REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Case No.: 44060/2018

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

26/07/2019
DATE

SIGNATURE

BONGANI NKALA	First Applicant
SIPORONO PHAHLAM	Second Applicant
THEMBEKILE MNAHENI	Third Applicant
MATONA MABEA	Fourth Applicant
ALLOYS MNCEDI MSUTHU	Fifth Applicant
MASIKO SOMI	Sixth Applicant
MTHOBELI GANGATHA	Seventh Applicant
LANDILE QEBULA	Eighth Applicant
JOSEPH LEBONE	Ninth Applicant
ZAMA GANGI	Tenth Applicant
MALUNGISA THOLE	Eleventh Applicant
MONOKOA THOMAS LEPOTA	Twelfth Applicant
MZAWUBALEKWA DIYA	Thirteenth Applicant
MSEKELI MBUZIWENI	Fourteenth Applicant

NANABEZI MGODUSWA	Fifteenth Applicant
THULENKHO KUSWANA	Sixteenth Applicant
MALEBURU REGINA LEBITSA	Seventeenth Applicant
MATAASO MABLE MAKONE	Eighteenth Applicant
MATSEKELO CISILIA MASUPHA	Nineteenth Applicant
MATIISETSO MASEIPATI JESENTA NONG	Twentieth Applicant
BANGUMZI BENNET BALAKAZI	Twenty-first Applicant
WATU LIVINGSTON DALA	Twenty-second Applicant
DYAMARA JANUARY JIBHANA	Twenty-third Applicant
MANTSO HENDRICK MOKOENA	Twenty-fourth Applicant
MBIKANYE ALFRED SAWULE	Twenty-fifth Applicant
ZONISELE JAN NKOMPELA	Twenty-sixth Applicant
ISHMAEL TSIKWANE MOTLEKE	Twenty-seventh Applicant
THABO EDWIN NTSALA	Twenty-eighth Applicant
ZIMOSHILE BOZO	Twenty-ninth Applicant
ZAMUKULUNGISA DYANTI	Thirtieth Applicant
AGRIPPA DLISANI	Thirty-first Applicant
MNCEDISI DLISANE	Thirty-Second Applicant
LUVOKO MADINDALA	Thirty-Third Applicant
MTUTUZELI MTSHANGE	Thirty-Fourth Applicant
MONDE MXESIBE	Thirty-Fifth Applicant
MZWANELE BUNYONYO	Thirty-Sixth Applicant
MZIKAYISE NQOSE	Thirty-Seventh Applicant
XOLISILE BUTU	Thirty-Eighth Applicant
ZOLISA JEJANA	Thirty-Ninth Applicant

MALEPA PUSO	Fortieth Applicant
ELIA MOTLALEPULA PHETANE	Forty-First Applicant
MOTLALEPULA MOKOENA	Forty-Second Applicant
SEKHOBE LETSIE	Forty-Third Applicant
TSHEHLA SOLOMON HLALELE	Forty-Fourth Applicant
MONA ASHTON MELAO	Forty-Fifth Applicant
NKOSI SELATA SELATA	Forty-Sixth Applicant
EDGAR NTJANA NTJANA	Forty-Seventh Applicant
EZEKIEL MUTSANA MASUPHA	Forty-Eighth Applicant
HARMONY GOLD MINING COMPANY LTD (Registration number M1950/038232/06)	Forty-Ninth Applicant
LESLIE GOLD MINES LIMITED (Registration number 1959/001124/06)	Fiftieth Applicant
RANDFONTEIN ESTATES LTD (Registration number 1889/000251/06)	Fifty-First Applicant
AVGOLD LIMITED (Registration number 1990/0070251/06)	Fifty-Second Applicant
UNISEL GOLD MINES LIMITED (Registration number 1972/010604/06)	Fifty-Third Applicant
LORRAINE GOLD MINES LIMITED (Registration number 1950/039138/06)	Fifty-Fourth Applicant
BRACKEN MINES LIMITED (Registration number 1959/001126/06	Fifty-Fifth Applicant
ANGLOGOLD ASHANTI LIMITED (Registration number 1944/017354/06)	Fifty-Sixth Applicant
FREE STATE CONSOLIDATED GOLD MINES (OPERATIONS) LIMITED (Registration number 1937/009266/06)	Fifty-Seventh Applicant
GOLD FIELDS LIMITED (Registration number 1959/003209/06)	Fifty-Eighth Applicant

GOLD FIELDS OPERATIONS LIMITED Fifty-Ninth Applicant
(Registration number 1968/004880/06)

NEWSHELF 899 (PROPRIETY) LIMITED Sixtieth Applicant
(Registration number 2007/019941/070

BEATRIX MINES (PROPRIETY) LIMITED Sixty-First Applicant
(Registration number 1977/002138/07)

FARWORKS/622 (PROPRIETY) LIMITED Sixty-Second Applicant
(Registration number M1964/004462/07)\

DRIEFONTEIN CONSOLIDATED (PROPRIETY) LIMITED Sixty-Third Applicant
(Registration number 1993/002956/07)

SIBANYE GOLD LIMITED Sixty-Fourth Applicant
(Registration number M2002/031431/06)

ANGLO AMERICAN SOUTH AFRICA LIMITED Sixty-Fifth Applicant
(Registration number 1917/005309/06)

AFRICAN RAINBOW MINERALS LIMITED Sixty-Sixth Applicant
(Registration number 1933/004580/06)

FREEGOLD (HARMONY) (PROPRIETY) LIMITED Sixty-Seventh Applicant
(Registration number 2001/029602/07)

GFL MINING SERVICES LIMITED Sixty-Eighth Applicant
(Registration number 1997/019961/06)

GFL JOINT VENTURE HOLDINGS (PROPRIETY) LIMITED Sixty-Ninth Applicant
(Registration number 1998/023354/07)

K2018259017 (SOUTH AFRICA) (PROPRIETY) LIMITED Seventieth Applicant
(Registration number 2018/259017/07)

IN RE: Application to certify a settlement class and approve a settlement agreement in respect of the certified class action between Bongani Nkala and 55 Others v Harmony Gold Mining Company Limited and 31 Others

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Judgment

Vally J

Introduction and background

[1] I have had the privilege of reading the comprehensive judgment of Windell J. I agree with the order she proposes. I have, however, penned a separate judgment as the approach I adopt and the emphasis I place on certain issues is slightly different.

[2] This case encapsulates the tragic and sad aspect of gold mining in South Africa. Gold mining has a long history in this country. At one level it has produced great wealth for a few and has allowed for the development of the country in general (by virtue of, amongst others, the foreign exchange and taxes earned through this industry) and of its richest province in particular. Yet at the same time it has produced untold pain, suffering, physical harm and death for hundreds of thousands of people who worked in these mines. This has been the persistent dialectic of the times.

[3] Focussing on the pain, suffering and the deaths, particularly those associated with the contraction of two diseases namely silicosis and tuberculosis (TB), certain applicants approached this Court for authorisation to bring a class action against 32 mining companies (the mining companies). They sought an order certifying a consolidated class action comprising of two classes, namely a silicosis class and a TB class, against the mining companies. They were successful. This Court issued a detailed order (the certification order) in that regard.

[4] The mining companies were aggrieved by the certification order and have succeeded in securing leave to appeal against it to the Supreme Court of Appeal (SCA).

The appeal is still pending. The certification order is therefore suspended.[1] In the meantime, however, the applicants in the certification application and some of the mining companies (the settling companies) engaged in negotiations aimed at settling the entire dispute between themselves. They have concluded a settlement agreement (the agreement). The agreement is intended to deal with the concerns of both the silicosis and the tuberculosis classes. Consequently, the parties to the agreement ask this Court to sanction it, for until this Court does so it is not binding on the parties. But first they sought a rule *nisi* allowing them to publish the agreement in various media and on various notice boards and websites informing class members that they have the right to object to the agreement. The rule *nisi* incorporated the agreement. It was issued by Mojapelo DJP on 13 December 2018. It was duly and widely published in the hope that it would come to the attention of all members of the two classes so that they could acquaint themselves with the terms of the agreement, and, should they wish to do so, challenge the application to have it approved by this Court. The rule *nisi* indicated that the return date for confirmation or discharge of the rule would be 29 - 31 May 2019. On 29 and 30 May 2019 this Court heard the application. We received extensive oral submissions from the applicants' counsel in support of the application. The application, it has to be said, was well prepared and presented in every respect. I remain indebted to all the legal representatives for the professionalism they demonstrated and for the very helpful assistance they provided as a whole.

[5] Should this Court approve the agreement, the applicants would be required to once again publish the terms of the agreement in various media so that class members[2]

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[1] The suspension of the order follows by operation of s 18(1) of the Superior Courts Act No 10 of 2013

[2] The reference to class member must, depending on the context of the message conveyed in a particular sentence or paragraph, be read to include a dependant of a class member. To draw the distinction each time is, I believe, unnecessary. Thus, at times the term class member would be referring to a claimant.

who wish to opt-out of the settlement are afforded an opportunity to do so. Should any class member exercise the right to opt-out s/he would be entitled to pursue his/her claim against any or all of the settling companies. The recognition of this right of a class member to opt-out and its exercise by the class members constitute the basis for one of the condition precedents of the agreement. More of this will be said later.

[6] The application of a rule *nisi* first, and the application for the approval of the agreement thereafter, is characterised as "*a two-stage process*". The process enjoys international pedigree: a number of national jurisdictions that are familiar with class action litigation have found the process useful. It has been adopted for one reason only: to protect the interest of the class members who (a) were not consulted with regard to the amount of the compensation they should each receive, and (b) remain ignorant as to the terms of the agreement concluded on their behalf and in their name. The purpose of the approach is well encapsulated by the learned author Rachael Mulheron who writes:

> "First, the interests of class members are affected by the result, and the court must ensure that their interests have been served by the settlement. ... Secondly, representative plaintiffs must be prevented from using the class action to improve their own bargaining positions to settle their individual claims on terms more favourable than for the other class members (the "sweetheart" settlement). Thirdly, court approval seeks to preclude class lawyers from benefiting themselves while obtaining minimal benefit for their clients. ... Fourthly, court approval of settlements is a means for the court to monitor extortionate settlements to prevent profiteering from vulnerable defendants." [3]

[7] One of the issues that courts entrusted with the responsibility to approve a settlement agreement in a class action have to consider is whether the compensation awarded to the class members is fair, adequate and reasonable. There could well be a

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[3] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, (2004, Oxford) at 390 - 391

variety of opinions on this issue, with members of the class adopting views that could be on opposite sides of a spectrum. The settlement agreement could, in such circumstances, be a recipe for division and conflict. The two-stage process to the approval bears the great merit of allowing for the ventilation in court proceedings of any division and conflict that may arise. Class members, or indeed anyone else, whose views are in discord with those who promote the agreement are afforded an opportunity to oppose the approval or to just raise their concerns, so that a court acting judiciously can take them into account.

[8] An important fact that should be recorded is that not all the ex-mineworkers who were authorised by the certification order to act as class representatives are part of the applicants in this application. Sadly, some of them have, as at the date the founding affidavit in this case was filed, passed away. They are: Mr Maphatsoe Kombi, Mr Mokholofu Boxwell, Mr Zwelendaba Mgidi, Mr Michael Litable, Mr Liphapang Lebina, Mr Zaneyeza Ntoni, Mr Tekeza Joseph Mdukisa, Mr Tohlang Paolosi Mako, Mr Mahola Emmanuel Selibo, Mr Malefatsane Mohlakasi, Mr Mthethelele Nelson Satu, Mr Myekelwa Mkenyane, Mr Patrick Sitwayi, Mr Zwelakhe Dala, Mr Vuyani Dwadube, Mr Matela Hlabathe, Mr Siqhamo Richard Hoyi and Mr Buzile Nyakaza. Regretfully, by the time this judgment is delivered and by the time the agreement is made operative (assuming it is approved and the conditions precedent thereto are met) many more deaths among the class members (including the class representatives) are likely to ensue. Further, there are two class representatives whose whereabouts are unknown and one who has withdrawn from the case altogether. Respectively, they are Mr Noebejara Tau, Mr Malusi Bovu and Mr Phumelelo Solitasi Siyocolo.

[9] Finally, before dealing with the merits of the application it bears mentioning that not all the companies that were respondents in the certification application have joined in the settlement. Some of them (the non-settling companies) intend to pursue the pending appeal. These non-settling companies are: DRDGold Limited (DRDGold), East Rand Propriety Limited (ERPM), Randgold and Exploration Company Limited, Evander Gold Mining Company Limited, Blyvooruitzicht Gold Mining Company Limited, Doornfontein Gold Mining Company Limited, Simmer and Jack Mines Limited and African Rainbow Minerals Gold Limited.

[10] The rule *nisi* was served on the non-settling companies. In terms of paragraph 5 of the rule *nisi* they were invited to participate in the proceedings on the return day. None of them exercised the right to participate and thus the hearing proceeded without any input from them. However, Malan Scholes Attorneys, acting on behalf of DRDGold and ERPM, wrote a letter to the attorneys for the class representatives stating that their clients had no legal interest in the material aspects of the rule *nisi* and would like to avoid an adverse costs order by not appearing on the return day. In their letter, the attorneys raised some concerns about the application for approval and what they believe would be the consequences of this Court granting part of the relief sought. More on this issue, too, will be said later.

The agreement, the Trust and the trustees

[11] At heart, the agreement is aimed at compensating the class members who suffered harm over many decades while in the employ of one or more of the settling

companies. This much is acknowledged in the agreement itself. In what essentially is a preamble to the agreement the following is recorded:

> "The Parties recognise the need to address issues associated with past, present and future compensation for Silicosis and Tuberculosis in the South African gold mining industry, and settle the Settled Claims fully and finally."

[12] It was concluded on 3 May 2018, after three years of intensive negotiations. The settling companies' liability for the compensation is unlimited. For the moment, they have agreed to collectively furnish a security of R5bn which will be paid to a trust to be established to administer the claims of all claimants.

[13] The agreement is subject to the fulfilment or waiver of a number of suspensive conditions, the key ones being: (i) that the agreement is made an unconditional order of this Court; (ii) no more than 2000 class members have opted out of the settlement; and (iii) the Trust Deed is lodged with the Master and letters of authority are issued by the Master to the first trustees. Any condition waived will be regarded as fulfilled. The compensation paid to a claimant is in full and final settlement of all claims the claimant may have against any of the settling companies. And, should the claimant pursue a claim against a third party which may require a settling company to bear a proportion of the claim against the third party, the claimant shall adjust his/her claim so that the settling company is absolved of all responsibility. Further, should the claimant's case continue against the non-settling companies, the claimant will not pursue any claim against the settling companies.

[14] In terms of the agreement an independent trust, called Tshiamiso - which means "*to make good*" - (the Trust), is to be established by the settling companies to manage

the implementation of the agreement. The Trust is integral to the agreement. Its object is:

> "to give effect to the [agreement] and provide Benefits to Eligible Claimants (being the beneficiaries to the trust) in the amounts and upon the terms set out in this Trust Deed. The activities of the Trust shall be directed at, and the Trust Fund shall be used in pursuit of, the Trust Object."

[15] Understandably, the Trust Deed (the Deed) is comprehensive. It attends to issues that are central to the agreement. In terms of the Deed, the Trust is responsible for locating the claimants, processing their claims and compensating (consistent with terminology common to Trusts in general, the Deed refers to this as "Benefit" because the eligible claimants are the beneficiaries of the Trust, but I prefer to use the term compensate) the eligible claimants, which includes dependants of deceased class members. The Deed spells out the basis upon which the class members shall qualify for compensation. The Deed also allows for the Trust to remain in existence for a period of twelve years only, for it is envisaged that in that time the Trust would have processed all the claims, after which the reason for its existence would cease.

[16] A claimant only has to fill in a standard claim form, which the Trust shall provide. The Trust shall bear the full cost of processing the claim, which includes any medical examination the claimant may be asked to undergo. The Trust has to appoint claims lodgement officers who are to be available to assist claimants with their claims. Consequently, the Trust has been structured in a manner that obviates the need for legal representation in the submitting and processing of claims. This, we were told, was included in order to avoid diluting the amount ultimately received by the claimant.

[17] The trustees are obliged to establish a fraud protection programme that should protect both the Trust and the claimants. They are also obliged to establish a financial literacy programme that must assist the claimants with the compensation received by them.

[18] A Trust Advisory Committee is to be established by the trustees soon after they take office. This committee is to be comprised of representatives from government, trade unions, community leaders, non-governmental organisations and any other body or entity appointed at the discretion of the trustees. The task of this committee is to meet twice a year and to "*advise, give input to, and raise concerns with*" trustees about matters relating to the Trust.

[19] The Trust shall be managed by no less than five and no more than seven trustees. The persons who have presently been nominated to serve as trustees are: Mr Abraham Joseph van Vuuren, Ms Kgomotso Mmathuto Molebatsi, Mr Michael Edward Murray, Dr Sophie Kisting-Cairncross, Ms Janet Love, Dr Malcolm Barry Kistnasamy (Dr Kistnasamy) and Professor May Hermanus. Collectively they constitute a talent to be reckoned with. They have extensive experience in the legal, medical and engineering disciplines. Each of them has admirable qualifications, experience and a proven track record showing, amongst others, the possession of a mature temperament necessary for constructive participation in the affairs of the Trust so that the object of the Trust is achieved with optimal efficiency. Their willingness to act as trustees inspires confidence that the Trust will be properly managed and that the claimants will receive fair treatment from the inception to the conclusion of their claims. Apart from their fiduciary duties to the Trust the trustees are required to: (i) administer the trust funds in the interests of the

eligible claimants; (ii) establish the processes, infrastructure and personnel necessary for the operations of the Trust, which includes locating the claimants, properly processing the claims, arranging and paying for medical examinations of claimants (except the claimants who are dependants); and, (iii) ensure that the compensation due to an eligible claimant is paid without undue delay. To this end they have a duty of care towards the claimants. It is important that they remain rooted in this duty at all times. It is a duty that must be carried out *uberimae fidei* (in utmost good faith), bearing in mind that they will be acting under the authority of this Court's order.

The persons who qualify as eligible claimants

[20] Not every mineworker who contracted silicosis or TB qualifies as a claimant. Should a mineworker not qualify as a claimant, his dependant(s), too, would not qualify. There are four classes of mineworkers and their dependants that qualify for compensation. They are:

[20.1] Classes 1 and 3: Persons who:

(i) as at the effective date are undertaking or prior to that undertook risk work;

(ii) on or before the effective date have or will contract silicosis or will have been exposed to silica dust or have or will have contracted TB;

(iii) who undertake or will have undertaken risk work on the mines of the settling companies after 12 March 1965;

(iv) who have not settled their claims previously (these persons are named in Schedule D of the Deed)

[20.2] Classes 2 and 4:

The dependants of all mineworkers falling into classes 1 and 3

[21] The settling companies and the class representatives have agreed to adopt a wider definition of risk work so that a greater number of claimants may be eligible than was catered for during the certification proceedings. Previously risk work was restricted to underground mineworkers and their dependants. But they have come to realise that this definition of risk work is too narrow. They all agree that surface workers too were exposed to excessive levels of silica dust. Hence, their new definition includes all risk work as defined by the Occupational Diseases in the Mines and Works Act, 78 of 1973 (ODIMWA). In terms of that definition all underground work and certain surface work where there is potential exposure to excessive silica dust constitute risk work. In effect, the parties have extended the definition of class members as contained in the certification order. Importantly though, this extension does not alter the certification order. That order is in place, albeit suspended pending the appeal. It can only be altered by the appeal court, or, if the appeal fails and the matter is remitted to this Court, by way of an amendment utilising the provisions of rule 28 of the Uniform Rules of Court.

The compensation amounts

[22] The compensation to be paid to an eligible claimant is determined by a number of factors. These have been categorised according to the degree of harm suffered by the claimant. Firstly, the harm is distinguished by reference to whether it is silicosis or TB-based. Secondly, the harm referred to in each of those two categories is divided into

further categories depending on its intensity. The categories of harm endured and the concomitant compensation levels are:

[22.1] the Silicosis category

(a) Silicosis class 1: a claimant who suffers mild lung function impairment will receive R70 000.00;

(b) Silicosis class 2: a claimant who suffers moderate lung function impairment will receive R150 000.00;

(c) Silicosis class 3: a claimant who suffers serious lung function impairment will receive R250 000.00. Over and above this a claimant falling into this category could receive a sum of R500 000.00 at the discretion of the trustees if he has:

(i) at least 10 years cumulative employment undertaking risk work on one of the mines of a settling company during the qualifying period; and,

(ii) one of the following disease processes:

(aa) progressive massive fibrosis and is aged less than 50 years;

(bb) lung cancer;

(cc) *cor pulmonale*; or

(dd) progressive massive fibrosis involving the lungs or oesophagus;

(d) dependants of claimants falling into the silicosis class will in certain cases also qualify for compensation. The dependants are sub-divided into two categories:

(i) a dependant of a person who died during the period between 12 March 1965 and the date when the agreement becomes operative, and in respect of whom the Medical Certification Panel has determined that silicosis was the primary cause of death, will be compensated in the amount of R100 000.00. Such a dependant is referred to as a Dependant Silicosis Category A (Category A);

(ii) a dependant of a person who died during the period between 12 March 1965 and the date when the agreement becomes operative but who falls outside Category A, but in respect of whom the Medical Certification Panel has determined that the deceased had silicosis class 2 or class 3, will be compensated in the amount of R70 000.00.

[22.2] The TB category

(a) if the claimant undertook risk work at one of the mines of a settling company for at least two years between 1 March 1994 and the date when the agreement becomes operative and who was diagnosed as having TB while employed or within a year of leaving his employ will receive:

(i) R50 000.00 if the lung impairment caused by the TB is defined as "first degree";

(ii) R100 000.00 if the lung function impairment caused by the TB is defined as "second degree";

(iii) the following amounts if the claimant undertook risk work between 1 March 1965 and 28 February 1994 at one of the mines of a settling company for a cumulative period of at least two years

and who was issued with the TB certificate under the provisions of ODIMWA while employed or within one year of leaving employment:

(aa) R10 000.00 if the TB certificate does not disclose the degree of lung impairment;

(bb) R50 000.00 if the TB certificate discloses that the degree of lung impairment was "first degree";

(cc) R100 000.00 if the TB certificate discloses that the degree of lung impairment was "second degree";

(b) a dependant of the TB claimant will receive R100 000.00 if the claimant who was deceased before the agreement becomes operative but who worked at a mine of a settling company for two or more cumulative years undertaking risk work and whose death, which must have occurred during his employment or within one year of him leaving employment, according to the Medical Certification Panel was primarily caused by TB.

[23] Any claimant who passes away, but was living when the agreement became operative and who had submitted a claim which was not finalised at the time of his/her death, will be treated as a living claimant and the full compensation due to him/her will be paid to the claimant's estate.

[24] From the third anniversary of the operative date, the amount of compensation will be adjusted each year by the Consumer Price Index for the preceding year.

[25] The compensation scheme does not cater for the situation where a successful claimant suffers from a progression of the disease. Once the claimant accepts the compensation and is paid, the claimant has no further claims against any of the settling companies. The compensation, in other words, is a once-off lump sum payment.

[26] A fact that cannot be overlooked is that there are a number of hoops through which each claimant has to go before s/he receives the compensation due to him/her. To begin with all claimants have to prove that they worked at one of the qualifying mines.[4] Given the paucity of the records kept by them, this may prove to be a challenging affair. It is a notorious fact that most mineworkers were only provided with a sheet of paper acknowledging their employment at a particular mine. Their employment was always for a year. The next year they would be re-recruited by the same employment agency – TEBA – but could be placed at a different mine from the one they were previously employed at. Even in the best of circumstances, these mineworkers were unable to keep proper, let alone meticulous, records of which mine they worked in from time to time. The magnitude of the problem is aptly captured in an averment in the affidavit of the independent expert witness Dr Deborah Jean Budlender (Dr Budlender), where she points out how difficult a task it is to locate ex-mineworkers because of "*poor record keeping by the mining industry in the 1970s and the 1980s, lack of tax numbers, service records and standard identity documents, language barriers, use of different names for employment and other purposes, distances and lack of awareness of their rights on the part of ex-mineworkers and their dependants*". Dependants are likely to confront as much if not more of a difficulty in proving the employment status of their bereaved loved ones who died of silicosis or TB related illnesses. The same would

[4] Dependants of deceased claimants will have to prove that their spouses or parents who owed them a duty of care worked on a qualifying mine during the qualifying period.

apply to their medical records where the claimants were, understandably, more concerned with restoring their health than keeping records of their medical conditions.

[27] In such circumstances it is not just incumbent upon but crucial that the trustees do everything possible to assist the claimants with their claims. No effort should be spared to ensure that every eligible claimant or his dependants receive the compensation that is due to them. That is what is required of trustees by the object of the Trust.[5] The trustees sitting in conscience, as they no doubt will, should have little difficulty in ensuring that no eligible claimant is wrongly denied the compensation they are entitled to: the focus should be on paying rather than refusing the compensation. The problem of fraudulent claims should, with minimal effort, be easily detected. In my view only in cases where fraud can be established should the respective claim be rejected.

Does the agreement serve the interests of justice?

[28] For this Court to imprint its stamp of approval onto the agreement it has to be satisfied that the agreement serves the interests of justice. To decide whether it does so a number of considerations have to be taken into account. They are many and varied.

[29] One consideration that has to be confronted is whether the amount of compensation to be paid to the claimants is commensurate with the harm they have each suffered. In countries where class actions and settlements of class suits have historically been more prominent than ours, courts, when required to give their

[5] The object of the trust is quoted in [14] above

imprimatur to settlement agreements, have scrutinised them by asking whether such settlement agreements are "*fair, reasonable and adequate*" from the perspective of the class members. This is because an agreement binds all class members – except those who have opted out – without most of them having a say in the settlement. The certification judgment in explaining why it was necessary to order that any settlement reached by the parties was not valid until approved by this Court was so that this Court could satisfy itself that any agreement reached was "*fair, reasonable and adequate and that it protects the interests of the class(*es)".[6] This is no doubt in the interests of justice.

[30] The question of whether the agreement as a whole and the compensation in particular is fair, reasonable and adequate is an intractable one, the answer to which many eminently reasonable people may well enthusiastically hold profoundly differing opinions. However, as soon as one asks the question one is smothered with the contentions (a) that it is the only agreement they have concluded and (b) absent the agreement the *lis* would continue for many years to come, with many of them dying in the meanwhile and with no guarantee of success. Both contentions are potent, but in my judgment they are neither individually nor collectively decisive.

[31] The contentions were emphasised on more than one occasion during the presentation of oral submissions. We were told that the agreement must be respected for (a) it is what the parties settled for, and (b) it is the factual that should be contrasted with the counterfactual of no settlement at all, which if it became a reality, the claimants, who have suffered so much, would be worse off.

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[6] *Nkala and Others v Harmony Gold Mining Companies Limited and Others* 2016 (5) SA 240 (GJ) at [39]

[32] As for the first, it is encased in classical liberal theory which, though analytically useful at times, does not always encompass the lived reality of everyday practical life. Factoring the latter into the equation is necessary for justice to prevail. After all, justice is located in everyday practical life. The class representatives have unanimously voiced their support for the agreement. They, we were told, have taken note of what many of the eligible claimants feel and think about the compensation amounts, and they report that every one of the eligible claimants they contacted support the agreement. This is not surprising as the evidence before us (endorsed by a wealth of sociological learning) shows beyond a shadow of doubt that the claimants are poor, weak, powerless, struggling to cope with the pain-inducing fibrotic forests in their chests and weary. Worse, as testified in the founding affidavit of Mr Richard Spoor (Mr Spoor), they are dying at an alarming rate. To them the amounts offered in the agreement will no doubt be entrancing.

[33] As for the second, it is a mode of thought engendered in the field of Psychology and is not without its problems. A counterfactual is a claim or a hypotheses that is contrary to the facts. It is often relied upon to assess the impact of an action. The concept is regularly employed by practitioners in the field of competition law. While it can be useful it has to be noted that more often than not it invokes fear rather than impelling rational thought. On the contrary, it may imperil rational thought and therefore does not always produce a just outcome. This is because the comparative counterfactual chosen is often the bleakest one, the one that bears the most pessimistic outcome. In this case, it is the fear of no settlement at all. It is to be compared to the benefit of at least some compensation for claimants who, all agree, deserve to be compensated. No settlement carries with it the risk of many dying long before their

cases are finalised. While there is no joy in that scenario it nevertheless cannot be allowed to deter the Court from performing its duty to see justice prevail.

[34] Thus, the two contentions notwithstanding, it is the duty of this Court to ensure that the agreement serves the interests of justice. To this end it is necessary to scrutinise the agreement dispassionately and objectively. Anything less is at risk of transforming the court into a registry of contractual obligations and that is not in the interests of justice[7]. The court's "*institutional interests*" should not be subordinated "*to the wishes of the parties*"[8]

[35] Hence, it is the duty of this Court to ensure that the agreement does not violate the Constitution, is not unlawful, immoral or unconscionable. If it fails this test then this Court has no alternative but to refuse approval thereto. At the same time an unconstitutional, unlawful, immoral or unconscionable settlement agreement is unlikely to pass the fairness, reasonableness and adequacy test. There are, as well, other considerations that are equally important. These relate, amongst others, to the method for applying for compensation by the claimants, the cost of the application for compensation, the fees charged by the legal representatives of the class(es) and last but not least the general public interest. In short, while the agreement reflects what the parties agreed to, and while there is no joy in the comparative counterfactual relied upon by counsel, neither of them can be allowed to deter the Court from performing its duty to see justice prevail.

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[7] See *Mansell v Mansel* 1953 (3) SA 716 (N) at 721B – F; *Thutha v Thutha* 2008 (3) SA 494 (TkH).
[8] *Ex Parte Le Grange and Another In re: Le Grange v Le Grange* [2013] ECGHC 75 at [47]

[36] For justice to prevail the compensation must bear some resemblance to the harm suffered. It must also not be too high, for it would be irresponsible to impose compensation awards that are so burdensome on the settling companies and which thereby result in their destruction.

[37] In this case the compensation amounts each eligible claimant would each receive are not insubstantial, while the sum total of the amount to be paid to all of them is certainly sizeable. It is expected to be in the range of R5bn but could be more. The settling companies cannot be accused of failing to appreciate the gravity of the harm the claimants have suffered. Given the nature of compensation in a class action – where the amount paid to a claimant is likely to be on the basis of one size fits all - it would be wrong to seek the perfect amount to be awarded to each claimant. Such a task would be an exercise in futility. All that can be achieved is a sum that bears a close resemblance to the harm suffered. Mr Spoor informed us that the "*settlement is not intended to, and indeed could never, make full redress for the loss and the harm suffered by the gold mineworkers, their families and communities over 100 years as a result of the epidemic of lung disease that afflicted them and the system of migrant labour and racial discrimination that sustained this epidemic.*" This is incontrovertible. After all, as the German philosopher, Immanuel Kant, noted: "*Out of the crooked timber of humanity no straight thing was ever made*".

[38] After carefully scrutinising the compensation amounts for the various categories two respectable independent experts, Dr Budlender and Dr Kistnasamy (who will also serve as a trustee) opine that they are fair, reasonable and adequate considering comparative awards granted in the field of occupational health and safety. Dr

Kistnasamy holds the office of Compensation Commissioner for Occupational Diseases. Both Drs Budlender and Kistnasamy commend the agreement. Further, and importantly, they both provide extensive evidence to show that the agreement is in the public interest. Another independent party, the South African Catholic Bishop's Conference, commends the agreement.

[39] The manner in which the agreement was concluded provides some insight as to its fairness, reasonableness and adequacy. A settlement agreement concluded by way of collusion between the settling parties would fail the test. In the present case extensive, difficult, detailed and protracted negotiations took place before the agreement was concluded. These were conducted at arms-length. A number of stakeholders consisting of the trade unions operating in the mining sector, non-governmental organisations such as Section 27, church-based organisations, the National Institute for Occupational Health, the Chamber of Mines, the non-settling companies, and government bodies (including those of the Southern African States) were consulted before the agreement was concluded. All of their concerns were taken note of. Salient features of the agreement were brought to their attention and none of them objected to it. The rule *nisi* was extensively advertised and no third party has objected to it. There has been no pressure from the legal representatives and the funders of the litigation, Motley Rice LLC (Motley Rice) and Hausfield LLP (Hausfield) on the class representatives to conclude the agreement.

[40] All these factors not only enhance the status of the agreement – in that it is not just another private agreement between the settling parties – but, crucially, show that the parties were sensitive to a variety of opinions before they concluded the agreement.

The opinions canvassed focused on almost every aspect of the agreement including, amongst others, the definition of risk work, the processes to be applied to determine the eligibility of claimants, the steps to be taken to locate eligible claimants, the amounts of compensation to be paid to the various categories of claimants, the method of payment and the assistance to be given to the claimants post the payments. Where possible the opinions were incorporated into the agreement.

[41] The amount of money set aside for the administration of the agreement is a staggering R804m. There is no doubt that locating claimants, processing their claims, which will involve assisting them with locating relevant documents, conducting health tests, etc., and assisting the successful claimants with financial matters, is a very costly affair. The eligible claimants reside all over the Southern African Region. Locating them and ensuring that they undergo medical examinations will, no doubt, prove to be very challenging. It could well cost in the region of R804m over the twelve year period. By agreeing to this spend the parties have certainly not been irresponsible. Nevertheless, the fact that the cost is bound to be very high is a discomforting one. It would be logical to assume that such a high cost has had an impact on the amount of compensation to be paid to eligible claimants.

[42] The legal representatives and the funders of the litigation have filed detailed affidavits explaining every minute aspect of the fees they have charged and the expenses they have incurred. They have provided details of these, almost to the last cent. A careful scrutiny of them demonstrates meticulous record keeping on their part as well as a scrupulous regard for avoiding unnecessary costs. Disbursements were kept as close as possible to the absolute minimum.

[43] The fees charged fall within the limits set by this Court in the certification judgment. They are by no means excessive or prohibitive. If anything the fees charged by Richard Spoor Incorporated (RSI) in general, and in particular by Mr Spoor himself, are on the low-end. These constituted a significant part of the overall fees because of the leading role played by RSI in this litigation. In fact, RSI did not charge for each and every hour it put into the matter. It is further necessary to record that one counsel, Mr Gilbert Marcus SC acted *pro bono* and another one, Mr Geoff Budlender SC, charged so little that he may well have not recovered his own expenses. In the same vein the funders, who because of their specialised knowledge and experience played a leading advisory role in the litigation, charged what can only be regarded as very reasonable fees. A further noteworthy fact is that the fees charged by the settling companies' legal representatives were never disclosed to this Court, but I harbour no doubt that they were substantial.

[44] On the whole the role of the legal representatives of the classes and especially that of Mr Spoor, Mr Abraham Kiewitz of Abraham Kiewitz Attorneys (AK), and the funders of the litigation, Motley Rice and Hausfield, can only be characterised as commendable. Between them, RSI and AK took approximately 38 000 instructions from class members. These class members reside all over Southern Africa. Locating and reaching them is no easy task. RSI conducted extensive legal and medical research necessary to launch the cases of the class members. As at the date of the filing of the founding affidavit Motley Rice advanced R49m to RSI and Hausfield advanced R50m to AK to cover litigation costs without any guarantee that they would recover anything in return from the litigation. These legal representatives and their funders cannot be

accused of exploiting the class members or the situation the class members find themselves in. Absent their hard work and the dogged persistence of some of them the ex-mineworkers and their families would not have received the justice of being compensated for the harm they have endured and in many cases continue to endure.

[45] To conclude. For a court to approve a settlement agreement in a class action it must be satisfied that the interests of justice are served by the approval. For an agreement to pass muster it must at least:

a. not breach any constitutional principle, be otherwise unlawful or immoral[9];

b. be concluded at arms-length and the settling parties must be free of all forms of duress;

c. provide for a comprehensive system of compensation that can be assessed objectively;

d. ensure that an application for compensation, the assessment thereof and its outcome is readily and easily accessible to all the class members;

e. ensure that the cost of the application, if borne by a claimant, is not so burdensome as to make the compensation meaningless;

f. ensure that all potential claimants as defined by the certification order are covered;

g. ensure that the claimant who proves his/her claim is compensated as soon as the claim is proven;

h. ensure the amount of compensation is neither too high nor too low; and,

i. ensure that the cost of implementing the agreement is justifiable;

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[9] *Eke v Parsons* 2016 (3) SA 37 (CC) at [26]

j. ensure that the fees of the legal representatives engaged by the class representatives are fair and reasonable; and

k. generally be in the public interest.

[46] The above is not an exhaustive list of important considerations to be taken into account. In this country the law in this area is still in its infancy. As it evolves other considerations may in time emerge.

[47] In my view, the agreement meets the requirements set out above.

The attitude of the non-settling companies, DRDGold and ERPM

[48] As mentioned earlier, DRDGold and ERPM's attorneys, in a letter to the attorneys of the class representatives, stated that they avoided participating in these proceedings because their clients wished to avoid an adverse costs order as anticipated in paragraph 4.4 of the rule *nisi*. The said clause provides that the parties "*opposing the grant of the relief on the return day*" could be directed to pay the costs of the application. I say "*could*" as the granting of a costs order always remains a matter that lies within the discretion of the court. That much is trite. Paragraph 5 of the rule *nisi* provides for "(m)*embers of the Settlement Classes and other interested parties*" to "*participate in the hearing on the return day, and may address the Court on the reasonableness, fairness and adequacy*" of the agreement. Any interested party who took advantage of this invitation to participate in the hearing by addressing the issue of the "*reasonableness, fairness and adequacy*" of the relief sought would have been free to contend that the

relief sought is not appropriate. It could have done so and placed on record that it was not opposing the relief sought. The two are not mutually exclusive. By participating and holding on to their contention it would simply be assisting the Court with useful submissions whilst leaving the matter in the hands of the Court. In such a case, the probability of it attracting an adverse costs order is, in my view, almost nil, especially as the matter concerns issues that are novel to South African law. In short, DRDGold could have participated in the hearing without opposing it and could still have raised their concerns about approving all or part of the agreement. Their argument could have carried the day. Their failure to do so is a result of an election on their part, one they were fully conscious of - as Malan Scholes say in their letter, their clients' rights remain "*strictly reserved, notwithstanding our client's failure to participate in or to oppose the settlement application*" (underlining added). Given their recognition that participation in the hearing is not the same as opposing the relief sought, their election to decline the invitation accorded to them by paragraph 5 of the rule *nisi* is not easily comprehensible.

[49] In any event, DRDGold and ERPM placed on record that they intend to pursue the appeal to finality. On this understanding they raise a number of issues. Firstly, they intend to place any new facts arising from the present matter before the SCA. They also intend to raise issues that will require the SCA to scrutinise the agreement and in particular consider whether the agreement could be approved by this Court, as anticipated in the rule *nisi*, given that the certification order of this Court is presently suspended. In these circumstances, it is their contention that "(i)*t is not competent for* [this Court] - *whether under the auspices of the settlement application or at all – to attempt to vary or revisit an order that presently has no legal effect. In these circumstances,* [this Court] *may not have the requisite jurisdiction to grant the relief*

sought in paragraph 4.3 of the rule nisi." Paragraph 4.3 of the rule *nisi* provides that "(t)*he class actions that were certified by this Court are terminated as against*" the settling companies once the agreement becomes operative. I have a grave difficulty in understanding why an order to the effect that the class action against the settling companies is terminated upon the agreement becoming operative is: (a) a variation or re-visitation of the certification order; and (b) a matter that falls outside the jurisdiction of this Court. DRDGold and ERPM as noted above did not deem it necessary to attend the hearing and assist this Court in understanding their claim, nor did they deem it necessary to make written submissions in this regard. This was most unfortunate as it deprived this Court from interrogating their submission even if only for purposes of comprehending it. And it is not possible to determine from the Malan Scholes' letter what exactly they had in mind.

[50] They further contend that this Court is not jurisdictionally empowered to grant the relief sought as it would constitute "*a setting aside*" of a "*judgment in rem*". Their argument it seems is that only the SCA is entitled to entertain this application for approval of the agreement, for the approval application is nothing short of an application to set aside the certification judgment, which, they say, is a judgment in *rem*. They do not explain their contention. They simply make reference to the Constitutional Court's (CC) judgment in *Airports Company South Africa*[10] and then assert that this Court lacks the jurisdiction to entertain the application.

[51] In *Airports Company South Africa* the appellant (ACSA) invited bidders to tender for what essentially was a lease agreement allowing for the operation of duty-free shops

[10] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and others* 2019 (2) BCLR 1165 (CC)

at three international airports. Three companies participated in the bid: Big Five, Flemingo and Tourvest. Big Five was awarded the tender. ACSA was on the verge of signing a lease agreement with Big Five but was not able to do so because Flemingo challenged the lawfulness of the award. Flemingo succeeded before Phatudi J in having the award set aside for being unlawful. This required ACSA to re-run the tender process. However, Big Five appealed. ACSA elected not to participate in the appeal. It filed a notice to abide. The appeal court heard the argument and reserved judgment, but before it could deliver the judgment Big Five and Flemingo (which participated in the appeal) concluded a settlement agreement which resolved the dispute between themselves. The settlement agreement though contained the following sub-clauses:

> "3.1 [Flemingo] abandons the order of Phatudi J...
>
> 3.3 [Flemingo] hereby withdraws in its entirety the [proceedings before Phatudi J] on the basis of and having the effect that [those] proceedings were never instituted ...
>
> 3.8 Upon signature of this agreement ... [Flemingo] acknowledges that ACSA is free and can now implement the award of its tender to [Big Five] without limitation or restriction and without any challenge thereto by [Flemingo]."

[52] The appeal court was requested to make the settlement agreement an order of court. It agreed. It furnished no reasons for doing so. ACSA elected to continue to re-run the tender process as per the order of Phatudi J. Big Five applied to the High Court to compel ACSA to abide by the decision of the appeal court by concluding the intended lease agreement with itself. ACSA opposed the application on the grounds that, despite its decision not to oppose the appeal against the order of Phatudi J, it was not bound by the appeal court's order even though that order contained the three sub-paragraphs quoted in [51] above. ACSA contended that the order of the appeal court was contrary to the precepts of the Constitution, the law as well as public policy. At this point it bears noting that everyone agreed that the Phatudi J order was an order *in rem*. Tourvest

which was cited as a respondent made common cause with ACSA. The contentions of ACSA found favour with the High Court, per Hughes J, who refused the application. Big Five appealed to the SCA. The SCA found that ACSA was bound by the appeal court's order. That order had the effect of setting aside the Phatudi J order for that is exactly what the parties intended with the settlement agreement. On that logic the SCA had overturned the order of Hughes J and ordered ACSA to sign the intended lease agreement with Big Five. The majority judgment of the CC disagreed with the SCA. According to it, the SCA erred in its conclusion, because the appeal court could not set aside a judgment or order *in rem* without giving reasons. Moreover, a judgment or order *in rem* cannot be set aside by a settlement agreement. As the appeal court merely adopted the settlement agreement it did not have the effect of an appeal judgment that set aside the judgment and order of Phatudi J. Had it, after considering the merits, given a reasoned judgment as to why it believed Phatudi J's judgment and order could not stand, the situation would have been different. On the issue of the three sub-paragraphs quoted in [51] above it noted that they merely record that Flemingo abandoned the judgment and order of Phatudi J and withdrew from the proceedings. The abandonment of the judgment and order did not result in them being set aside – parties do not have the power to set aside a judgment and order. As for the withdrawal from the proceedings, if that meant withdrawal from the proceedings before Phatudi J it would be meaningless as the judgment remains extant. Accordingly, it reversed the order of the SCA and reinstated the order of Hughes J.

[53] DRDGold and ERPM's case is that the order sought in paragraph 4.3 of the notice of motion is a call for the reversing or setting aside of the certification order, which they say is an order *in rem*. They claim to draw valuable support for their

contention from the reasoning of the CC in *Airports Company South Africa*[11]. However, based on the exposition of that case in [51] and [52] above I am of the opinion that its *ratio* has no bearing on the one before us.

[54] The certification order recognised and allowed for the *lis* (in the form of a class action) between the mining companies (settling and non-settling ones) and the class members to proceed. The settling companies and the class members who accept the agreement have decided that they wish to put an end to the *lis*. Accordingly, paragraph 4.3, we know, effectively declares that the *lis* between the settling companies and class members who bind themselves to the agreement is ended. It says nothing of the *lis* between the non-settling companies and all the class members. Whether the paragraph is included in the order of Court matters not at all for the *lis* between the non-settling companies and the class members. That *lis* continues. The recognition of the fact is embodied in what I would call the preamble and in clause 2.12 of the agreement, where it is explicitly pronounced that:

> Preamble:
>
> "This Agreement is made and entered into by and between, among others, the [settling companies], the Claimants' Attorneys and the Class Representatives. This Agreement sets out the terms upon which, and the conditions subject to which, the Parties will:
>
> ...
>
> b. settle the Settled Claims fully and finally,
>
> with the Class Action Litigation terminating as against the [settling companies], and only continuing [with] the [non-settling companies] [which] are not parties to this Agreement."
>
> "Clause 2.12:
>
> Without unreasonable delay after the Effective Date, each [settling company] which appealed [the certification order] shall withdraw its appeal instituted in the SCA... The provisions of this clause 2.12 does not impose any obligation on any

[11] n 10

> of the [settling companies] to secure the withdrawal of its Appeal in respect of the interests of any third party that is an appellant in that Appeal but is not party to this Agreement."

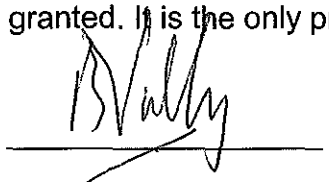
[55] Hence, should the appeal by the non-settling companies against the certification order succeed that *lis* may or may not (depending on the order of the appellate court) come to a close. Should the appeal fail, the *lis* between the class members and the non-settling companies as defined in the certification order would remain pending and the law would have to take its course. Furthermore, and importantly, any class member that opts-out of the agreement is entitled to pursue his/her case against the settling companies. On this understanding of the legal status of the matter (which I presume, DRDGold, ERPM and Malan Scholes do not dispute as they have said nothing to the contrary), this Court would not be either setting aside, amending or reversing the certification order. On this logic, whether that order is an order *in rem* or not is of no moment. I am, therefore, at a loss as to why it falls outside the jurisdiction of this Court to grant paragraph 4.3 of the notice of motion: the logic underlying the assertion simply eludes me. And, again, the refusal of DRDGold, ERPM and even Malan Scholes to participate in the hearing despite raising their concerns in a letter to the applicants' attorneys has not been helpful.

[56] In my view, DRDGold's, ERPM's and Malan Scholes' failure to participate in the hearing either through written submissions alone or through written and oral submissions was an unnecessary loss of an opportunity. DRDGold and ERPM were invited to participate. Their attorneys Malan Scholes has been involved in this matter since its inception. If any of them had any doubts or concerns about any aspects of the application they should have penned a letter to the Deputy-Judge President wherein they could seek clarification, assistance or simply record their position. Instead, they

wrote a letter to the applicants' attorneys wherein they explicitly stated that they will take the matter up with the SCA. Why they did not deem it necessary to take up their concerns with this Court is never explained. In this regard I do not find their fear of attracting an adverse costs order to be explanation, for as I say above the danger of a costs order does not attach to their participation. Their approach is regrettable.

Conclusion

[57] For the reasons set out above I hold that the order as proposed should be granted. It is the only principled and pragmatic thing to do.



Vally J
Gauteng High Court
Johannesburg Local Division