

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 48226/12

In the application for admission as *amici curiae* of –

**TREATMENT ACTION CAMPAIGN NPC**

First Applicant

**SONKE GENDER JUSTICE NPC**

Second Applicant

*In re:* the matter between –

**BONGANI NKALA AND FIFTY-FIVE OTHERS**

Applicants

and

**HARMONY GOLD MINING COMPANY LIMITED  
AND THIRTY-ONE OTHERS**

Respondents

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**ANELE BOYCE YAWA**

do hereby make oath and state:

1 I am an adult male and the chairperson of the Treatment Action

Campaign NPC (“the TAC”). I am authorised to depose to this affidavit on TAC’s behalf. In this regard, I attach – as annexure “**FA1**” – a copy of a resolution of TAC’s National Council dated 26 October 2014.

- 2 The contents of this affidavit fall within my personal knowledge, except where otherwise stated or indicated by the context, and are to the best of my belief both true and correct. Where I make legal submissions, I do so on the advice of the applicants’ legal representatives.

### **PURPOSE OF THIS APPLICATION**

- 3 This is an application in terms of rule 16A(5) of the Uniform Rules of Court for the TAC and Sonke Gender Justice NPC (“Sonke”) to be admitted as *amici curiae* (“*amici*”) in the application brought by Bongani Nkala and 55 others (“the class action applicants”) under consolidated case no. 48226/12 (“the main application”).
- 4 The need for this application flows from the refusal of the respondents in the main application to consent to the applicants being admitted as *amici*. I have been advised that in light of the specific role the *amicus curiae* plays in our judicial system, in particular by drawing the attention of courts “*to relevant matters of law and fact to which attention would not otherwise be drawn*”, this refusal is unreasonable.
- 5 I begin this affidavit by dealing with the applicants’ attempt to secure the

parties' consent to be admitted as *amici*. Thereafter, I consider the following five issues in turn:

- 5.1 First, the applicants' interests in the main application;
- 5.2 Second, a summary of the legal submissions the applicants intend to make if admitted as *amici* ("the legal submissions");
- 5.3 Third, the additional evidence the applicants seek to introduce and its relevance to the legal submissions they intend to make;
- 5.4 Fourth, the relevance of the legal submissions; and
- 5.5 Finally, the basis for believing that the applicants' submissions differ from those of the other parties and will assist this Court.

### **SEEKING THE PARTIES' CONSENT TO BE ADMITTED AS *AMICI***

6 On 29 October 2014, the class action applicants issued a notice in terms of rule 16A ("the 16A notice") in which they indicated their intention to raise various constitutional issues in the main application. I understand that the 16A notice was placed on the relevant notice board in the court in accordance with the provisions of rule 16A(1)(c).

7 A copy of the 16A notice, which is stamped in accordance with the

provisions of rule 16A(1)(d), is attached as annexure “**FA2**”. In relevant part, the 16A notice provides as follows:

*“KINDLY TAKE NOTICE THAT the Applicants in this matter intend raising the following constitutional issues:*

*Infringement of Constitutional Rights by the Respondents*

*1 Whether the respondents failed to ensure that the conditions of work of the members of the class did not infringe the following constitutional rights:*

*1.1 The right to human dignity (section 10 of the Constitution);*

*1.2 The right to life (section 11 of the Constitution);*

*1.3 The right to bodily integrity (section 12(2) of the Constitution);*

*1.4 The right to an environment not harmful to health and well-being (section 24 of the Constitution); ...*

*1.5 The right to have access to adequate healthcare (section 27(1) of the Constitution)[; and]*

*1.6 The right of access to any information that is held by another person and that is required for the exercise or protection of any rights.”*

*Standing and Access to Justice*

*2 Whether the Applicants are entitled to act in the interest of*

*the proposed classes sought to be certified in terms of section 38(c) of the Constitution.*

- 3 *Whether the requirement of certification affects the Applicants' right of access to justice contained in section 34 of the Constitution.*
- 4 *The effect that a court's decision not to certify the proposed classes will have on the Applicants' right of access to justice contained in section 34 of the Constitution.*

#### *Constitutional Damages*

- 5 *Whether the members of the proposed classes are entitled to constitutional damages separate from their ordinary damages.*

#### *Development of the Common Law in terms of Section 39(2) of the Constitution*

- 6 *Whether, in light of the requirement to certify a class prior to bringing a class action, the common law should be developed in terms of section 39(2) of the Constitution to allow for the general damages of a class member who dies after the institution of the certification application and prior to finalisation of the class action, to be transmissible to his or her deceased estate."*
- 8 In response to the 16A notice, SECTION27 – acting on behalf of the TAC and Sonke – sent a letter to all the parties in the main application seeking their admission as *amici* “*upon the terms and conditions proposed [t]herein (or as agreed upon in writing by the parties).*” A copy

of that letter, dated 4 November 2014, is attached as annexure “FA3”.

- 9 In that letter, SECTION27 set out the applicants’ interests in the constitutional issues identified in the 16A notice, and the submissions the TAC and Sonke intended to make if admitted as *amici*. In particular, paragraph 9 of the letter provides as follows:

*“Our clients’ primary intention is to be of assistance to the court in coming to a decision on issues that are of fundamental constitutional importance. If admitted, the TAC and Sonke intend to –*

*9.1 advance legal argument supporting the certification of the class action; and*

*9.2 introduce evidence that is relevant to the consideration of the following two constitutional issues:*

*9.2.1 whether certification should be granted; and*

*9.2.2 whether the transmissibility of damages question should be decided at the same time as the certification issue.”*

- 10 In expanding upon paragraph 9.1 of the letter, SECTION27 identified a range of legal issues that the TAC and Sonke intended to address if admitted as *amici*. In addition, SECTION27 identified the nature of the evidence that they intended to introduce to assist in the determination of the constitutional issues identified in paragraph 9.2 of the letter.

11 Given that the 16A notice was issued on 29 October 2014, the parties had until 26 November 2014 to consider and make a decision on the applicants' request for admission as *amici*. As is recorded below, the applicants were only able to secure the consent of the class action applicants. All of the respondents who responded to the request refused to grant consent. Simmer and Jack Mines Limited, the 24<sup>th</sup> respondent, failed to respond at all.

11.1 In a letter dated 21 November 2014, Richard Spoor Inc Attorneys indicated that all of the class action applicants had consented to the admission of the TAC and Sonke as *amici*. A copy of this response is attached as annexure "**FA4**".

11.2 Most responses on behalf of the respondents simply denied consent, without providing any reasons. Copies of these responses are attached as annexures "**FA5**" to "**FA9**". In addition to denying consent, they noted that the relevant respondents reserved their rights to reconsider their positions if and when served with any application.

11.3 Only three responses provided some basis for the refusal to grant consent, also reserving the right to reconsider if and when served with an application. Copies of these letters are attached as annexures "**FA10**" to "**FA12**":

- 11.3.1 Attorneys acting on behalf of the 13<sup>th</sup> to 19<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> respondents, collectively referred to as the Gold Fields respondents, alleged that *“the required criteria for admission as an amicus [were] not indicated”*.
- 11.3.2 Those acting on behalf of the 20<sup>th</sup> and 21<sup>st</sup> respondents alleged that the SECTION27 letter *“does not sufficiently articulate the grounds upon which [the TAC and Sonke] and this makes it impossible meaningfully to consider [the] request as against the criteria for admission as an amicus.”* In addition, they alleged that *“it is not apparent from [the] letter that [the TAC and Sonke] will advance argument or adopt a position which is not already articulated by the applicants.”*
- 11.3.3 Finally, the legal representatives of the 25<sup>th</sup> and 26<sup>th</sup> respondents offered two reasons for their clients’ refusal: first, that *“the terms and conditions of admission that the TAC and Sonke seek ... extend well beyond what is permissible for amici curiae”*; and second, *“intervention ... at this late stage of the proceedings will have a material impact on the progress of the certification proceedings, including the hearing of the matter”*. No explanation in either regard was provided.

12 Thus by 26 November 2014, the final day of the 20-day period to which rule 16A(2) refers, the applicants had not secured the written consent of

all the parties to the main application. In the result, they were entitled to make this application in terms of the provisions of rule 16A(5).

### **APPLICANTS' INTERESTS IN THE MAIN APPLICATION**

- 13 The TAC is registered both as a non-profit company (registration no. 2000/029181/08) and a non-profit organisation (registration no. 043-770-NPO). Its principal place of business is at Westminster House, 2<sup>nd</sup> floor, 122 Longmarket Street, Cape Town. Copies of the TAC's relevant registration certificates are attached as annexures "**FA13**" and "**FA14**".
  
- 14 The TAC advocates for increased access to treatment, care and support services for persons living with HIV and/or tuberculosis (TB), and campaigns to reduce new HIV and TB infections. Its strategic objectives are set out in paragraph six of its constitution, a copy of which is attached as annexure "**FA15**".
  
- 15 Amongst others, these objectives include to –
  - 15.1 advocate for the implementation of an effective and comprehensive HIV and TB prevention, diagnosis, treatment, care and support programme;
  
  - 15.2 advocate for effective evidence-based HIV and health policies and an enabling policy environment; and

- 15.3 pursue litigation, other forms of legal action and rights-based advocacy for the advancement of the TAC's principal objects.
- 16 As an integral part of its work, the TAC has been both applicant and *amicus curiae* in numerous applications in the superior courts since its establishment almost 16 years ago. Amongst others, the TAC has been involved in the following decided cases:
- 16.1 *Lee v Minister of Correctional Services* (2013 (2) SA 144 (CC)), a case dealing with the respondent's liability for the damages suffered by the applicant as a result of contracting tuberculosis ("TB") while in detention (as *amicus curiae*);
- 16.2 *Treatment Action Campaign v Minister of Correctional Services and Another* ([2009] ZAGPHC 10), a case dealing with access to a report of the Judicial Inspectorate of Prisons (as it then was) regarding an investigation into the death an inmate with HIV at Westville Correctional Centre (as applicant);
- 16.3 *N and Others v Government of the Republic of South Africa and Others (No 1)* (2006 (6) SA 543 (D)), a case dealing with the constitutional obligations of the state to provide access to health care services for inmates (as applicant);

- 16.4 *Cipla Medpro (Pty) Ltd v Aventis Pharma SA; Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others* (2013 (4) SA 579 (SCA)), a case dealing – in part – with the impact of public interest considerations on the balance of convenience test in applications for interim interdicts (as *amicus curiae*); and
- 16.5 *Treatment Action Campaign and Another v Rath and Others* [2008] 4 All SA 360 (C), a case dealing – in large part – with the legal obligations of the Medicines Control Council to protect the public (as applicant).
- 17 The TAC was also involved in the challenge brought by the then Pharmaceutical Manufacturers' Association of South Africa and 39 others to the Medicines and Related Substances Control Amendment Act 90 of 1997. As a result of delays on the part of both applicants and respondents, that matter – under case number 4183/98 (TPD) – took almost three years to get to court. But within six weeks of the High Court having admitted the TAC as *amicus curiae*, the matter was settled.
- 18 Sonke is also a registered non-profit company (registration no. 2006 / 023739 / 08) and non-profit organisation (registration no. 064-502-NPO). Sonke's principal place of business is at Westminster House, 4<sup>th</sup> floor, 122 Longmarket Street, Cape Town. Copies of Sonke's relevant registration certificates are attached as annexures "**FA16**" and "**FA17**". I am advised that an affidavit by the Executive Director of Sonke will

accompany this application.

- 19 Sonke works in South Africa and other African countries to ensure the development of just and democratic societies. Its strategic objectives include to strengthen government, civil society and citizen capacity to promote gender equality and human rights, to prevent domestic violence and sexual violence, and to reduce the spread and impact of HIV.
- 20 Amongst others, Sonke makes use of the following strategies to implement its vision and mission:
  - 20.1 Raising awareness of people's rights and ensuring that they are able to claim and enforce these rights;
  - 20.2 Providing support and tools to individuals, institutions, organisations, and communities, to enable them to put their knowledge into action for the enforcement of rights; and
  - 20.3 Supporting efforts to monitor, track, and research the outcomes of community actions, the implementation of national and international laws and policies, and the commitments made by powerful institutions as they relate to gender justice and human rights.
- 21 Like the TAC, Sonke also recognises the role that litigation may play to

effect social change. With this in mind, Sonke approached the Equality Court in early 2009 alleging that Mr Julius Malema – then the president of the ANC Youth League – had acted in breach of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 in making certain statements about rape while addressing members of the public.

- 22 In its judgment in *Sonke Gender Justice Network v Malema* (2010 (7) BCLR 729 (EqC)), the Equality Court for the District of Johannesburg held that Malema's statements constituted hate speech and harassment. It ordered him to issue a public apology in the form of a press release, and to pay a certain amount of money to a non-profit organisation that provides services to survivors of rape and other forms of sexual assault.
- 23 Central to the work of both the TAC and Sonke is the recognition in the Constitution of a wide range of fundamental rights, and the obligations they impose – both negative and positive – on public and private persons. When read together with sections 7, 8, 34 and 38 of the Constitution, these rights not only provide substantive guarantees, but also contemplate their effective vindication and realisation.
- 24 Given what is set out above, I submit that each of the applicants has a substantial interest in ensuring that the rights entrenched in the Bill of Rights – including those recognised in sections 9, 10, 11, 12, 24, 26, 27 and 28 of the Constitution – are respected, protected, promoted and fulfilled. In the result, both the TAC and Sonke have an interest in most

of the constitutional issues identified in the 16A notice.

## **SUMMARY OF THE APPLICANTS' INTENDED LEGAL SUBMISSIONS**

25 In the event the applicants are admitted as *amici*, their legal submissions will consider the nature and framework of the law on class actions, and will support the consolidated application for the grant of certification.

26 In addressing the questions identified in paragraph 25 above, the TAC and Sonke intend to focus on the following four legal issues:

26.1 The framework of class action law in South Africa, with a particular focus on:

26.1.1 The need for a flexible approach to class actions and the requirements to be met for certification, having regards to the facts of any particular case;

26.1.2 Where this matter fits in the class action framework that the applicants advance in legal submissions; and

26.1.3 The implications of the failure to certify the class action in this matter, recognising that a failure to do so would hinder the interests of justice;

26.2 How section 173 enables a court to regulate its own process to deal with all class actions;

- 26.3 The implications of the nature of the gold mining industry and the particular role it has played in the political economy of South Africa for the horizontal application – in terms of section 8(2) of the Constitution – of the rights in question, with a particular focus on substantive equality and access to justice; and
- 26.4 The necessity for corporate accountability and the right to an effective remedy under international law.
- 27 The first two of these four issues will be considered with reference to the evidence to which I refer at paragraph 30 below, as well as various decisions of the superior courts.
- 28 In dealing with the third legal issue (identified in paragraph 26.3 above), the applicants will seek to rely on the evidence already contained in the record, the evidence to which I refer at paragraph 30 below, as well as relevant case law dealing with the horizontal application of the Bill of Rights.
- 29 In dealing with the fourth legal issue (identified in paragraph 26.4 above), the applicants will rely in large part on the affidavit of Mr. Anand Grover (“Grover”), an advocate of the Bar Council of Maharashtra who practices in all courts throughout India, including the Supreme Court. From August 2008 to July 2014, Grover served as the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest

attainable standard of physical and mental health. A copy of his affidavit is attached as annexure “**FA18**”.

### **ADDITIONAL EVIDENCE THE APPLICANTS SEEK TO INTRODUCE AND ITS RELEVANCE TO THE LEGAL SUBMISSIONS**

30 In addition to the evidence contained in Grover’s affidavit, the TAC and Sonke intend to rely on the evidence contained in two further affidavits:

30.1 First, the affidavit of Professor Francis Aylmer Hunter Wilson (“Wilson”), an emeritus professor of economics at the University of Cape Town; and

30.2 Second, the affidavit of Mr. Dean John Peacock (“Peacock”), Sonke’s executive director, to which the notice of motion refers.

31 In his expert affidavit, which is attached as annexure “**FA19**”, Wilson considers the following five issues:

31.1 First, the migrant labour system;

31.2 Second, the geographic sources of labour for the gold mining industry in South Africa;

31.3 Third, an overview of the socio-economic conditions in labour-

providing areas, with a particular focus on the former Transkei;

31.4 Fourth, the socio-economic conditions of former underground gold mineworkers in the Alfred Nzo district in the Eastern Cape; and

31.5 Fifth, access to compensation for occupational illness and social security benefits for former mineworkers and their families.

32 I have been advised by Peacock that he intends to introduce evidence that considers the impact of illness and unemployment on the children and families of former mineworkers, with a particular focus on the gendered implications of occupational lung disease in areas that provide labour to the mines.

33 If admitted as *amici*, the TAC and Sonke will argue that the new evidence is directly relevant to the determination of two legal issues:

33.1 First, whether certification should be granted; and

33.2 Second, whether the transmissibility of damages question – one of the constitutional issues identified in the 16A notice – should be decided at the same time as the certification issue.

34 In respect of the first legal question, the evidence is directly relevant to

understanding the practical implications of non-certification insofar as substantive equality (as contemplated by section 9 of the Constitution) and access to justice (as contemplated by section 34 of the Constitution) are concerned. Put simply, the evidence will provide further detail on the context within which the application for certification is to be considered.

- 35 In respect of the second legal question, the evidence is relevant to any determination of the likely impact on potential claimants – and their families (with a particular focus on women and children) – of any delay in determining whether the common law ought to be developed in terms of section 39(2) of the Constitution to allow for the transmissibility of damages.

## **RELEVANCE OF THE LEGAL SUBMISSIONS**

- 36 I have been advised that should many of the applicants' legal submissions be accepted, then – absent exceptional circumstances – this Court ought to grant certification. In that event, this Court's focus should be placed on how best to regulate its own process – in terms of section 173 of the Constitution – to deal with the class action in question. As indicated above, the TAC and Sonke also intend to address this issue.

## **HOW THE APPLICANTS' SUBMISSIONS ARE DIFFERENT FROM THOSE OF THE OTHER PARTIES AND WILL ASSIST THIS COURT**

37 By the time the 16A notice was issued on 29 October 2014, the class action applicants had already delivered their replying affidavits in the main application. These affidavits were filed on 16 September 2014. This meant that the TAC and Sonke were well aware of both the type of submissions the parties intend to make, as well as the nature and extent of the evidence already contained in the record. In the result, the applicants were able to ensure that the submissions they intend to make are different from those of the other parties.

38 In addition, the evidence sought to be introduced is indeed new. Put simply, the record does not yet contain the type of evidence set out in Grover's and Wilson's affidavits, as well as the evidence Peacock advises will be contained in his affidavit.

39 In the result, this Court will be assisted by –

39.1 the introduction of evidence that is relevant to the determination of key legal questions relating to the disputes on certification and separation of issues; and

39.2 legal submissions that will assist this Court in relation to its determination of these two issues and which will differ from those of the parties themselves.

## **CONCLUSION**

40 In the result, I submit that the applicants have made out a case for this Court to admit them as *amici* on the terms and conditions as set out in the notice of motion.

\_\_\_\_\_  
**ANELE BOYCE YAWA**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_  
on this the \_\_\_\_ day of \_\_\_\_\_ 2014.

\_\_\_\_\_  
**COMMISSIONER OF OATHS**