

SOUTH AFRICA / JUDGMENT

Nkala and Others (2018/44060), Ex parte [2018] ZAGPJHC 657 (13 December 2018)

[2018] ZAGPJHC 657**COURT**

South Gauteng High Court, Johannesburg

BEFORE

P. M. Mojapelo

CASE / FILE NUMBER

2018/44060

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Source record**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION****Case****Number: 2018/44060**In the ex parte application
of:

BONGANI
NKALA 1st
Applicant
SIPORONO
PHAHLAM 2nd
Applicant
THEMBEKILE
MNAHENI 3rd
Applicant
MATONA
MABEA 4th
Applicant
ALLOYS
MNCEDI
MSUTHU 5th
Applicant
MASIKO
SOMI 6th
Applicant
MTHOBELI
GANGATHA 7th
Applicant
LANDILE

QEBULA 8th
Applicant
JOSEPH
LEBONE 9th
Applicant
ZAMA
GANGI 10th
Applicant
MALUNGISA
THOLE 11th
Applicant
MONOKOA
THOMAS
LEPOTA 12th
Applicant
MZAWUBALEKWA
DIYA 13th
Applicant
MSEKELI
MBUZIWENI 14th
Applicant
NANABEZI
MGODUSWA 15th
Applicant
THULENKHO
KUSWANA 16th
Applicant
MALEBURU
REGINA
LEBITSA 17th
Applicant
MATAASO
MABLE
MAKONE 18th
Applicant
MATSEKELO
CISILIA
MASUPHA 19th
Applicant
MATHISETSO
MASEIPATI JESENTA
NONG 20th
Applicant
BANGUMZI
BALAKISI 21st
Applicant
WATU
DALA 22nd
Applicant
DYAMARA
JIBHANA 23rd

Applicant
MANTSO
MOKOENA 24th
Applicant
MBIKANYE
SAWULE 25th
Applicant
ZONISELE
NKOMPELA 26th
Applicant
ISHMAEL
MOTLEKE 27th
Applicant
THABO
NTSALA 28th
Applicant
ZIMOSHILE
BOZO 29th
Applicant
ZAMUKULUNGISA
DYANTYI 30th
Applicant
AGRIPPA
DLISANI 31st
Applicant
MNCEDISI
DLISANE 32nd
Applicant
LUVOKO
MADINDALA 33rd
Applicant
MTUTUZELL
DAVID
MTSHANGE 34th
Applicant
MONDE
MXESIBE 35th
Applicant
MZWANELE
BUNYONYO 36th
Applicant
MZIKAYISE
NQOSE 37th
Applicant
XOLISILE
BUTHU 38th
Applicant
ZOLISA
JEJANA 39th
Applicant
MALEPA

PUSO 40th
Applicant
ELIA
MOTLALEPULA
PHETANE 41st
Applicant
MOTLALEPULA
MOKOENA 42nd
Applicant
SEKHOBÉ
LETSIE 43rd
Applicant
TSHEHLA
SOLOMON
HLALELE 44th
Applicant
MONA
ASHTON
MELAO 45th
Applicant
NKOSI
SELATA
SELATA 46th
Applicant
EDGAR
NTJANA
NTJANA 47th
Applicant
EZEKIEL
MUTSANA
MASUPHA 48th
Applicant
HARMONY GOLD MINING COMPANY LIMITED
(Registration
number
M1950/038232/06) 49th
Applicant
RANDFONTEIN ESTATES LIMITED
(Registration
number
1889/00251/06) 50st
Applicant
AVGOLD LIMITED
(Registration
number
1990/007025/06) 51st
Applicant
UNISEL GOLD MINES LIMITED
(Registration
number
1972/010604/06) 52nd

Applicant
LORAINÉ GOLD MINES LIMITED
(Registration
number
1950/039138/06) 53rd

Applicant
ANGLOGOLD ASHANTI LIMITED
(Registration
number
1944/01734/06) 54th

Applicant
FREE STATE CONSOLIDATED GOLD MINES
(OPERATIONS) LIMITED
(Registration
number
1937/009266/06) 55th

Applicant
GOLD FIELDS LIMITED
(Registration
number
1968/004880/06) 56th

Applicant
GOLD FIELDS OPERATIONS LIMITED
(Registration
number
1959/0032096/06) 57th

Applicant
NEWSHELF 899 (PROPRIETARY) LIMITED
(Registration
number
2007/019941/07) 58th

Applicant
BEATRIX MINES (PROPRIETARY) LIMITED
(Registration
number
1977/002138/07) 59st

Applicant
FARWORKS/682 (PROPRIETARY) LIMITED
(Registration
number
M1964/004462/07) 60nd

Applicant
DRIEFONTEIN CONSOLIDATED
(PROPRIETARY)
LIMITED
(Registration
number
1993/002956/07) 61st

Applicant
SIBANYE GOLD LIMITED
(Registration

number
M2002/031431/06) 62nd
Applicant
ANGLO AMERICAN SOUTH AFRICA LIMITED
(Registration
number
1917/005309/06) 63rd
Applicant
AFRICAN RAINBOW MINERALS
(Registration
number
1933/004580/06) 64th
Applicant
FREEGOLD (HARMONY) (PROPRIETARY)
LIMITED
(Registration
number
2001/029602/07) 65th
Applicant
GFL MINING SERVICES LIMITED
(Registration
number
1997/019961/06) 66th
Applicant
GFI JOINT VENTURE HOLDINGS
(PROPRIETARY)
(Registration
number
1998/023354/07) 67th
Applicant
K2018259017 (SOUTH AFRICA)
(PROPRIETARY) LIMITED
(Registration
number
2018/259017/07) 68th
Applicant
IN RE: Application to certify
settlement classes and approve a settlement agreement

JUDGMENT

MOJAPELO DJP:

- [1] This is a sequel to the judgment granted by this Court on 13 May 2016 in *Nkala and Others v Harmony Gold Mining Companies Ltd and Others*[1] (Nkala 2016). A brief background is apposite.

Background

[2] In that case this court certified a class action against a number of mining companies following a number of applications which were

consolidated under case number 2012/48226.

[3] In the certification judgment the Court certified two classes on whose behalf actions were to be instituted by the class representatives

against the named mining companies. The class representatives were also certified. The certified classes may be broadly described as the silicosis class and the tuberculosis class.

[4] The silicosis class comprised of 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 –

(a) Where such mineworkers work or have worked on one or more of the gold mines listed on the attached to the court order as Annexure A after 12 March 1965;

(b) 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 Ltd, and who are not named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Ltd under case numbers HQ11X03245, HQ11X03246, HQ12XX02667 and HQ12X05544;

(c) Who are not named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Limited under case

numbers HQ11X03245, HQ11X03246, HQ12XX02667 and HQ12X05544 (the silicosis class).

[5] The tuberculosis class comprised of current and former underground mineworkers who contracted pulmonary tuberculosis, and the dependants

of diseased 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 in Annexure “A” to that court order after 12 March 1965 (the pulmonary tuberculosis class).

[6] In the same judgment (Nkala 2016) three teams of legal representatives namely, Richard Spoor Inc Attorneys, Abrahams Kiewitz Inc Attorneys and the Legal Resources

Centre, were certified as the class legal representatives.

[7] The following class representatives have since passed away and are therefore not cited as representatives of the settlement classes: Mr Maphatsoe Kompi, Mr Mokholofu Boxwell, Mr Zwelendaba Mgidi, Mr Michael Litabe, Mr Liphapang Lebina, Mr Zaneyeza Ntloni, Mr

Tekeza

Joseph Mdukisa, Mr Tohlang Paolosi Mako, Mr Mahola Emmanuel Selibo, Mr Malefetsane 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.

[8] The 1st to 48th applicants in the present application are surviving class representatives in the class action certified on 13 May 2016.

[9] The 49th to 67th applicants before this court were prospective defendants who have reached settlement with the class representatives, which settlement

is referred to further hereunder. They are referred to as the settling mining companies.

Settlement Agreement

[10] Following protracted negotiations, a Settlement Agreement was concluded on 03 May 2018 between the settling mining companies and the class representatives.

[11] There are eight prospective defendants in the certification class action which are not parties to the Settlement Agreement. They are: DRDGold Limited, East Rand Proprietary Mines Limited, 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 (the non-settling mining companies).

[12] The settling mining companies (49th – 67th applicants) have incorporated and registered a company as a special purpose vehicle to represent all of them in relation to certain

matters in the Settlement Agreement and its accompanied Tshiamiso Trust. The company is referred to as the Agent.

[13] It is proposed that the Settlement Agreement should be binding on all class members who do not opt out of it and that once the opting out period shall have expired, the class action certified in Nkala 2016 shall terminate as against the settling mining companies.

[14] The Settlement Agreement makes provision for the establishment of the Tshiamiso Trust (“the Trust”) in terms of which the claims of eligible mineworkers and the dependants of deceased mineworkers arising from silicosis and pulmonary tuberculosis will be paid. The Trust will identify and locate those beneficiaries and will assess, process and pay their claims.

[15] In terms of the certification judgment in Nkala 2016, any Settlement Agreement reached between the class representatives and the mining companies shall only be of force and take effect if approved by this Court.[2]

Present Application

[16] The purpose of the present application is to seek the approval of this Court for the Settlement Agreement. The application is brought in two stages. At the first stage, it is proposed that four new classes be certified for the purposes of settlement and that a rule nisi be issued. Once the rule nisi has been issued, the second stage will occur on the return day, and will involve full ventilation of the question whether the Settlement

Agreement should be approved by the Court.

[17] There is as yet no established precedent or procedure in South Africa for obtaining approval of settlement agreements that are to bind class members. The two-stage procedure proposed in this application comprises (a) stage one, which is prior notice of the proposed settlement to the class; and (b) stage two, being an approval hearing. The proposed procedure is said to follow procedures employed in other jurisdictions (including Australia, Canada and the United States of America). For present purposes, it suffices that it is consistent with the well-known rule nisi procedure in South Africa.

[18] Corbett JA described the rule nisi procedure in *SAFCOR Forwarding (Johannesburg) Pty Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674H – 675A as follows:

“The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate

interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons...”

[19] The two-stage procedure seeks to afford optimal protection to the proposed class members by ensuring that they have the opportunity to familiarise themselves with the terms of the settlement agreement, to raise any objections they may have and to consider their rights in relation to the settlement.

[20] The present application is brought ex parte jointly by the 48 surviving class representatives of the certified classes, the nineteen settling mining companies and the Agent.

[21] This is the first stage of the approval application in which the applicants seek the certification of four new classes for the purposes of settlement; and the issuing of a rule nisi to deal with further processes that should unfold after the first stage.

[22] Having considered the application and having heard counsel on behalf of all the applicants, I am, for present purposes, satisfied that the relief sought at this stage should be granted.

[23] The following order is made:

The Draft Order attached hereto which was agreed to by all the applicants, and which I have today initialled and dated, together with the Annexures referred to therein, is hereby made an order of this Court.

P. M. MOJAPELO

DEPUTY JUDGE PRESIDENT

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of Hearing: 13 December 2018

Date of Judgment: 13 December 2018

Counsel for the Applicants:

Adv A. Cockrell SC

Adv A. Dodson SC

Adv J. Bleazard

Adv C. Tabata

Adv Y. Ntloko

Instructed by:

Richard Spoor Inc Attorneys

1st – 48th Applicants' Attorneys

Abrahams Kiewitz Inc Attorneys

1st – 48th Attorneys

Legal Resources Centre

Bowman Gilfillan Inc Attorneys

49th – 70th Applicants

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 44060/18

JOHANNESBURG, 13 December 2018

BEFORE THE HONOURABLE DEPUTY JUDGE PRESIDENT MOJAPELO

Ex Parte:

BONGANI NKALA AND 67 OTHERS

Applicants

IN RE: Application to certify settlement classes and approve a settlement agreement

COURT ORDER

HAVING read the papers and heard counsel in the above matter, the following order is made:

1 It is declared that the following groups of persons constitute four separate classes (collectively “the Settlement Classes”):

“Class 1

All persons:

- i. who as at the Effective Date are undertaking, or prior to the Effective Date have undertaken, Risk Work;
- ii. who on or before the Effective Date have or will have contracted Silicosis or will have been exposed to silica dust;
- iii. who undertake or have undertaken Risk Work on one or more of the Qualifying Mines after 12 March 1965; and
- iv. who are not listed in Schedule D of the Trust Deed.

Class 2

The dependants of any of the persons contemplated in class 1 who (i.e such persons) are deceased as at the Effective Date.

Class 3

- ii. who on, before or after the Effective Date have or will have contracted Tuberculosis; and
- iii. who undertake or have undertaken Risk Work on one or more of the Qualifying Mines after 12 March 1965.

Class 4

The dependants of any of the persons contemplated in class 3 who (i.e such persons) are deceased as at the Effective Date.”

2 The first to forty-eighth applicants are granted leave to act as the class representatives of the Settlement Classes.

3 Richard Spoor Inc, Abrahams Kiewitz Inc and the Legal Resources Centre are certified as the joint legal representatives of the Settlement Classes for the further conduct of the class actions (“the Class Lawyers”).

4 A rule nisi is issued calling on the members of the Settlement Classes and any interested parties to show cause on 29 to 31 May 2019 why a final order should not be made in the following terms:

4.1 The settlement agreement attached to this order marked “A”, as amended by both the addendum to the settlement agreement attached to this order marked “B” (“the Addendum”) and the second addendum to the settlement agreement attached to this order marked “B1” (“the Second Addendum” and the Settlement Agreement, the Addendum and the Second Addendum together constitute “the Settlement Agreement”), is made an order of court;

4.2 It is declared that the Settlement Agreement is binding on all members of the Settlement Classes save for those persons who give written notice that they wish to be excluded from the Settlement Classes, on or before the date

stipulated in the opt-out notice described in paragraph 12.2.3 below (“the Settling Claimants”);

4.3 The class actions that were certified by this Court in the matter of Nkala and Others v Harmony Gold Mining Company Limited and Others [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016

(5) SA 240 (GJ) (13 May 2016) (“Nkala”) under consolidated case number 48226/12 are terminated as against the 49th to 67th applicants (“the Settling Companies”) if and when the Settlement Agreement becomes operative under clause 2.9 of the Settlement Agreement.

4.4 The parties opposing the grant of the relief on the return day (or such of them as this Court may determine) are directed to pay the costs of the application or such costs as this Court may determine, jointly and severally.

5 Members of the Settlement Classes and other interested parties may participate in the hearing on the return day, and may address the Court on the reasonableness, fairness and adequacy of the Settlement Agreement, on the basis set out in paragraph 9 below.

6 The applicants must take the following steps to give notice to members of the Settlement Classes and interested parties of the steps that must be taken to participate in the hearing on the return day:

6.1 The Class Lawyers must forthwith:

6.1.1 publish a class notice in the form of Schedule 7 of the Addendum (“the settlement hearing notice”) on a prominent notice board at each of the offices of the Class Lawyers for a period of not less than 30 days;

6.1.2 request the Employment Bureau of Africa in Southern Africa to display the notice on a prominent notice board at each of its offices for a period of not less than 30 days;

6.1.3 request Legal Aid South Africa to display the notice on a prominent notice board at each Justice Centre and public office of Legal Aid South Africa for a period of not less than 30 days;

6.1.4 request the National Union of Mineworkers, the Association of Mineworkers and Construction Union, the National Union of Metalworkers of South Africa, United Association of South Africa and Solidarity to display the notice on a prominent notice board at each of their regional offices for a period of not less than 30 days;

6.1.5 deliver a copy of the notice to each advice office, paralegal office and community-based organisation with which the Class Lawyers are familiar and which are likely, in the opinion of the Class Lawyers, to be approached by members of the classes, and request them to display the notice on a prominent notice board at their offices for a period of not less than 30 days;

6.1.6 post the notice on a website managed by the Class Lawyers for a period of not less than 30 days; and

6.1.7 take the steps reasonably within the power of the Class Lawyers to ensure compliance by the agencies referred to in paragraphs 6.1.2 to 6.1.5 with the requests referred to in those paragraphs.

6.2 The Settling Companies that constitute the founders in terms of the Trust Deed attached to the Settlement Agreement (“the Founders”) must take steps reasonably possible to publish the settlement hearing notice –

6.2.1 as an advertisement in the newspapers listed in Schedule 8 of the Addendum and in the languages there stipulated. The notice must be published in each such newspaper once per week for a period of four weeks;

6.2.2 as a radio announcement broadcast on each of the radio stations listed in Schedule 9 of the Addendum (in the languages there stipulated) and based on the form attached and marked “C”. Such broadcasts are to be made twice daily on alternate days for a period of four weeks.

6.3 The Settling Companies must publish the settlement hearing notice:

6.3.1 on the homepage of each of the Settling Companies’ websites (if any) for a period of not less than 30 days;

6.3.2 on a prominent notice board for mineworkers at each of the mines, listed on the settlement hearing notice, that they own, operate or control, for a period of not less than 30 days; and

6.3.3 where they do not own, operate or control a mine listed in the settlement hearing notice, by requesting the companies that own, operate or control such mines to display the notice on a prominent notice board for mineworkers at each mine, for a period of not less than 30 days.

6.4 The Class Lawyers and the Settling Companies must publish the full text of the Settlement Agreement on the websites referred to in paragraphs 6.1.6 and 6.3.1 above and must make available the full text of the Settlement Agreement to any person purporting to be a class member who requests it.

7 The publication of the settlement hearing notice in accordance with paragraph 6 of this order must be completed no later than fourteen weeks before the hearing on the return day – i.e., by 20 February 2019.

8 The costs associated with publication in the press and over radio of the settlement hearing notice are to be borne by the Founders.

9 Any member of the Settlement Classes or any other interested party who wishes to participate in the hearing on the return day must take the following steps to do so:

9.1 Notice of intention to participate in the hearing, based on the form attached and marked “D”, must be served on Richard Spoor Inc Attorneys and filed at the above court by no later than ten weeks prior to the return day – i.e., by 20 March 2019;

9.2 Should no notice of intention to participate in the hearing be received on or before 20 March 2019, the matter shall be set down for hearing on an unopposed basis on 3 April 2019;

9.3 Any affidavit for purposes of the hearing must be served on Richard Spoor Inc Attorneys and filed at the above court, by no later than ten weeks prior to the return day – i.e., by 20 March 2019;

9.4 Any written argument for purposes of the hearing must be served on Richard Spoor Inc Attorneys and filed at the above court, by no later than five weeks prior to the return day – i.e., by 24 April 2019,

and Richard Spoor Inc Attorneys must then forthwith serve on the remaining attorneys for the applicants and to the participators’ attorneys copies of every document thus served on them, provided that service in terms of this order may be effected at the email addresses of the attorneys listed in the notice of motion and the email addresses in the notices of intention to participate.

10 The applicants may –

10.1 by no later than seven weeks before the return day, i.e. by 10 April 2019, file replying affidavits in response to any affidavits filed in terms of paragraph 9 above;

10.2 by no later than three weeks before the return day, i.e., by 8 May 2019, file written argument.

11 The court will by no later than two weeks before the return day, i.e., by 5 May 2019, determine which of the the members of the Settlement Classes and the interested parties, if any, that have filed affidavits and/or written argument, will be allowed to make oral submissions at the hearing.

12 The court shall, when giving its final decision in this matter, simultaneously issue–

12.1 an approved summary of the decision; and

12.2 directions for the publication of –

12.2.1 the court's decision;

12.2.2 the Settlement Agreement, if approved; and

12.2.3 the opt-out notice to members of the Settlement Classes based on Schedule 3 of the Addendum (the newspaper and print notice), and as a radio notice based on the form attached and marked “E”, or such other form as the court deems appropriate, if the Settlement Agreement is approved.

13 Should the court not approve the Settlement Agreement on the return day or should the Settlement Agreement not become operative due to failure of a suspensive condition, the certification of the Settlement Classes shall terminate with immediate effect.

14 Upon issue of this rule nisi order, a copy of the application and the rule nisi order shall be served on –

14.1 Xulu Attorneys Incorporated of 85 St George's Mall, First Floor, Nedbank Building, Cape Town; and

14.2 Those of the respondents in Nkala that are not party to the Settlement Agreement, at the addresses for service specified in those proceedings.

15 Save in respect of the order in paragraph 14 above, service in terms of this order may be effected by email to the email address specified in any notice of intention to participate.

BY THE COURT

THE REGISTRAR

[1] Nkala and Others v Harmony Gold Mining Companies Limited and Others (2012/48226, 2012/31324, 2012/31326, 2012/31327, 2012/48226, 2013/08108) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) at pp. 695 – 701

[2] See paragraph 13 of the Court Order in Nkala 2016

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