

FAR-REACHING JUDGMENT OF THE RECENT SILICOSIS CLASS ACTION CASE

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The scope and magnitude of the proposed class actions envisaged in *Nkala v Harmony Gold Mining Company Limited (Treatment Action Campaign NPC and Sonke Gender Justice NPC Amicus Curiae) ("Nkala")*¹ is unprecedented in South Africa and would traverse novel and complex issues both of fact and law² and entail the further development of class action law in South Africa, which is 23 years in the making.³

INTRODUCTION

Class actions represent a paradigmatic shift in the South African legal process. It is a process that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group or "class" against one or more defendants. The South African class action process:⁴

- > 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;

- > is designed to protect not only the plaintiff, but also the defendant(s) from facing a multiplicity of actions resulting in the defendant(s) having to recast or regurgitate its/their case against each and every individual plaintiff;
- > moves the litigation forward, is in the interest of justice and 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 a different court on the same issue; and
- > allows for a single finding on the issue(s), which finding binds all the plaintiffs and defendants.⁵

BACKGROUND OF NKALA

The judgment of the Full Bench of the High Court of South Africa, Gauteng Local Division, Johannesburg was handed down by Deputy Judge President Mojapelo and Judges Vally and Windell on 13 May 2016. The 69 applicants⁶ sought to bring a class action, against 32 companies operating in the gold mining industry ("the respondents"), to claim compensation on behalf of current and former underground mineworkers who contracted silicosis⁷ or

¹2016 JDR 0881 (GJ).

²Paragraph [7] of *Nkala*.

³Section 7(4) of the Interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) introduced class actions into South African law. Section 38(c) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") replicated section 7(4) of the Interim Constitution and allows for any natural or juristic person (acting as a member of, or in the interest of, a group or class of persons) to approach a court alleging that a right in the Bill of Rights has been infringed or threatened and to request the court to grant appropriate relief, including a declaration of rights. Class actions in such cases as provided for in section 38(c) of the Constitution is now part of the supreme law of South Africa.

⁴As developed through common law and with reference to the report published on class actions and public interest actions in 1998 by the The South African Law Commission "The recognition of class actions and public interest actions in South Africa" Project 88 (1998).

⁵*Nkala* at [33] and [34].

⁶Mineworkers employed in South Africa in the gold mining industry having worked or who have worked for at least two years after 12 March 1965 (cut-off point) on one or more of the gold mines listed in the court application. The cut-off date coincides with the effective date of the new regulatory regime brought under the Mines and Works Act No 27 of 1956.

⁷Silicosis is a form of occupational lung disease caused by the inhalation of crystalline silica dust (quartz) and is marked by inflammation and scarring of the lungs. Patients with silicosis are particularly

pulmonary tuberculosis (TB),⁸ and on behalf of the dependants of mineworkers who died of silicosis or TB contracted whilst employed in the South African gold mines.⁹

NKALA CASE SUMMARY¹⁰

The applicants sought an order for the certification of one consolidated class action comprising of two classes, namely a silicosis class¹¹ and a TB class, against the respondents. The applicants proposed a bifurcated process through which the single class action would proceed in two stages, stage one being during which issues common to both classes shall be determined and stage two during which individual issues shall be determined with the court sanctioning the adoption of a bifurcated process. The potential class members may range from between 17 000 and 500 000 members, the bulk of which belong to the silicosis class.

The court followed the judgment of the Supreme Court of Appeal ("SCA") in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*¹² where the SCA provided a list of seven requirements of overlapping nature, which should guide a court in making a certification decision,¹³ being:

- > the existence of a class identifiable by objective criteria;
- > a cause of action raising a triable issue;
- > that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- > that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- > that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- > that the proposed representative is suitable to be permitted to conduct the action and represent the class; and
- > whether given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

The court held that the criteria used to identify members of the two classes must be objective and, in defining the class, it is not necessary to identify all the putative class members, but the class must be defined with sufficient precision (but not too wide) so as to allow for a particular individual's membership to be objectively determined.

The court expressed its view that there was simply 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. The court held that the class definitions are not overbroad and cannot be unmanageable.

In considering whether there is any realistic alternative to a class action, the court held that a class action is the only realistic option through which justice can prevail and most mineworkers can assert their claims effectively against the mining companies and the only avenue to realise the right of access to courts, which is guaranteed for the mineworkers by the Constitution of the Republic of South Africa, 1996.

The court further stated that once the determination on whether or not 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 and concluded that the proposed class action is the most appropriate way for this matter to proceed.

On the transmissibility of general damages the majority of the court held that the common law had to be developed to allow for a claim for general damages to be transmissible¹⁴ (without being restricted only to class action suits) to the estate or executor of a deceased mineworker, even though the stage of *litis contestatio* (close of pleadings whereafter pre-trial and trial procedures commence) had not been reached at the time of the mineworker's death. This development should also not be restricted to only cases where the plaintiff has died *pre-litis contestatio* but should also apply to the case where the defendant or potential defendant has died *pre-litis contestatio*, as the same principles as those applicable to plaintiffs apply to defendants.

As to practical arrangements, the court held that these can be fully and finally determined by the trial court after pleadings have closed and all factual and legal issues have crystallised or been identified, as it is not within the power of the court certifying the class action, to prescribe to the trial court how it should structure its hearings. The court rejected the submissions of the mining companies that the class action is untenable and unmanageable.

The court made it clear that by holding that it is in the interest of justice that a class action be certified in this case, that they do not find that the mining companies are jointly liable for the harm suffered by an individual mineworker as the law of delict is clear that a defendant may only be held liable for his own delict and not that of another defendant. The liability of each mining company defendant 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.

The court's certification order further made rulings regarding certification of legal and class representatives, class action notice steps to be taken to ensure that the notices are brought to the attention of the maximum number of mineworkers, reports to be filed on the publishing of the notice, opt-in and opt-out provisions for the class members to be bound or not to the judgments handed down in the first and second stages of the class action, the respondents' liability for the costs of the certification application and to share half of the applicants' costs of publishing the notice and that any settlement agreement would only be of force and take effect if approved by this court.

susceptible to TB infection. Silicosis is a latent, progressive, incurable and irreversible disease.

⁸TB is a bacterial lung disease which can be treated successfully and cured if detected early.

⁹The application was strenuously opposed by 31 of the 32 respondents. The respondents represent close to the entire gold mining industry in South Africa. The magnitude and the range of legal representatives involved in this case are also unprecedented being 37 counsel instructed by 11 different law firms.

¹⁰This section contains extracts from *Nkala*.

¹¹The silicosis class rests on the common cause fact that silica dust causes silicosis (and is the only cause) whilst the TB class rests on the contention that the inhalation of silica dust increases the risk of contracting TB.

¹²2013 (2) SA 213 (SCA).

¹³*Children's Trust* case at [26].

¹⁴The claim of general damages in this case shall be transmissible from the date when the certification application was launched in August 2012.

APPLICATIONS FOR LEAVE TO APPEAL AGAINST THE NKALA JUDGMENT AND SETTLEMENT NEGOTIATIONS¹⁵

It is reported in the media that on 24 June 2016 the High Court refused the application for leave to appeal brought by some of the South African mining companies against the certification of silicosis and TB classes in the class action, as the High Court held that the certification (which is a procedural step and interlocutory) is not appealable and that it is not in the interest of justice to grant leave to appeal, as there is also no prospect of success of such an appeal. The court however granted the mining companies leave to appeal against a finding amending the common law in respect of the transmissibility of general damages.¹⁶

Subsequent to the above, it has further been reported in the media that some of these mining companies have petitioned the SCA for leave to appeal the class action certification judgment as these companies are of the view that, due to this being an unprecedented area of law and that the court failed to address a number of important aspects in its judgment, the principles have to be considered by a higher court. These mining companies have also indicated that they are conscious of the concerns that the appeal process will delay the finalisation of the matters and have indicated that should the leave to appeal be granted, they will request the appeal to be dealt with on an expedited basis.¹⁷

On the basis of the provisions of Section 18 of the Superior Courts Act No. 10 of 2013 and with reference to the media reports on the status of the applications for leave to appeal:

- > The operation and execution of the High Court's judgment on the transmissibility of general damages is suspended pending the outcome of this appeal, unless the court, in exceptional circumstances and upon application by the mineworkers, allows its judgment to be carried into effect pending the decision of the appeal; and
- > The operation and execution of the High Court's judgment on the certification of the class action is (as it is regarded as an interlocutory order) not suspended pending the outcome of the petition to the SCA for an application for leave to appeal the certification; and the processes envisaged dealing with the preparation of the class action proceedings can, thus, technically, proceed pending the outcome of the petition to the SCA.

The Occupational Lung Disease Working Group (consisting of some of the respondents in this case and who have also petitioned the SCA for leave to appeal the certification judgment) expressed its views that achieving a mutually acceptable comprehensive settlement which is fair to both past, present and future employees, and sustainable for the

mining sector, is preferable to protracted litigation and efforts are being continued to achieve common ground with the relevant stakeholders.¹⁸

CONCLUSION

Despite the development of class action law through case law, and the enactment of section 38 constitution-like provisions in the companies and the consumer protection legislation, there is still a need for legislative reform of class actions to bring it in line with the South African Law Commission's 1998 Report on class actions.

In light of the fact that recent case law, more specifically *Nkala*, will undoubtedly lead to further class actions being launched in South Africa, the necessity to have a comprehensive legislative framework within which to govern class actions is now more prevalent than ever before. The case law to date has greatly assisted with the development and refinement of the certification process of South African class actions but the regulatory framework for the procedure and conduct of class actions is yet to be developed, especially from a case management perspective, even if guidance could, broadly speaking, be obtained from case law in the absence of any formal legislative framework governing class actions in South Africa.

When considering the potential of 500 000 or more class members who could be part of *Nkala*, which sets it amongst the ranks of the largest class action cases ever certified in the world, it is clear that, save for it being in a country with no formal legislative framework governing class actions, there is also a dire need for clear guidance to be provided from a case management perspective on the procedures and conduct in a case of such unparalleled proportions in South Africa to ensure its timeous, proactive, cost-effective, efficient and pragmatic adjudication to the benefit of all of the parties concerned.

Although legislative reform of class actions by the South African government is necessary, one can echo the sentiments expressed by Professor Wouter de Vos of the University of Cape Town in his commentary¹⁹ on the *Children's Trust* case and can also commend the judges in *Nkala* for their active judicial approach in the development of the legal position of class actions in South Africa as *Nkala* is, pending the outcome of any appeal procedures, regarded as the latest, most authoritative, *locus classicus* on the certification of class actions in South Africa.

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¹⁵Position as at date of compilation hereof.

¹⁶Extracts from <http://section27.org.za/2016/06/bongani-nkala-others-v-harmony-gold-others/> (27-06-2016).

¹⁷Extracts from <http://www.miningreview.com/news/gold-miners-to-file-petition-to-the-sca-for-leave-to-appeal/> "Gold miners file petition against silicosis judgment" (18-07-2016).

¹⁸Extracts from <http://www.miningreview.com/news/gold-miners-to-file-petition-to-the-sca-for-leave-to-appeal/> "Gold miners file petition against silicosis judgment" (18-07-2016).

¹⁹De Vos "Judicial Activism gives recognition to a general class action in South Africa" 2013 TSAR 380.

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