrongdoers who die before *litis contestatio*. Neither the mineworkers nor the mining companies dealt with those implications on passive transmissibility.

[236] During the hearing of this matter, legislation in foreign jurisdictions such as the United States of America, the United Kingdom and Australia where the law regarding transmissibility has been developed, were referred to and considered. Legislation has been enacted in all three countries to provide a statutory cause of action for wrongful death and the preservation of any pre-existing rights of action held by the injured party. The legislation in these countries differs with respect to the type of damages that can be claimed. Two States in the USA exclude damages for pain and suffering, and all Australian states exclude damages for pain and suffering except in the case of deaths resulting from dust-related or asbestos-related diseases. The majority of the Canadian provinces have expressly excluded the transmissibility of claims for "damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities".

There are clearly divergent approaches in the respective legislatures of different jurisdictions. Foreign models should not be used without proper recognition of non–legal aspects that influence the procedures in both foreign and local jurisdictions. Incorporating foreign customs into practice through judicial prescriptions may not have the desired result.[106] This approach is sensible, specifically in the South African social context. We did not have the benefit of a complete comparative analysis dealing with the effect that the transmissibility of general damages had in those countries where such enabling legislation exists.

[237] The power of the courts to develop the common law must be exercised in an incremental fashion as required by the facts of each particular case. This duty was summarised in *R v Salituro*[107] and cited with approval in *Du Plessis and Others v De Klerk and Another*[108]as follows:

> "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

[238] South Africa does not have legislation governing class action claims. The rules governing class actions have been developed by the courts. In the absence of legislative regulation in South Africa, the courts are duty bound to continue the development of class action proceedings. In *Children's Trust* the court for example held that for purposes of prescription, service of the application for certification should

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[106] Hurter 2006; Cilsa 485 at 500 and 503
[107] (1992) 8 CRR (2d) 173 ([1991] 3 SCR 654)
[108] 1996 (3) SA 850 (CC).

constitute service of process claiming payment of the debt for the purpose of s 15(1) of the Prescription Act 68 of 1969[109]. In Australia specific legislation exists to provide for transmissibility of claims for pain and suffering resulting from dust-related or asbestos-related diseases. Section 173 read with s 39(2) of our Constitution imposes an obligation on courts to develop the common law appropriately, if it is in the interest of justice. The foreign jurisdictions referred to have no equivalent duty under their constitutional framework.

[239] In *Thebus and Another v S,*[110] the need to develop the common law under s 39(2) of the Constitution was held to arise in at least two instances. The first, when a rule of the common law is inconsistent with a constitutional provision and the second, where the common law may have fallen short of its spirit, purport and objects, even though not inconsistent with a specific constitutional provision. It is then that *"the common law had to be adapted so that it grew in harmony with the 'objective normative value system' found in the Constitution"*[111].

[240] Social justice and the advancement of human rights and freedoms (with an emphasis on the values of human dignity, substantive equality, and non-discrimination) are described as *"[t]he leitmotif of our Constitution*."[112] These constitutional values militate in favour of the development of the common law. In the present matter the constitutional rights of two categories of persons are relevant to transmissibility: the rights of mineworkers, who are members of the class, and the rights of their heirs. The question is whether these values (human dignity, equality and non-discrimination) are

[109] At [89]
[110] 2003 (6) SA 505 (CC) para 28
[111] *Thebus* at para 28
[112] *Kaunda and Others v The President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) para 220

advanced by acknowledging and perpetuating the distinction the common law draws between the transmissibility of actions for pain and suffering before and after *litis contestatio,* particularly in circumstances of the kind currently before this court.

[241] The development of the common law must be fact-driven. Insufficient facts were placed before this court to go as far as holding that general damages are transmissible in all matters in which an injured party has a claim. The facts are however, sufficient to justify the development of the common law in relation to class action proceedings. Such development is in the interest of justice and any further delay would cause an injustice. In the context of a class action, and specifically a class action of this magnitude, it will take much longer to reach *litis contestatio*. The courts have not yet pronounced on the application of the rules relating to close of pleadings and transmissibility in the context of class action proceedings. If the rule is applied strictly, *litis contestatio* cannot be reached during the certification proceedings at all. It would be reached only after the finalization of the certification process, and thus after the exchange of pleadings.

[242] The mineworkers and their dependants form part of the most vulnerable and marginalized members in our society. Such injustice as there may be extends to women and children living in geographical localities of mining and rural communities. These communities are home to individuals (mostly relatives) upon whom ailing mineworkers would have relied on for the provision of accommodation and food as well as maintaining the quality of life of terminally ill mineworkers.

[243] Taking into consideration the specific circumstances of this case, as highlighted in the main application and the evidence of the mineworkers, I am of the view that the

spirit, purport and objects of the Bill of Rights requires the incremental development of the common law regarding transmissibility in respect of class actions. This development extends only to the transmissibility of claims for general damages in those cases where a class member dies after the institution of the certification application and prior to finalisation of a class action. In those instances, such general damages as that class member would have been entitled to claim, will be transmitted to his or her deceased estate.

_____

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

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Attorneys for 28th Respondent:	Cliffe Dekker Hofmeyr
Attorneys for 29th Respondent:	Van Hulsteyns Attorneys

Hearing of Argument: 12 to 23 October 2015

Date of delivery of Judgment: 13 May 2016

ANNEXURE "A" LIST OF MINES*

1. Harmony Gold Mine
2. Virginia Gold Mine
3. Merriespruit Gold Mine
4. Unisel Gold Mine
5. Free State Saaiplaas Gold Mine
6. Free State Saaiplaas Gold Mine Shafts 2 and 3
7. Saaiplaas Gold Mine Shafts 4 and 5 (now Masimong Mine)
8. President Steyn Gold Mine
9. President Steyn Gold Mine Shafts 1 and 2 (now part of Bambanani)
10. President Steyn Gold Mine Shaft 4
11. President Brand Gold Mine
12. President Brand Gold Mine Shafts *1, 2,* 3 and 5
13. Kusasalethu Gold Mine (formerly Elandsrand)
14. Elandsrand Gold Mine
15. DeeiKraal Gold Mine
16. Evander Gold Mine
17. Kinross Gold Mine
18. Winkelhaak Gold Mine
19. Bracken Gold Mine
20. Leslie Gold Mine
21. Randfontein Estates Gold Mine
22. Doornkop Gold Mine
23. Freegold 1 Gold Mine (now Bambanani)
24. Freegold 2 Gold Mine (now part ofTshepong)
25. Free Gold 3 Gold Mine (now part ofTshepong)
26. Freegold 4 Gold Mine (now part ofTshepong)
27. Tshepong Gold Mine (formerly Freegold 2 and 4)
28. Bambanani Gold Mine (formerly Freegold 1)
29. Masimong Gold Mine (formerly FS Saaiplaas 4 and 5)
30. H J Joel Gold Mine
31. Joel Gold Mine
32. St Helena Gold Mine

33. Western Holdings Gold Mine
34. Matjhabeng Gold Mine (formerly part of Western Holdings)
35. Target Gold Mine
36. Target Gold Mine Shafts 1 and 2
37. Target Gold Mine Shaft 3
38. Loraine Gold Mine
39. Loraine Gold Mine Shaft 3 (now part of Target)
40. Freddies Gold Mine
41. Freddies Gold Mine Shafts 7 and 9 (now part of Target)
42. Phakisa Gold Mine
43. Hartebeesfontein (now part of Buffelsfontein)
44. Vaal Reefs Gold Mine
45. Vaal Reefs Gold Mine Shafts *1,* 2, *3, 4, 5,* 6 and 7
46. Vaal Reefs Gold Mine No 8 Shaft (now Great Noligwa)
47. Vaal Reefs Gold Mine No 9 Shaft (now Kopanong)
48. Vaal Reefs Gold Mine No 10 Shaft (now Tau Lekoa)
49. Vaal Reefs Gold Mine No 11 Shaft (now Moab Khotsong)
50. Great Noligwa Gold Mine (formerly Vaal Reefs 8)
51. Kopanang Gold Mine (formerly Vaal Reefs 9)
52. Tau Lekoa Gold Mine {formerly Vaal Reefs 10)
53. Moab Khotsong Gold Mine {formerly Vaal Reefs 11)
54. Western Deep Levels Gold Mine
55. Western Deep Levels Gold Mine Shaft 1 (now Mponeng)
56. Western Deep Levels Gold Mine Shaft 2 (now Savuka)
57. Western Deep Levels Gold Mine Shaft 3 (now Tau Tona)
58. Mponeng Gold Mine (formerly Western Deep Levels 1)
59. Savuka Gold Mine(formerly Western Deep Levels 2)
60. Tau Tona Gold Mine(formerly Western Deep Levels 3)
61. Free State Geduld Gold Mine
62. South Deep Gold Mine
63. Beatrix Gold Mine
64. Oryx Gold Mine
65. Kloof Gold Mine
66. Libanon Gold Mine

67. Leeudoorn Gold Mine
68. Venterspost Gold Mine
69. Western Areas Gold Mine
70. East Driefontein Gold Mine
71. West Driefontein Gold Mine
72. Driefontein Consolidated Gold Mine
73. Kloof-Driefontein Complex (KDC Complex)
74. of stat Buffelsfontein Gold Mine
75. Blyvooruitzicht Gold Mine
76. Doornfontein Gold Mine (now part of Blyvooruitzicht)
77. East Rand Proprietary Mines
78. Durban Roodepoort Deep Gold Mine
79. Welkom Gold Mine
80. East Geduld Gold mine
81. Orkney Mines
82. Vlakfontein Gold Mine

ANNEXURE B1 (AMENDED): PUBLISHED NOTICE TO CLASS MEMBERS

NOTICE OF CLASS ACTION TO:
All underground mineworkers who work or have worked on any of the gold mines listed below, at any time after 12 March 1965, and who have silicosis and/or pulmonary tuberculosis;
and
The dependants of underground mineworkers who worked on any of the gold mines listed below, at any time after 12 March 1965, and who died from silicosis and/or pulmonary tuberculosis.

THE RELEVANT MINES:

Bambanani Gold Mine (formerly Freegold 1)	Matjhabeng Gold Mine (formerly part of Western Holdings
Beatrix Gold Mine	Merriespruit Gold Mine
Blyvooruitzicht Gold Mine	Moab Khotsong Gold Mine (formerly Vaal Reefs 11)
Bracken Gold Mine	Mponeng Gold Mine (formerly Western Deep Levels 1)
Buffelsfontein Gold Mine	Oryx Gold Mine
DeelKraal Gold Mine	Phakisa Gold Mine
Doornfontein Gold Mine (now part of Blyvooruitzicht)	President Brand Gold Mine
Doornkop Gold Mine	President Brand Gold Mine Shafts 1, 2, 3 and 5
Driefontein Consolidated Gold Mine	President Steyn Gold Mine
Durban Roodepoort Deep Gold Mine	President Steyn Gold Mine Shaft 4
East Driefontein Gold Mine	President Steyn Gold Mine Shafts 1 and 2 (now part of Bambanani)
East Rand Proprietary Mines	Randfontein Estates Gold Mine
Elandsrand Gold Mine	Saaiplaas Gold Mine Shafts 4 and 5 (now Masimong Mine)
Evander Gold Mine	Savuka Gold Mine (formerly Western Deep Levels 2)
Freddies Gold Mine	South Deep Gold Mine
Freddies Gold Mine Shafts 7 and 9 (now part of Target)	St Helena Gold Mine
Free Gold 3 Gold Mine (now part of Tshepong	Target Gold Mine
Free State Geduld Gold Mine	Target Gold Mine Shaft 3
Free State Saaiplaas Gold Mine	Target Gold Mine Shafts 1 and 2
Free State Saaiplaas Gold Mine Shafts 2 and 3	Tau Lekoa Gold Mine (formerly Vaal Reefs 10)
Freegold 1 Gold Mine (now Bambanani)	Tau Tona Gold Mine (formerly Western Deep Levels 3)
Freegold 2 Gold Mine (now part of Tshepong)	Tshepong Gold Mine (formerly Freegold 2 and 4)
Freegold 4 Gold Mine (now part of Tshepong)	Unisel Gold Mine
Great Noligwa Gold Mine (formerly Vaal Reefs 8)	Vaal Reefs Gold Mine
H J Joel Gold Mine	Vaal Reefs Gold Mine No 10 Shaft (now Tau Lekoa)
Harmony Gold Mine	Vaal Reefs Gold Mine No 11 Shaft (now Moab Khotsong)
Hartebeesfontein (now part of Buffelsfontein)	Vaal Reefs Gold Mine No 8 Shaft (now Great Noligwa)
Joel Gold Mine	Vaal Reefs Gold Mine No 9 Shaft (now Kopanong)
Kinross Gold Mine	Vaal Reefs Gold Mine Shafts 1, 2, 3, 4, 5, 6 and 7

Kloof Gold Mine	Venterspost Gold Mine
Kloof-Driefontein Complex (KDC Complex)	Virginia Gold Mine
Kopanong Gold Mine (formerly Vaal Reefs 9)	West Driefontein Gold Mine
Kusasalethu Gold Mine (formerly Elandsrand)	Western Areas Gold Mine
Leeudoorn Gold Mine	Western Deep Levels Gold Mine
Leslie Gold Mine	Western Deep Levels Gold Mine Shaft 1 (now Mponeng)
Libanon Gold Mine	Western Deep Levels Gold Mine Shaft 2 (now Savuka)
Loraine Gold Mine	Western Deep Levels Gold Mine Shaft 3 (now Tau Tona)
Loraine Gold Mine Shaft 3 (now part of Target)	Western Holdings Gold Mine
Masimong Gold Mine (formerly Free State Saaiplaas 4 and 5)	Winkelhaak Gold Mine

PLEASE TAKE NOTE THAT:

1. A class action for money damages has been started in the Gauteng Local Division of the High Court, Johannesburg, against the companies that owned, operated, controlled and/or advised the gold mines listed above, on behalf of:

   All current and former underground mineworkers who have silicosis and/or pulmonary tuberculosis and who have worked on any of the above listed gold mines at any time after 12 March 1965, as well as the dependants of such mineworkers who have died of silicosis and/or pulmonary tuberculosis, with the exclusion of persons –

   (i) whose claims are to be determined by arbitration in the matter of Blom and Others v Anglo American South Africa Limited; and

   (ii) who are named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544.

2. If you fall in the above class of persons, you automatically form part of the class action unless you opt out of the class action by sending a written notice to the attorneys representing the class, to be received by no later than 31 January 2017.

3. Please include your name, address and telephone number in the notice, and send it by post, fax or email to one of the following attorneys:

   Richard Spoor Incorporated
   Tel: +27 (0)11 482 6081
   Fax: +27 (0)11 482 1419
   Email: info@richardspoor.co.za
   Postal address: PO Box 303 Parklands, 2121
   Attention: Richard Spoor

   Abrahams Kiewitz Incorporated
   Tel: +27 (0)21 914 4842
   Fax: +27 (0)21 914 1455
   Email: classaction@ak.law.za
   Postal address: PO Box 3048, Tygervalley, 7536, Cape Town

Attention: Charles Abrahams

Legal Resources Centre
Tel: +27 (0)11 836 9831
Fax: +27 (0)11 834 4273
Email: sayi@lrc.org.za
Postal address: PO Box 9495, Johannesburg, 2000
Attention: Sayi Nindi
www.lrc.org.za

4. **TAKE NOTE THAT: Each class member who does not opt-out will be bound by any judgment or settlement, whether favourable or not, and will not be allowed to proceed with an independent action.**
5. Any money damages and other court order obtained by the class representatives under a judgment or settlement will be distributed to individual members of the class. Should the class action proceed to a stage where the liability of specific companies has to be decided and individual money damages are to be decided, class members will be advised by the legal representatives of the steps you will have to take as a class member to opt-in to the action for this purpose. **This means that you will have to take more steps yourself at a later stage to benefit personally from any success in the class action**.
6. The attorneys have entered into contingency fee agreements with the class representatives with respect to recovery of their legal fees and disbursements. These agreements provide that the attorneys will not receive payment for their work unless and until the class action is successful or costs are received from the defendant gold mining companies. If the class action is successful, the attorneys will be entitled to a fee payable out of the amount recovered under the judgment or settlement of the action, which amount will require court approval.
   As a member of the class, you have a right to participate in the proceedings. Should you wish to do so, kindly contact the attorneys (details listed above). You can also visit the following website for copies of the legal documents filed in the case: www.lrc.org.za; and www.goldminersilicosis.co.za.
7. To get more information about the class action, to obtain assistance in opting out or opting in, or if you wish to participate in the case, you may:
   (a) Contact one of the legal representatives (details listed above);
   (b) Call the toll free Call Centre at [insert number]. The Call Centre will operate from [hours], until [date]. There is no cost to persons calling that number from within the borders of the Republic of South Africa; or
   (c) Send a “please call me” by SMS to the following number [insert number], and one of the legal representatives will call you.

8. The following persons have been certified as the class representatives, and will act on behalf of the class in the action:

BONGANI NKALA	KAMBI ADMINISTRATIVE AREA, MTHATHA
SIPORONO PHAHLAM	IMIZIZI A/A REDOUBT, BIZANA, 4800

THEMBEKILE MNAHENI	MOHOABATSANA A/A, MT FLETCHER, 4770
MATONA MABEA	MOHALE'S HOEK, MEKALING, HA-MAKOANYANE
MOKHOLOFU BOXWELL	BUTHA-BUTHE, TLOKOENG
ALLOYS MNCEDI MSUTHU	MTHUMASI A/A, RAMAFOLE LOC, MT FLETCHER
MYEKELWA MKENYANE	BIZANA
ZWELENDABA MGIDI	TWAZI A/A, FLAGGSTAFF, 4810
MTHOBELI GANGATHA	NKUNZIMBINI A/A, LUSIKISIKI
LANDILE QEBULA	NGXOKWENI ADMIN AREA, LIBODE
PHUMELELO SOLITASI SIYOCOLO	NTLENZI ADMINISTRATIVE AREA, FLAGGSTAFF
TEKEZA JOSEPH MDUKISA	MADIBA A/A, BIZANA, 4800
JOSEPH LEBONE	MOHALE'S HOEK, TAUNG, HA-MONYAKE
ZAMA GANGI	GORHA ADMIN AREA, LUSIKISIKI, 4820
MALUNGISA THOLE	IMIZIU A/A, BIZANA, 4800
MONOKOA THOMAS LEPOTA	MASERU, ROMA, HA-ELIA
MZAWUBALEKWA DIYA	TYENI A/A BIZANA, 4800
MSEKELI MBUZIWENI	NQABENI VILLAGE, ISIKELO A/A, BIZANA, 4800
ZANEYEZA NTLONI	TWAZI A/A FLAGGSTAFF
TOHLANG PAULOSI MAKO	MOHALE'S HOEK, TAUNG, SILOE
NANABEZI MGODUSWA	WPHILISWENI/ TSHUZI WOC, BIZANA
THULENKHO KUSWANA	MIKHWE LOC, BIZANA
MALEBURU REGINA LEBITSA	LIRIBE, PELA-TSOEU, HA-MOTSOANE
MATAASO MABLE MAKONE	BUTHA BUTHE, MAKENENG, HA-TUMANE
MATSEKELO CISILIA MASUPHA	THUATHE, PUTHA-LICHABA, MASERU
MATIISETSO MASEIPATI JESENTA NONG	HA RANNAKOE, MATELILE, MAFETENG
BANGUMZI BENNETT BALAKAZI	PEDDIE, EASTERN CAPE
WATU LIVINGSTON DALA	CALA, EASTERN CAPE
ZWELAKE DALA	CALA, EASTERN CAPE
DYAMARA JANUARY JIBHANA	MERINO PARK, QUEENSTOWN, EASTERN CAPE
MANTSO HENDRICK MOKOENA	25 REITZ STREET, DOORN, WELKOM, FREE STATE
MBIKANYE ALFRED SAWULE	458 KOPANO, MIDFORD, EASTERN CAPE
ZONISELE JAN NKOMPELA	1909 MZAMO STREET, LINGE, QUEENSTOWN, EASTERN CAPE
ISHMAEL TSIKWANE MOTLEKE	516 SLOVO PARK, WITSIESHOEK, FREE STATE
THABO EDWIN NTSALA	4422 ZONE 7, MEQHELENG, FICKSBURG, FREE STATE
MALEPA PUSO	916 PHOMOLONG RHEEDESPARK EXT 2, 9458, WELKOM, FREE STATE
NOEBEJARA TAU	HA-KHOLANYANE, MATELILE, MAFITENG, LESOTHO
ELIA MOTLALEPULA PHETANE	MOSOANG HA-MOJELA HA MAPHEPHE, LESOTHO
MOTLALEPULA MOKOENA	HA-MOTLOHELOA, LESOTHO
SEKHOBE LETSIE	MATISENG, LESOTHO
TSHEHLA SOLOMON HLALELE	3878 KS, KUTLWANONG, OD 9480, WELKOM, FREE STATE

MONA ASHTON MELAO	HANGOATONYANE, MAZENOD, MASERU, LESOTHO
NKOSI SELATA SELATA	35149 HANIPARK, SHILOSERT, BRONVILLE, 9459, FREE STATE
EDGAR NTJANA NTJANA	PO BOX TLALI 70, SETLEKETSENG, LESOTHO
MAHOLA EMMANUEL SELIBO	SAINT RODERICK, HA-SHOEPANE, KHUBETSOANA, LESOTHO
EZEKIEL MUTSANA MASHUPA	ROOM E20, HARMONY, WELKOM, 9460, FREE STATE
MALEFETSANE MOHLAKASI	MOSOANG, HA-MOJELA, HA-MAKOETUE SEHLABENG SA, LESOTHO
MTHETHELELI NELSON SATU	ESKOBENI LOCATION, COFIMVABA, EASTERN CAPE

ANNEXURE C1 (AMENDED): RADIO NOTICE TO CLASS MEMBERS

This is a message to: All underground mineworkers who work or have worked on certain gold mines in South Africa, at any time from 12 March 1965, and who have contracted silicosis, and/or tuberculosis.

This message is also directed to: All the dependants of underground mineworkers who worked on certain gold mines in South Africa, at any time from 12 March 1965, and who died from silicosis or tuberculosis.

PLEASE TAKE NOTE THAT:

1. A class action for money damages has been started in the Gauteng Local Division of the High Court, Johannesburg, against the companies that owned, operated, controlled and/or advised certain gold mines in South Africa, on behalf of:

   All current and former underground mineworkers who have silicosis and/or pulmonary tuberculosis and who have worked on any of the gold mines cited in the proceedings, at any time after 12 March 1965, as well as the dependants of such mineworkers who have died of silicosis or pulmonary tuberculosis, with the exclusion of persons –

   (i) whose claims are subject to arbitration in the matter of Blom and Others v Anglo American South Africa Limited; and
   (ii) **who are named plaintiffs in the actions pending in the United Kingdom against Anglo American South Africa Limited**.

2. If you fall within this class of persons, you automatically form part of the class action, and you will be bound by any judgment or settlement obtained in the class action.

3. If you do not wish to be part of the class action, you must opt out by sending a written notice to the attorneys representing the class, to be received by no later than [date].

4. Please refer to this week's [SPECIFY NEWSPAPERS] for the list of gold mines covered by the class action; and for details of how to "opt out" should you choose not to be a member of the class and how to "opt in" at the stage when final liability and damages are decided.

5. For more information, you can also:
   a. Call the following toll-free number: [insert]. The Call Centre will operate until [date]. There is no costs to persons calling that number from within the borders of the Republic of South Africa; or
   b. Send a "please call me" by SMS to the following number [insert], and the legal representative will call you; or
   c. Visit the websites at www.lrc.org.za and www.goldmindersilicosis.co.za.

ANNEXURE D: LIST OF NEWSPAPERS

Newspapers		
South Africa		
Newspapers	**Language/s**	**Distribution**
Alex Pioneer	All Languages	Gauteng
Horizon	English, Afrikaans	Gauteng
Soweto Express & Soweto	Zulu, Xhosa, English, S Sotho,	Gauteng
Times	Pedi	Gauteng
Kathorus Mail	Zulu, SeSotho, English	Gauteng
Tshwane Sun Hammanskraal,	Setswana and English	
Tswane Sun Central		Mpumalanga
Kruger 2 Canyon	N Sotho, Tsonga, Siswati &	Mpumalanga
The Herald	English	Mpumalanga
The Herald	N Sotho, Tsonga, Siswati &	Mpumalanga
The Herald	English	Mpumalanga
Highlands Panorama	Setswana, Ndebele & English	
	SiSwati, Zulu, English,	Limpopo
Polokwane Observer	Afrikaans	Limpopo
Bulletin	N Sotho, Tsonga, Siswati,	
	Pedi, English	Limpopo
Limpopo Mirror	N Sotho & English	
	N Sotho, Tsonga, Afrikaans,	Limpopo
Seipone, Mogol Post	English	
	Venda, Tsonga, Sepedi,	Limpopo
Zoutpansberger	Afrikaans, English	
	N Sotho, English, Afrikaans,	Free State
Mangaung Issue	Ndebele	Free State
Eastern Free State Issue	English, Afrikaans, Venda,	Free State
Maluti News	Sotho, Tsonga	North West
Northwest Independent,	English, Sotho	
Overvaal	Sesotho, Zulu & English	North West
	Sesotho & English	North West
Zeerust News	Setswana, Afrikaans, Sesotho,	Kwa-Zulu Natal
Mmega District News	N Sotho	Kwa-Zulu Natal
Pinetown Izindaba,	Setswana, English, Afrikaans	
Amanzimtoti,	Setswana, Afrikaans, English	Kwa-Zulu Natal
Galaxy, Northern Star, Stanger	Zulu, Xhosa & Siswati	Kwa-Zulu Natal
Weekly	Zulu, English, Xhosa	Eastern Cape
Al Qalam KZN		Eastern Cape
Ladysmith Herald, Stanger	Zulu, English, Afrikaans,	Eastern Cape
weekly	German	Northern Cape
The Reporter	Zulu, English	
Eastern Cape Today	Xhosa, Afrikaans, English	Northern Cape
Pondo News	Xhosa & English	Western Cape
Kathu Gazette	Xhosa, English, Sesotho,	
	Afrikaans	
De Aar Echo	Afrikaans, Setswana, Xhosa &	
Durban North News	English	
	Afrikaans, Xhosa, English	
	Xhosa & English	
Zimbabwe		
Newspapers	**Language/s**	**Distribution**
Sunday Mail	English	National
The Chronicle	English	National
The Herald	English	National
The Manic Post	English	National
Zambia		
Newspapers	**Language/s**	**Distribution**

Zambia Daily Mail	English	National
The Post	English	National
Swaziland		
Newspapers	**Language/s**	**Distribution**
Times of Swaziland	English	National
Swazi Observer	English	National
Mozambique		
Newspapers	**Language/s**	**Distribution**
Noticias	Portuguese	National
Savana	Portuguese	National
Domingo	Portuguese	National
Malawi		
Newspapers	**Language/s**	**Distribution**
Malawi News	English, Chichewa	National
The Sunday Times	English	National
Lesotho		
Newspapers	**Language/s**	**Distribution**
Public Eye	English, Sesotho	National
Botswana		
Newspapers	**Language/s**	**Distribution**
Botswana Gazette	English	National
The Voice	English, Setswana	National

ANNEXURE D: LIST OF RADIO STATIONS

Radio Stations		
South Africa		
Station	**Language/s**	**Distribution**
Alx FM	All Languages	Gauteng
Eldos FM	English, Afrikaans	Gauteng
Jozi FM	Zulu, Xhosa, English, S Sotho,	Gauteng
Kasie FM	Pedi	Gauteng
Radio Moretele	Zulu, SeSotho, English	Gauteng
Radio Shoshanguve	Setswana and English	Gauteng
Barberton Community Radio	Setswana and English	Mpumalanga
Radio Bushbuckridge	N Sotho, Siswati & English	Mpumalanga
eMalahleni Community	N Sotho, Tsonga, Siswati,	Mpumalanga
Radio Middleburg	English	Mpumalanga
Radio Kangala	N Sotho, Tsonga, Siswati,	Mpumalanga
Radio Kanyamazane	English	Mpumalanga
Radio Moutse	Zulu, Ndebele and English	Mpumalanga
Tubatse	Setswana, Ndebele & English	Mpumalanga
Radio Botlokwa	SiSwati, Zulu, English,	Limpopo
Greater Lebowakgomo	Afrikaans	Limpopo
Greater Tzaneen FM	N Sotho, Tshonga, Siswati, English	Limpopo
Makhado FM	N Sotho, Pedi, English	Limpopo
Radio Mohodi	N Sotho and English	Limpopo
Mokopane Radio	N Sotho, Tsonga, Afrikaans, English	Limpopo
Radio Moletsi	Venda, Tsonga, Sepedi,	Limpopo
Musina	Afrikaans, English	Limpopo
Phalaborwa	N Sotho and English	Limpopo
Radio Sekgosese	N Sotho, English, Afrikaans,	Limpopo
SKFM	Ndebele	Limpopo
Radio Univen	N Sotho and English	Limpopo
Motheo FM	English, Afrikaans, Venda,	Limpopo
Radio Naledi	Sotho, Tsonga	Free State
Qwa Qwa Radio	Tsonga, Sepedi, Zulu, English	Free State
Setsoto FM	SePedi & English	Free State
Aganang	SePedi and English	Free State
Kopanong	Venda and English	North West
Lethlabile	English, Sotho	North West
Radio Mafikeng	Sesotho and English	North West
Modiri FM	Sesotho, Zulu and English	North West
Radio Mafisa	Sesotho and English	North West
Vaaltar	Setswana, Afrikaans, Sesotho,	North West
Icora FM	N Sotho	North West
Imbokodo	Setswana, English, Afrikaans	North West
Inanda FM	Setswana, English	Kwa-Zulu Natal
Izwi Lomzansi	Setswana, English	Kwa-Zulu Natal
Radio Khwezi	Setswana, Afrikaans, English	Kwa-Zulu Natal
Zululand	Setswana and English	Kwa-Zulu Natal
Alfred Nzo	Setswana and English	Kwa-Zulu Natal
Inkonjane	Zulu	Kwa-Zulu Natal
Radio Khanya	Zulu, Xhosa, Siswati	Eastern Cape
Lukhanji	Zulu, English, Xhosa	Eastern Cape
Nkqubela Radio	Zulu, English	Eastern Cape
Radio Takalani	Zulu, English, Afrikaans, German	Eastern Cape
	Zulu, English	Eastern Cape
	Xhosa & S Sotho, with English	Eastern Cape

Unique FM	in the News	Eastern Cape
Radio Unitra	Xhosa, English	Eastern Cape
Radio Vukani	Xhosa, English	Eastern Cape
Radio Riverside	Xhosa, Afrikaans, English	Northern Cape
	Xhosa, English	
Radio Teemaneng	English, Xhosa	Northern Cape
Ulwazi	English, Xhosa	Northern Cape
Radio Zibonele	Xhosa, English, Sesotho, Afrikaans	Western Cape
	Xhosa	
	Afrikaans, Setswana, Xhosa, English	
	Xhosa, Tswana, S Sotho, English	
	Afrikaans, Xhosa, English	
	Xhosa, English	
Zimbabwe		
Station	**Language/s**	**Distribution**
ZFM	English/Shona	National
Star FM	English/Shona	National
ZBC FM (official radio)	English/Shona/Ndebele	National
BBC WS Africa	English	International
Zambia		
Station	**Language/s**	**Distribution**
ZNBC (official radio)	English	National
BBC WS Africa	English	International
Swaziland		
Station	**Language/s**	**Distribution**
SBIS Radio 1	Siswati	National
SBIS Radio 2	English	National
TWR Voice of the Church	English	National
Mozambique		
Station	**Language/s**	**Distribution**
Radio Mozambique	All indigenous languages, English & Portuguese	National
BBC WS Africa	English	International
RDP Africa	Portuguese	National
Malawi		
Station	**Language/s**	**Distribution**
MBC Radio 1	English, Chichewa, Tumbuka, Ya, Lomwe, Tonga	National
MBC Radio 2	English, Chichewa	National
BBC WS Africa	English	International
Lesotho		
Station	**Language/s**	**Distribution**
Radio Lesotho	Sesotho and English	National
BBC WS Africa	English	International
People's Choice FM	Sesotho and English	National
Botswana		
Station	**Language/s**	**Distribution**
Radio Botswana RB1	English, Setswana	National
Radio Botswana RB2	English, Setswana	National
Duma FM	English, Setswana	National