IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION JOHANNESBURG

CASE NUMBER: 48226/2012

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

FIRST, SECOND, FOURTH TO EIGHTH AND THIRTY-SECOND RESPONDENTS' HEADS OF ARGUMENT IN *AMICI CURIAE* APPLICATION

INTRODUCTION

1 The applicants for class certification (**"the class applicants"**) notify six constitutional issues as arising on the affidavits exchanged in the main application.

2 The applicants in this application (**"TAC"** and **"Sonke"**) rely on such notification in seeking leave to participate in the main application as friends of the court.

3 Yet they tender to advance no argument and/or to adduce no evidence in relation to any such issue.

4 Rather, they identify two *unnotified* constitutional issues, which they propose to address by means of both argument and evidence.

5 We submit that this is impermissible under the rule on which TAC and Sonke rely.

6 Even if we are wrong in this regard, both the issues themselves and the contentions which TAC and Sonke seek an opportunity to advance are already before the court and addressed in the submissions and allegations of the parties. They are neither novel nor unique. Hence they do not satisfy the requirements of the rule.

7 In any event, allowing TAC and Sonke to precipitate a further exchange of thousands of pages of affidavits consisting solely or mainly of repetitive material would impede rather than facilitate the resolution of the consolidated certification application. It would hinder rather than help the court. Hence the court ought not to exercise its discretion in favour of granting the relief sought in this application.

8 Consequently, this application falls to be dismissed.

RULE 16A AND ITS INTERPRETATION

The Provisions of Rule 16A

9 If a party raises a constitutional issue in an action or application, notice thereof – including a clear and succinct description of the issue – must be provided to and published by the registrar.[1]

10 Any person with an interest in the issue[2] may be admitted as *amicus curiae* in the proceedings, on such terms and conditions as may be agreed or ordered, provided:

10.1 all parties consent in writing to admission; or

10.2 the person successfully applies to court for admission.[3]

11 Such an application must:

11.1 briefly describe the applicant's interest in the proceedings; and

11.2 clearly and succinctly set out:

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1 Rule 16A(1)

2 TAC and Sonke read rule 16A(2) as permitting them to seek admission to assist the court in respect of *any* constitutional issue raised in the proceedings, even if it is not among those identified in the class applicants' rule 16A(1) notice. We submit that this is an incorrect interpretation, having regard to the text, context and purpose of the rule: Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) [17]-[26]; Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) [10]-[12].

3 Rules 16A(2) to 16A(5)

11.2.1 the contentions[4] proposed to be advanced by the applicant;

11.2.2 their relevance to the proceedings; and

11.2.3 the applicant's reasons for believing that the contentions:

11.2.3.1 are different from those of the parties; and

11.2.3.2 would be of assistance to the court.[5]

12 Ultimately, the court retains discretion to grant or refuse the application on such terms and conditions as it may determine.[6]

The Purpose of Rule 16A

13 The purpose of rule 16A is to bring cases involving constitutional issues to the attention of persons who may be affected by or legitimately interested in their outcome[7] so that they may take steps to protect their interests by:

13.1 seeking to intervene either as parties or as *amici curiae*;[8] and

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4 We use the term "*contentions*" to refer both to legal submissions and to factual allegations.

5 Rule 16A(6)

6 Rule 16A(8); In re Certain Amicus Curiae Applications: Minister of Health & Others v Treatment Action Campaign & Others 2002 (5) SA 713 (CC) [3]

7 *Amicus* application pg 346 AA pr 10; Shaik v Minister of Justice and Constitutional Development & Others 2004 (3) SA 599 (CC) [24]

13.2 directing the court's attention to relevant matters of fact and/or law which would otherwise not come to the fore.[9]

14 It is intended to clarify grounds for intervention in public interest matters, given that "*constitutional cases*" may have consequences which reach beyond their parties.[10]

The Role of an Amicus Curiae

15 Rule 16A is "*specifically intended to facilitate the role of amici in promoting and protecting the public interest*", i.e. to:

15.1 ensure "*that courts consider a wide range of options and are well informed*"; and

15.2 increase "*access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues*".[11]

16 The rationale for this role is that:

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8 Rates Action Group v City of Cape Town 2004 (5) SA 545 (C) [21]

9 In re Certain Amicus Curiae Applications *supra* [5]; Shaik v Minister of Justice *supra* [24]; Fourie & Another v Minister of Home Affairs & Others 2005 (3) SA 429 (SCA) [55]

10 Rates Action Group v City of Cape Town *supra* [21]; Children's Institute v Presiding Officer, Children's Court, Krugersdorp & Others 2013 (2) SA 620 (CC) [25]

11 Children's Institute v Presiding Officer *supra* [26]

> "*[h]igh courts often hear vulnerable litigants with limited resources. These litigants are invariably unable to produce the kind of compelling evidence that an expert, like the Children's Institute, may be able to provide. In these instances, the amicus speaks to aid voiceless and penniless people and assists the court in making an informed decision*".[12]

17 An *amicus curiae* is a friend of the court; not an ally of any of the parties. Where an applicant has "*a dog in the fight*", it should seek leave to intervene *as a party*:

> "*... the submissions must be directed at assisting the court to arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant. This does not mean an amicus may not urge upon a court to reach a particular outcome. However, it may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation*".[13]

18 In return for the privilege of participating in the proceedings without qualifying as a party, an *amicus curiae* bears a special duty to the court: to offer cogent submissions that are of assistance to the court, to provide fresh insight, including by not:

18.1 repeating arguments advanced by the parties; and/or

18.2 otherwise burdening the proceedings.[14]

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12 Children's Institute v Presiding Officer *supra* [34]

13 Children's Institute v Presiding Officer *supra* [34]; National Treasury & Others v Opposition to Urban Tolling Alliance & Others 2012 (6) SA 223 (CC) [13]

14 In re Certain Amicus Curiae Applications *supra* [5]; Children's Institute v Presiding Officer *supra* [26]; National Treasury v OUTA *supra* [13]-[16]

The Absence of Precedent

19 We are unaware of precedent in our law for the admission of *amici curiae* in comparable proceedings, i.e. a complex consolidated application in which scores of applicants, represented by well-resourced multi-national public interest legal teams, seek to initiate a class action against 30+ respondents on behalf of tens or even hundreds of thousands of potential claimants.

20 This is so, we submit, since it is most unlikely, in litigation of such nature and scale, that a court requires *additional* argument and/or evidence from yet further participants and representatives, offering no experience and/or expertise in respect of class action proceedings, bearing in mind that the consolidated certification application is:

20.1 prepared and presented as a constitutional matter;

20.2 conceived and conducted in the public interest;

20.3 specifically designed to protect the interests of claimants not yet before court, i.e. "*the voiceless and penniless people*" who fall within the proposed silicosis and tuberculosis classes; and

20.4 already burdened by a record comprising some 5,000 pages of argument and evidence.

RULE 16A AND ITS APPLICATION

The Class Applicants' Notice in terms of Rule 16A(1)

21 In October 2014 the class applicants gave notice, in terms of rule 16A(1), that the following "*constitutional issues*" arise in the certification application:[15]

21.1 whether the respondents failed to ensure that the conditions of work of members of the proposed classes did not infringe their constitutional rights to dignity (section 10), life (section 11), bodily integrity (section 12(2)), unharmful environment (section 24), adequate healthcare (section 27(1)) and access to information (section 32);[16]

21.2 whether the class applicants are entitled, in terms of section 38(c) of the Constitution (enforcement of rights as a class), to act in the interests of the proposed classes;[17]

21.3 whether the requirement of class certification affects the class applicants' right of access to justice under section 34 of the Constitution;[18]

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15 *Amicus* application pg 346-347 AA pr 11

16 *Amicus* application pg 31-32 ax FA2 pr 1

17 *Amicus* application pg 32 ax FA2 pr 2

18 *Amicus* application pg 32 ax FA2 pr 3

21.4 the effect that a decision not to certify the proposed classes would have on the class applicants' right of access to justice under section 34 of the Constitution;[19]

21.5 whether the potential class members are entitled, in the event of breaches of constitutional rights, to claim "*constitutional damages*" independently of their "*ordinary damages*";[20] and

21.6 whether the common law should be developed, in terms of section 39(2) of the Constitution, to allow for the general damages of a potential class member, who dies after initiation of the certification application but before finalisation of any class action, to be transmissible to his or her deceased estate (**"the transmissibility of damages issue"**).[21]

22 These six issues may be referred to as **"the notified constitutional issues"**.

TAC's and Sonke's Request in terms of Rule 16A(2)

23 In November 2014 TAC and Sonke wrote to the parties to the main application requesting consent, under rule 16A(2), to be admitted as *amici curiae*.[22] In paragraphs 3 to 8 of the letter, TAC and Sonke asserted interests in the notified constitutional issues themselves. If admitted as friends of the court, they proposed to:

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19 *Amicus* application pg 32 ax FA2 pr 4

20 *Amicus* application pg 32 ax FA2 pr 5

21 *Amicus* application pg 32-33 ax FA2 pr 6

22 *Amicus* application pg 38-43 ax FA3; pg 348-351 AA pr 13

23.1 advance argument in support of the certification of a class action; and

23.2 adduce evidence of relevance to the consideration of two additional "*constitutional issues*":

23.2.1 "*whether certification should be granted*", having regard to substantive equality and access to justice; and

23.2.2 "*whether the transmissibility of damages question should be decided at the same time as the certification issue*".[23]

24 These two issues may be referred to as **"the proposed constitutional issues"**.

25 The class applicants consented to TAC's and Sonke's request for admission.[24]

26 The respondents did not.[25]

TAC's and Sonke's Application in terms of Rules 16A(5) and (6)

27 In this application, TAC and Sonke assert interests in the main application itself (as opposed to the notified or proposed constitutional issues). They proceed to:

27.1 summarise their "*intended legal submissions*":[26]

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[23] *Amicus* application pg 41-42 ax FA3 pr 9

[24] *Amicus* application pg 44 ax FA4; pg 351 AA pr 14

[25] *Amicus* application pg 45-57 ax FA5-FA12; pg 351 AA pr 14

27.1.1 if admitted as *amici curiae*, TAC and Sonke will "*consider the nature and framework of the law on class actions*" and "*support the consolidated application for the grant of certification*",[27] focussing on:

27.1.1.1 the framework of class action law in South Africa, with a particular focus on the need for a flexible approach to class actions and the implications of a failure to certify the class action in this matter, "*recognising that a failure to do so would hinder the interests of justice*".[28] In support of this submission, TAC and Sonke propose to rely on the evidence of Wilson and Peacock as well as judicial decisions;[29]

27.1.1.2 how section 173 of the Constitution enables a court to regulate its process to deal with all class actions.[30] In support of this submission, TAC and Sonke propose to rely on the evidence of

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26 *Amicus* application pg 351-353 AA pr 15.2

27 *Amicus* application pg 20 FA pr 25

28 *Amicus* application pg 20 FA pr 26.1

29 *Amicus* application pg 21 FA pr 27; pg 22 FA pr 30

30 *Amicus* application pg 20 FA pr 26.2

Wilson and Peacock as well as judicial decisions;[31]

27.1.1.3 "*[t]he 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*".[32] In support of this submission, TAC and Sonke propose to rely on evidence in the record, the evidence of Wilson and Peacock as well as judicial decisions;[33] and

27.1.1.4 the necessity for corporate accountability and the right to an effective remedy under international law.[34] In support of this submission, TAC and Sonke propose to rely on Grover's evidence[35]

(**"the proposed submissions"**); and

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31 *Amicus* application pg 21 FA pr 27; pg 22 FA pr 30

32 *Amicus* application pg 21 FA pr 26.3

33 *Amicus* application pg 21 FA pr 28; pg 22 FA pr 30

34 *Amicus* application pg 21 FA pr 26.4

35 *Amicus* application pg 21-22 FA pr 29

27.1.2 as regards the relevance of the proposed submissions, TAC and Sonke say that, if certification is granted, "*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*";[36]

27.2 outline the "*additional evidence the [class] applicants seek to introduce*" (**"the proposed allegations"**),[37] contending that the affidavits of Wilson, Peacock and Grover are "*directly relevant*" to the determination of the proposed constitutional issues;[38]

27.3 give their reasons for believing that the proposed submissions and allegations are *different* to those of the parties.[39] In this regard, TAC and Sonke claim that:

27.3.1 "*the submissions they intend to make are different from those of the other parties*" (without identifying any such difference); and

27.3.2 "*the evidence sought to be introduced is indeed new*" (on the unsubstantiated basis that "*the record does not yet contain the*

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36 *Amicus* application pg 24 FA pr 36

37 *Amicus* application pg 353-354 AA pr 15.3

38 *Amicus* application pg 22-24 FA pr 30-35

39 *Amicus* application pg 354-355 AA pr 15.4

type of evidence" set out in the Wilson, Peacock and Grover affidavits);[40] and

27.4 give their reasons for believing that the proposed submissions and allegations would be of *assistance* to the court.[41] In this regard, TAC and Sonke claim that the court would be aided by argument and evidence of relevance to the determination of the proposed constitutional issues.[42]

28 This application is opposed by the Harmony, Gold Fields and AASA respondents.

The Harmony Respondents' Grounds of Opposition

29 In the first instance, none of the proposed submissions and allegations is proffered in respect of any of the *notified* constitutional issues. If, as we submit, TAC and Sonke are wrong in reading rule 16A(2) as permitting them to seek admission to assist the court in respect of the *proposed* constitutional issues, this application is stillborn and must fail.

30 If their interpretation of rule 16A(2) finds favour with the court, we submit that:

30.1 as regards the proposed submissions:

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40 *Amicus* application pg 24-25 FA pr 37-38

41 *Amicus* application pg 354-355 AA pr 15.4

42 *Amicus* application pg 25 FA pr 39

30.1.1 nothing TAC and Sonke intend to say is novel or unique. The proposed submissions are already raised, repeated and debated – at length – in the record of the main application. There is no need for TAC or Sonke either to bring them to the court's attention or to restate them yet again;[43] and

30.1.2 in any event, the founding affidavit in this application shows no purpose or relevance of such submissions *vis-à-vis* TAC and Sonke. The high water mark of this aspect of their case is the suggestion that, *if* and *when* certification is granted, the court should consider how best to regulate its process under section 173 of the Constitution.[44] TAC and Sonke do not venture a view on how the court might begin to grapple with a class action of the magnitude contemplated in the main application. Having read and considered some 20 lever-arch files of paper exchanged in the commonality/dissimilarity debate, that is, TAC and Sonke have nothing to suggest on process. Not a thought … other than that *the court* should consider the issue once it has certified classes and there is no turning back. Hence nothing TAC and Sonke have to offer has a bearing on the

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43 *Amicus* application pg 357 AA pr 16.2.1

44 *Amicus* application pg 24 FA pr 36

central issue – whether the proposed class action would be convenient or even viable;[45]

30.2 the proposed allegations do not assist in deciding either of the proposed constitutional issues:

30.2.1 the affidavits of Wilson, Peacock and Grover offer the court no guidance whether to certify the proposed classes because they repeat factual allegations traversed in the record whilst remaining silent on the commonality/dissimilarity debate. In any event, the kinds of evidence and opinion they put up – whilst conceivably relevant to any class action which may follow – are neither here nor there for purposes of the certification application;[46] and

30.2.2 the *timing* of the determination of the transmissibility of damages issue (as opposed to the *merits* of the issue) is not one of the notified constitutional issues. In any event, it is a matter already raised in the record of the main application, as we point out in paragraphs 37 to 40 below;[47]

30.3 it is thus incorrect to suggest that the submissions of TAC and Sonke are *new* or *different* to those already before court. Nor is the evidence or

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45 *Amicus* application pg 357-358 AA pr 16.2.2

46 *Amicus* application pg 358 AA pr 16.3.1

47 *Amicus* application pg 358 AA pr 16.3.2

opinion of Wilson, Peacock and Grover either novel or unique. All their contentions are existing ones for consideration and determination in the certification proceedings and/or irrelevant to the main application;[48] hence

30.4 what TAC and Sonke proffer would not be of assistance to the court.

31 Were TAC and Sonke to be admitted as *amici curiae*, moreover, each of the 30+ respondents (or at least each of the respondent groups) would require an opportunity to answer this 350-page application. Thereafter, TAC and Sonke would require an opportunity to reply to each set of answering papers. The already-voluminous record would grow substantially. An enormous additional burden would be imposed on the court and the parties.[49] Critically, as TAC and Sonke acknowledge, "*the further exchange of affidavits as contemplated by the amicus respondents would place the remainder of the timetable under significant pressure*".[50] In the circumstances, the court's discretion should not be exercised in favour of TAC and Sonke.

32 In summary, then, the relief sought in this application should not be granted since:

32.1 TAC and Sonke are able to contribute nothing of significance to the determination of the main application or any of the notified constitutional issues that is not already traversed in the record;[51] and

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48 *Amicus* application pg 359 AA pr 16.4

49 *Amicus* application pg 359 AA pr 17

50 *Amicus* application pg 24 FA pr 36

51 *Amicus* application pg 360 AA pr 21.1

32.2 insofar as they tender argument and/or evidence that is either novel or unique, it falls beyond the scope of the relief sought in the certification application and is irrelevant to the notified constitutional issues.[52]

THE PROPOSED CONSTITUTIONAL ISSUES

33 Paragraph 33 of the founding affidavit in this application identifies the two constitutional issues that TAC and Sonke propose to address as *amici curiae*.[53]

34 The proposed constitutional issues lie at the forefront of the case brought by the class applicants. They are neither novel nor unique to this application.[54]

35 In the first instance, whether certification should be granted is the primary issue in the main application, a question to which almost 5,000 pages of argument and evidence are already devoted by the parties.

36 Second, the burdens borne by dependent women and children, including where their breadwinners die before the close of pleadings, are topics traversed in detail in the papers comprising the record:

36.1 Each of the classes and alternative classes sought to be certified in prayers 1 to 4 of the amended notice of motion (main application pages 5 to 7)

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52 *Amicus* application pg 360 AA pr 21.2

53 *Amicus* application pg 23 FA pr 33

54 *Amicus* application pg 377 AA pr 32.3

includes dependants of mineworkers who died of silicosis or tuberculosis. Hence the claims of women and children affected by occupational disease form part of and will, if meritorious, be vindicated in any class action that may follow the certification application.[55]

36.2 The same is true of the definitions of the "*silicosis class*" and the "*tuberculosis class*" pleaded in paragraphs 1.1 and 1.2 of the draft particulars of claim which appears as an annexe to the notice of motion in the main application (main application pages 28 and 29).[56]

36.3 Insofar as reliance on health and safety regulations is pleaded in the draft particulars of claim, paragraphs 125 and 130 thereof (main application pages 95 and 96) aver that the regulations were promulgated not only for the benefit and protection of members of the silicosis and tuberculosis classes but also for those dependent on such members for maintenance and support.[57]

36.4 In consequence of alleged breaches of such duties, members of the silicosis and tuberculosis classes are alleged in the draft particulars of claim to have died of occupational disease, "*causing their dependants to suffer a loss of support*" (main application page 109 paragraph 146; page 111 paragraph

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55 *Amicus* application pg 378 AA pr 32.3.1

56 *Amicus* application pg 378 AA pr 32.3.2

57 *Amicus* application pg 378 AA pr 32.3.3

150). Paragraphs 151.6 and 152.6 thereof seek damages in compensation for such loss of support (main application pages 111 and 112).[58]

36.5 Since the time of the Spoor applicants' original application there has been an endeavour to safeguard the interests of "*[t]he dependants of mineworkers who died as a result of silicosis (whether or not accompanied by any other disease)*", as appears from paragraph 4.2 of Spoor's original founding affidavit (main application page 255). The affidavit contains a number of similar references, including in paragraph 9.2 on page 257 of the record.[59]

36.6 Difficulties with the computation of damages claimable by dependants of deceased breadwinners were identified in paragraph 155 of the founding affidavit in the Spoor applicants' initial application for certification (main application page 346).[60]

36.7 Hence the original Spoor application had, as four of its applicants and proposed class representatives, widows who, together with their children, contend for dependent actions arising out of the deaths of their husbands. Their affidavits, which give details of their life circumstances, are to be found at pages 626 to 660 of the record.[61]

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58 *Amicus* application pg 378-379 AA pr 32.3.4

59 *Amicus* application pg 379 AA pr 32.3.5

60 *Amicus* application pg 379 AA pr 32.3.6

61 *Amicus* application pg 379 AA pr 32.3.7

36.8 The class sought to be certified in the original LRC application included, where a mineworker was deceased, "*the dependant(s) of such person*" (main application page 1495 paragraph 23.1.6).[62]

36.9 Significantly, that application raised, as an issue for determination by the court, "*[w]hether or not relatives who cared for sick or deceased miners should be entitled to compensation for the value of the voluntary services provided, as I am advised is the case under English law … and Australian law …*" (main application page 1511 paragraph 47.4). This is the question which Sonke puts up in support of its application to be admitted as *amicus curiae*. Sonke's input is unnecessary as the question is already before court.[63]

36.10 That the interests of dependants are sought to be protected by means of aggregated proceedings is reiterated in paragraph 83 of the Spoor applicants' replying affidavit, where it is noted that it requires to be proved "*that the dependant had a right to support by a mineworker who died of silicosis as a result of wrongful, negligent, and/or intentional conduct by the defendant(s)*".[64]

37 Significantly, as regards the *timing* of the determination of the transmissibility of damages issues, TAC and Sonke add nothing to what is already before court. The

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62 *Amicus* application pg 380 AA pr 32.3.8

63 *Amicus* application pg 380 AA pr 32.3.9

64 *Amicus* application pg 380 AA pr 32.3.10

class applicants ask that the issue be heard and decided upfront – as part of the certification application rather than any class action – and catalogue their reasons for doing so.[65] For example:

37.1 Paragraph 10 of the amended notice of motion in the main application (main application page 10) seeks a declaratory order, as part of the certification application, "*that, in the event that any class member dies after the institution of the certification application and prior to finalisation of the class action, such general damages as that class member would have been entitled to claim shall be transmissible to his or her deceased estate*".[66]

37.2 In paragraphs 31 to 35 of Spoor's affidavit in support of the consolidation of what had been three certification applications (main application pages 129 to 132) evidence and argument in support of the transmissibility of general damages, including by means of the development of the common law in terms of section 39(2) read with sections 9, 10, 11, 12 and 34 of the Constitution, are set out in detail.[67]

37.3 Spoor cites studies in support of the submission that there are high mortality rates among silicotic miners. According to him, "*[u]nless the common law provides for the transmissibility of claims for general damages of class members as from the institution of proceedings, a substantial number of*

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65 *Amicus* application pg 392-393 AA pr 48.3

66 *Amicus* application pg 393 AA pr 48.3.1

67 *Amicus* application pg 393 AA pr 48.3.2

class members (or their deceased estates) will lose any claims for general damages".[68]

37.4 Significantly, as regards Sonke's proposed participation in the main application, Spoor continues that "*[t]he impact of this loss will be borne, in particular, by the widows and children of former mineworkers living in the former labour-sending areas in rural South Africa and Southern Africa*".[69]

37.5 It is further submitted that, to the extent that our common law does not already provide for the transmissibility of general damages in the circumstances, "*it must be developed in order to give effect to the spirit, purport and object of the Bill of Rights*". More particularly, or so it is contended, the common law falls to be developed in terms of section 39(2) of the Constitution to vindicate "*the rights to equality (section 9), dignity (section 10), life (section 11), freedom and security of the person (section 12) and access to court (section 34)*".[70]

37.6 This issue is also addressed in Nindi's founding affidavit in the original LRC application, as appears from paragraph 28 thereof (main application page 1500): "*In addition, a substantial proportion of silicotic gold miners*

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68 *Amicus* application pg 393 AA pr 48.3.3

69 *Amicus* application pg 394 AA pr 48.3.4

70 *Amicus* application pg 394 AA pr 48.3.5

have died and continue to do so. At the same time their general damages entitlements are lost and cannot be claimed by their estates".[71]

38 The respondents – including the Harmony respondents – point out in their answering papers why it is undesirable for the *motion* court to determine the question. They contend that it would be in the interests of justice for the *trial* court to do so.[72]

39 In reply, the class applicants put up counter-arguments:

39.1 in paragraph 35.11 of his replying affidavit in the certification application, Spoor identifies as an alleged common issue of fact and/or law the question whether "*the general damages suffered by the members of the class [are] transmissible to their dependants before litis contestatio has been reached*";[73] and

39.2 the question of the transmissibility of general damages is re-addressed in paragraphs 170 to 174 of the Spoor applicants' replying affidavit in the certification application. These paragraphs tackle not only an alleged need for such damages to be transmissible to deceased estates but also the question *when* it would be appropriate for the issue to be heard and decided by the court (i.e. at the certification application or at any class action). The Spoor applicants argue that it would be in the interests of justice for the issue to be determined as part of the certification application and hence the

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71 *Amicus* application pg 394 AA pr 48.3.6

72 *Amicus* application pg 394-395 AA pr 48.4

73 *Amicus* application pg 395 AA pr 48.5.1

arguments that TAC and Sonke wish to put up are already before court. In this regard, I refer to what is stated and repeated in paragraphs 364, 370 and 404 of the affidavit.[74]

40 Hence both the proposed constitutional issues will be heard and decided regardless of the outcome of this application. It follows, I submit, that TAC and Sonke do not meet the threshold for intervention as *amici curiae*.[75]

THE PROPOSED SUBMISSIONS

41 According to TAC and Sonke, if they are permitted to participate in the main application, "*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*".[76]

42 It is not the role of an *amicus curiae* to support any party to proceedings in which it is admitted to serve as friend of the court.

43 Nor should it favour particular relief save to the extent that it may reflect a proper and just resolution of the parties' disputes.

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74 *Amicus* application pg 395 AA pr 48.5.2

75 *Amicus* application pg 380 AA pr 32.4

76 *Amicus* application pg 370-371 AA pr 31.1

44 In any event, neither TAC nor Sonke has experience or expertise in relation to aggregated proceedings and there is nothing to suggest that they could make a contribution which would otherwise be overlooked or ignored by the three teams of lawyers who initiated the main application. Nothing novel or unique is identified in the founding affidavit of Yawa.[77]

The First Proposed Submission

45 This is especially true in relation to what Yawa terms "*[t]he framework of class action law in South Africa*".

46 Nothing contained in paragraph 26.1 of the founding affidavit in this application suggests that there is something TAC and Sonke could say or do that would not otherwise be said or done by the Spoor, Abrahams and/or LRC applicants. Nor is any such "*framework*" among the notified constitutional issues.[78]

The Second Proposed Submission

47 Equally, Yawa's reference to the manner and extent to which section 173 of the Constitution (inherent power of courts to regulate process) enables a court to regulate its process to accommodate a class action is neither a matter in relation to which TAC

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[77] *Amicus* application pg 371 AA pr 31.2

[78] *Amicus* application pg 371 AA pr 31.3

and Sonke have experience or expertise nor an issue absent from the record in the main application. It is also not a notified constitutional issue.[79]

48 The inter-relationship between sections 34 (access to courts), 38(c) (enforcement of rights as a class) and 173 (inherent power of courts to regulate process) of the Constitution – for purposes of giving effect to class actions – is traversed at length in the record of the main application, including in:

48.1 paragraphs 166 and 167 of Spoor's original founding affidavit (main application pages 348 and 349), where it is concluded that "*[i]t is only by way of a class action of the kind the [Spoor] applicants seek to institute, that the rights of the members of the classes can be enforced at all, and that effect can be given to their right of access to court in terms of section 34 of the Constitution*";[80]

48.2 paragraphs 83 to 89 (or equivalent) of the founding affidavit in each of the original Abrahams applications (main application pages 723 to 725), including the submission that: "*the [Abrahams] Applicants should be permitted to represent the class under either section 38 or section 173 of the Constitution, with due regard to the right of access to Courts of members of the class. It would be impossible for the class members to institute actions on their own, and it is therefore necessary for a class*

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79 *Amicus* application pg 371 AA pr 31.4

80 *Amicus* application pg 372 AA pr 31.5.1

action to be instituted in order for the right of access to Court to be protected";[81]

48.3 paragraphs 17, 55 and 67 of the Spoor applicants' replying affidavit in the main application, which assert that "*[t]he Constitution requires this Court to facilitate access to justice. It specifically contemplates that the class action is a permissible procedural mechanism for achieving access to courts. In developing this procedure, courts and litigants have a constitutional duty to adapt their procedures to overcome logistical and other challenges*";[82] and

48.4 paragraph 6 of the Abrahams applicants' replying affidavit in the certification application, in which it is asserted:

48.4.1 that "*[t]he social justice goals of the constitutional provision for class actions … can be best realised through the use of a litigation mechanism that allows thousands of worker-victims access to the legal system, without shouldering alone the costs and burdens of what would be burdensome and unnecessarily repetitive individualised litigation*"; and

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[81] *Amicus* application pg 372 AA pr 31.5.2

[82] *Amicus* application pg 372-373 AA pr 31.5.3

48.4.2 that "*this class action litigation is the only viable, workable and manageable avenue open to the class members to obtain redress for their suffering*".[83]

49 Since section 173 of the Constitution is not among the notified constitutional issues and is already relied on by the class applicants, it provides TAC and Sonke with no basis on which to seek involvement in the main application.[84]

50 The first and second proposed submissions would, according to Yawa, "*be considered with reference to the evidence*" referred to in paragraph 30 of her founding affidavit in this application. There, she points to and attaches the affidavits of Wilson and Peacock. Significantly, however, neither deponent addresses "*[t]he framework of class action law in South Africa*" or "*[h]ow section 173 enables a court to regulate its own process to deal with all class actions*". Indeed, nowhere in Yawa's affidavit or its annexes do TAC and Sonke set out any evidence of relevance to these issues and/or any arguments to be advanced in relation to them. There is simply an allusion to an as-yet-unidentified contribution purportedly to be made in due course. This does not meet the standard set by rule 16A.[85]

The Third Proposed Submission

51 Yawa turns in paragraph 26.3 of the founding affidavit in this application to the third of the legal issues in respect of which TAC and Sonke are said to be able to make a

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83 *Amicus* application pg 373 AA pr 31.5.4

84 *Amicus* application pg 373 AA pr 31.6

85 *Amicus* application pg 374 AA pr 31.7

contribution: "*[t]he 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*". Again, it is said that reliance would be placed on the evidence of Wilson and Peacock in respect of this issue.[86]

52 But there are a number of difficulties with the proposition:

52.1 the circumstances in which the Constitution has horizontal application by virtue of section 8(2) thereof is not one of the notified constitutional issues;[87]

52.2 in any event, the role of the gold mining industry in the political economy of the country is not a topic that has escaped the class applicants. Their voluminous papers are replete with allegations and submissions on that score;[88]

52.3 the Spoor, Abrahams and LRC applicants already assert reliance on the horizontal application of the Constitution and thus it too is not a novel or unique insight on the part of TAC and Sonke;[89]

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86 *Amicus* application pg 374 AA pr 31.8

87 *Amicus* application pg 375 AA pr 31.8.1

88 *Amicus* application pg 375 AA pr 31.8.2

89 *Amicus* application pg 375 AA pr 31.8.3

52.4 a further example of the same proposition is to be found in paragraph 109.2 of the Spoor applicants' replying affidavit in the main application:

> "*it is submitted that the rights in the Bill of Rights are capable of horizontal application in terms of section 8(2) of the Constitution … Whether horizontal application is appropriate in the present matter will be a matter for the trial court to determine in the specific circumstances of the matter, but there is no basis for the respondents to contend that horizontal application is excluded in principal at the outset*";[90]

52.5 neither TAC nor Sonke has any independent knowledge or understanding of the South African gold mining industry that might position or prepare it to assist the court in a manner or to an extent not catered for by the class applicants;[91] and

52.6 neither organisation brings experience or expertise in aggregated proceedings of a sort not enjoyed by the three legal teams representing the class applicants.[92]

The Fourth Proposed Submission

53 The fourth legal issue in relation to which TAC and Sonke propose to assist the court is "*[t]he necessity for corporate accountability and the right to an effective remedy under international law*".[93]

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90 *Amicus* application pg 375 AA pr 31.8.4

91 *Amicus* application pg 375-376 AA pr 31.8.5

92 *Amicus* application pg 376 AA pr 31.8.6

54 TAC and Sonke purport to rely on the affidavit of Grover.[94]

55 The first point to note is that this issue is not among the notified constitutional issues.[95]

56 Second, the class applicants address, at great length, both the need for corporate accountability and the right to an effective remedy in the form of a class action. These matters form the essence of the relief sought in the certification application. They are neither novel nor unique insights sought to be advanced by TAC and Sonke.[96]

57 Third, nothing in the objectives and/or activities of these organisations renders them suitable parties to address these topics, at least not in preference to the class applicants and their respective legal teams.[97]

58 Thus the proposed submissions will be considered in the main application regardless of whether TAC and Sonke are admitted to participate as *amici curiae*. Since their involvement is far from essential, it is submitted that this application should fail.[98]

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93 *Amicus* application pg 376 AA pr 31.9

94 *Amicus* application pg 376 AA pr 31.10

95 *Amicus* application pg 376 AA pr 31.11

96 *Amicus* application pg 376 AA pr 31.12

97 *Amicus* application pg 376 AA pr 31.13

98 *Amicus* application pg 376 AA pr 31.14

THE PROPOSED ALLEGATIONS

59 The participation of Wilson, Peacock and Grover was not dependent on the intervention of TAC and Sonke as *amici curiae*.

60 Their affidavits could have been filed in support of the case advanced by the class applicants. Indeed, Wilson purports to rely on a study by Roberts, who is an existing expert witness in the main application.[99]

61 As regards the evidence sought to be introduced in the name of Wilson, we refer to paragraphs 47 to 66 of the Harmony respondents' answering affidavit (pages 392 to 407 of the record in the main application) but highlight, in particular, that:

61.1 Even if the former Transkei region of the Eastern Cape is characterised by pronounced socio-economic depravation, this factor is neutral as regards the prospects of success of the main application.

61.2 Insofar as the stated devastation of the Transkei is concerned, the record of the main application traverses the issue as follows:

61.2.1 In paragraphs 97.2 and 100.1 of Spoor's founding affidavit in the Spoor applicants' initial application for certification (main application pages 294 and 296) reference is made to the "*Libode study*" of 1998, which pertained to "*former mineworkers, principally gold mineworkers in Libode, Eastern Cape*".

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99 *Amicus* application pg 360 AA pr 22.1

61.2.2 The original Spoor application addressed, in paragraphs 166 to 183 (main application pages 348 to 355), the socio-economic hardships experienced by communities affected by the migrant labour system, rendering relevant to the determination of the certification application the facts and circumstances which TAC and Sonke consider that only they are able to place before court.

61.2.3 Similarly, in paragraphs 17.7 to 17.9 (or equivalent) of the founding affidavit in each of the original Abrahams applications (main application pages 684 and 685), Abrahams described what he termed a "*hidden epidemic*" of occupational disease said to have been "*widely recognised as resulting directly from the gold mining companies' labour recruitment practices, and more particularly their practice of recruiting black Africans from the former 'homelands' (also known as 'bantustans') in South Africa, as well as the neighbouring countries of Lesotho, Malawi, Swaziland, Mozambique and Botswana, and then relocating the black Africans back to their homes when their employment with the mines [had] ended*".

61.2.4 Certain of the cited applicants in such applications were said to be resident in the Eastern Cape.

61.2.5 The same is true of at least one of the cited applicants in the original LRC application.

61.2.6 The original LRC application also sought to place reliance on the Libode study referred to in paragraph 61.2.1 above (main application pages 1497 and 1498 paragraph 25.2.2), meaning that the LRC applicants raise socio-economic conditions in the Transkei as an issue in the certification application.

61.2.7 This is evident too from paragraph 27 of Nindi's founding affidavit in the original LRC application (main application page 1500).

61.2.8 According to Nindi, ,the LRC "*operates out of offices located in Johannesburg, Cape Town, Durban and Grahamstown, has unique experience representing poor client communities living in remote rural areas of South Africa*" and has been involved in landmark litigation, including "*a class action on behalf of thousands of persons with claims for socialist systems in the Eastern Cape province*" and education rights cases in which it "*acted for, and put up evidence of, rural schools located in remote areas of the Eastern Cape*" (main application pages 1529 and 1530 paragraph 91). On Nindi's version, the LRC is well placed to draw the court's attention to the socio-economic conditions in labour-giving regions such as the Transkei.

61.2.9 Spoor reverts to the socio-economic conditions of regions affected by migrant labour in his replying affidavit in the certification application, including paragraph 22 thereof: "*It*

must be recognised that mineworkers, and African mineworkers in particular, have contributed enormously to this country's economic wealth and prosperity, but that they have done so at great cost to themselves, to their families, and to their health, as well as the communities from which they hail, which are amongst the most impoverished and under-developed regions of southern Africa. Moreover, the diseases of silicosis and tuberculosis have exacted their toll, not only on the health of mineworkers and their families, but have posed and continue to pose a danger to the health and welfare of the public".

61.2.10 As Spoor summarises in paragraph 138 of his replying affidavit in the certification application, "*of the 47 class representatives, 16 live in Lesotho; 7 are in the Free State and 24 are in the Eastern Cape. There is accordingly a geographical spread among the class representatives which will facilitate communication to class members as the litigation proceeds. While the class members come from throughout rural South Africa and the southern Africa region, the majority of mineworkers employed on the respondents' mines, and who are recruited through The Employment Bureau of Africa ('TEBA'), come from Lesotho and the Eastern Cape*".

62 As regards the evidence sought to be introduced in the name of Peacock, we refer to paragraphs 67 to 80 of the Harmony respondents' answering affidavit (pages 408 to 413 of the record in the main application) but highlight, in particular, that:

62.1 Even if it is accepted that women bear a disproportionate burden of caring for the young, sick and old, this state of affairs does not justify aggregation in the absence of commonality.

62.2 In fact, it suggests that dependents' actions ought to be investigated, particularised and quantified with reference to the facts and circumstances applicable in each instance. If anything, therefore, Peacock's reference to the hardships confronted by certain women tasked with caring for sufferers of occupational disease militates against the class actions sought to be instituted and conducted by the class applicants.

63 As regards the evidence sought to be introduced in the name of Grover, we refer to paragraphs 37 to 46 of the Harmony respondents' answering affidavit (pages 383 to 391 of the record in the main application) but highlight, in particular, that:

63.1 It is denied that Grover's final report and the UN guiding principles have a bearing on the certification application and/or any class action that may follow:

63.1.1 neither document is relevant to any of the notified constitutional issues. The question of international law liability on the part of multi-national companies does not arise given that the class

applicants seek to bring a class action against respondents that are South African companies with local operations. There is no endeavour to impose liability on any foreign entity. Multi-nationality is not a factor in the proceedings; and

63.1.2 the class applicants place no reliance on any right to health under international law. They wish collectively to sue South African companies for alleged breaches of common law, statutory/regulatory and constitutional duties owed to their mineworking employees. Grover says nothing in relation to any such obligations and thus offers no new argument or additional evidence in relation to the issues in the main application.

63.2 Nor are Grover's views on any international law right to an effective remedy of relevance to the main application since class actions are recognised in South African law. There is no need to persuade the court that a class action should be permitted in appropriate circumstances. The question is whether, in the circumstances of this case, a class action would be appropriate. It is whether the class action envisaged by the class applicants would be appropriate or even feasible. Grover has nothing to contribute on this score.

64 In the result, the affidavits of Wilson, Peacock and Grover do not contribute anything of significance to the outcome of the main application that does not already appear in the record. They offer no insight or perspective on the commonality/dissimilarity

debate which lies at the heart of the certification application. It follows, we submit, that "*the evidence that forms part of this application*" should not be included in the record of proceedings in the main application.[100]

THE COURT'S DISCRETION

65 In our submission, the application for admission as *amici curiae* does not merit burdening the court and the parties with the participation of TAC and Sonke as parties to the certification application. It is clear that, if they are granted rights of participation, they will duplicate submissions already open to the class applicants and/or advance contentions that fall beyond the ambit of the relief sought in the main application and are of no relevance to any notified constitutional issue. Neither outcome would be of assistance to the court.[101]

66 If TAC or Sonke considers that it holds a novel or unique perspective on an issue of significance (i.e. a notified constitutional issue), it is open to it to share the view with the legal teams briefed to argue the case on behalf of the Spoor, Abrahams and LRC applicants. Indeed, by launching this application, they have in effect already done so. Their further participation in the proceedings would, we submit, be superfluous.[102]

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100 *Amicus* application pg 360-361 AA pr 22.2

101 *Amicus* application pg 361 AA pr 23.1

102 *Amicus* application pg 361 AA pr 23.2

CONCLUSION

67 It follows, we submit, that this application should be dismissed.

68 As regards costs:

68.1 should this application succeed, it would be appropriate for the costs to be reserved pending the outcome of the certification application, at which time the court would be in a position to assess the contribution (if any) of TAC and/or Sonke;[103] but

68.2 if this application fails, there is no reason why TAC and Sonke should not bear and pay the costs of failure, jointly and severally, including the costs of three counsel briefed to represent the Harmony respondents.[104]

AE FRANKLIN SC

RM PEARSE

L SISILANA

Chambers Sandton

25 March 2015

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103 *Amicus* application pg 362 AA pr 24.1

104 *Amicus* application pg 362 AA pr 24.2