IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No:

In the matter between:

ZONISELE NKOMPELA	First Applicant
ISHMAEL TSIKWANE MOTLEKE	Second Applicant
THABO EDWIN NTSALA	Third Applicant

and

HARMONY GOLD MINING COMPANY LIMITED (Registration number 1950/038232/06)	First Respondent
AFRICAN RAINBOW MINERALS GOLD LIMITED (Registration number 1997/015869/06)	Second Respondent
ARMGOLD-HARMONY FREEGOLD JOINT VENTURE COMPANY (Registration number 2001/029602/07)	Third Respondent
AVGOLD LIMITED (Registration number 1990/007025/06)	Fourth Respondent
EVANDER GOLD MINES LIMITED (Registration number 1963/006226/06)	Fifth Respondent
RANDFONTEIN ESTATES LIMITED (Registration number 1889/000251/06)	Sixth Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

CHARLES PETER ABRAHAMS

hereby make oath and say that:

1. I am an admitted attorney, practising as such as a senior partner at Abrahams Kiewitz Attorneys ("Abrahams Kiewitz"), at Suite 518, 5th floor, Tygerlake Building, Niagara Way, Tyger Falls, Carl Cronje Drive, Tygervalley, Bellville, Western Cape. Abrahams Kiewitz are the Applicants' attorneys of record, and I have at all times been the attorney at the firm responsible for dealing with the matter. I am duly authorised to depose to this affidavit, and institute this application, on behalf of the Applicants.

2. The facts deposed to herein fall within my personal knowledge and belief, unless the contrary appears from the context, and are both true and correct.

The parties

3. The First Applicant is Zonisele Jan Nkompela, an adult male who was employed as an underground mineworker by the Respondent mining companies between 1967 and 1994. The First Applicant has silicosis.

4. The Second Applicant is Ishmael Tsikwane Motleke an adult male who was employed as an underground mineworker by the Respondent mining companies between 1987 and 2007. The Second Applicant has silicosis.

5. The Third Applicant is Thabo Edwin Ntsala, an adult male who was employed as an underground mineworker by the Respondent mining companies between 1982 and 1997. The Third Applicant has tuberculosis and silicosis.

6. The First Respondent is HARMONY GOLD MINING COMPANY LIMITED, a company duly registered in terms of the company laws of the Republic of South Africa, with registration number 1950/038232/06 and having its registered office at Randfontein Office Park, corner of Main Reef Road and Ward Avenue, Randfontein.

7. The Second Respondent is AFRICAN RAINBOW MINERALS GOLD LIMITED, a company duly registered in terms of the company laws of the Republic of South Africa, with registration number 1997/015869/06 and having its registered office at Randfontein Office Park, corner of Main Reef Road and Ward Avenue, Randfontein.

8. The Third Respondent is ARMGOLD-HARMONY FREEGOLD JOINT VENTURE COMPANY (Pty) Ltd., a company duly registered in terms of the company laws of the Republic of South Africa, with registration number 2001/029602/07 and having its registered office at Randfontein Office Park, corner of Main Reef Road and Ward Avenue, Randfontein.

9. The Fourth Respondent is AVGOLD LIMITED, a company duly registered in terms of the company laws of the Republic of South Africa, with registration

number 1990/007025/06 and having its registered office at Randfontein Office Park, corner of Main Reef Road and Ward Avenue, Randfontein.

10. The Fifth Respondent is EVANDER GOLD MINES LIMITED, a company duly registered in terms of the company laws of the Republic of South Africa, with registration number 1963/006226/06 and having its registered office at Randfontein Office Park, corner of Main Reef Road and Ward Avenue, Randfontein.

11. The Sixth Respondent is RANDFONTEIN ESTATES LIMITED, a company duly registered in terms of the company laws of the Republic of South Africa, with registration number 1889/000251/06 and having its registered office at Randfontein Office Park, corner of Main Reef Road and Ward Avenue, Randfontein.

12. The Respondents are collectively referred to as Harmony.

Jurisdiction

13. As Harmony has its principal place of business within the area of this Honourable Court, I respectfully aver that this Honourable Court has jurisdiction to hear the matter.

The nature and purpose of this application

14. The Applicants bring this application on behalf of a proposed class of similarly-situated mineworkers who were, or have been and in some instances continue to be employed by Harmony at some stage since 1956 and who have occupational lung diseases (as more fully described elsewhere in this affidavit). The Applicants will, in due course, contend that these occupational lung diseases have been caused by the poor working conditions at various mines owned by Harmony and the failure by Harmony to take reasonable steps to ensure a safe working environment at its mines, thereby resulting in a breach of Harmony's common law, statutory and constitutional obligations. As a result, the Applicants will contend that individual members of the class have suffered damages for which Harmony is liable.

15. In the event that the Applicants succeed in obtaining the relief sought in the notice of motion, they will pursue a claim for certain declaratory relief on behalf of the class in action proceedings that will be instituted in due course. In the event of this Honourable Court granting that declaratory relief, members of the class may thereafter seek to enforce claims for damages against Harmony on an individualised basis.

16. The purpose of these proceedings is thus, in essence, to permit the Applicants to institute a class action on behalf of the class which is defined in these proceedings, and to obtain certification of the proposed class.

Class actions in South Africa

17. A "class action" has been explained by the South African Law Commission (the "Law Commission") as follows[1]:

> "The class action is a device by which a single plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter of the suit. The ruling of the Court will bind all class members. This is perceived as a means of fostering both judicial economy and social utility – the courts will no longer be inundated with numerous claims relating to a common subject-matter, and individual plaintiffs with claims too small for individual pursuit are provided access to the courts. Class actions can also serve an effective enforcement function, especially in the area of civil rights, environmental law and consumer claims."

18. When bringing a class action, it is necessary to have clarity about the composition of the class. There are indications from the Courts that this should occur through the "certification" of the proposed class. Certification is a relatively novel procedure in South African law and was invoked for the first time in the *Children's Resource Centre Trust*[2] matter, as discussed in more detail elsewhere in this affidavit. Although certification is not formally required by the Uniform Rules of Court (or any other regulatory or statutory provision), it has therefore been considered prudent to seek the certification of the proposed class in these proceedings, as well as confirmation that the Applicants are permitted to represent the envisaged class.

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[1] South African Law Commission, Project Report No. 88, "Recognition of Class Actions and Public Interest Actions in South African Law: Report", August 1998 ("SALC Report"), at par 2.3.2

[2] *The Trustees for the Time Being of the Children's Resources Centre Trust & Others v Pioneer Food (Pty) Ltd and Others* (25302/10, 25353/10) [2011] ZAWCHC 102 (7 April 2011)

The structure of the affidavit

19. The rest of this affidavit is structured as follows:

19.1. Firstly, I provide a brief overview of the facts pertaining to the unhealthy working conditions and the high rates of occupational lung diseases (effectively amounting to an epidemic) in South African goldmines in general.

19.2. Secondly, I set out facts pertaining to the high rates of occupational lung diseases at Harmony's gold mines.

19.3. Thirdly, I explain why the intended action against Harmony should proceed by way of a class action.

19.4. Fourthly, I explain why the intended action should proceed by way of an "*opt out*" class in respect of the declaratory relief sought, and by way of an *"opt in"* class in respect of any claim for damages.

19.5. Fifthly, I address the notice to be given to the class, which I consider reasonable and necessary in the circumstances.

19.6. Sixthly, I advance submissions as to why the Applicants adequately represent the class and ought to be given leave to represent the class. I also provide reasons as to why Abrahams Kiewitz should be given leave to be the legal representatives for the class.

19.7. Finally, I address the issue of costs.

Brief overview of the unhealthy working conditions and the occupational lung disease epidemic in South African gold mines

20. For about the last one hundred years, the mine safety and health regulatory regime in the gold mining industry in South Africa has recognized the causal link between occupational lung diseases such as silicosis, tuberculosis, silico-tuberculosis, chronic obstructive lung disease, and lung cancer, on the one hand, and poor environmental conditions in the mines on the other.

21. The nature of silicosis and other lung diseases, and the correlation between those diseases and exposure to silica dust, is explained by Dr. Richard Clapp ("Dr Clapp") in his declaration (affidavit) which is filed herewith. In that affidavit, Dr Clapp explains that:

21.1. Silicosis is a progressive and painful lung disease, in which the tissue of the lung becomes fibrotic and the lung capacity diminishes on a progressive basis. Where a miner has contracted the disease, the progression or worsening of the disease continues after the miner has stopped working in the mine.

21.2. There is no cure for silicosis and the disease can be fatal. It is considered a latent disease, which means that the onset of symptoms and disability can ensue several years after the exposure.

21.3. Pulmonary tuberculosis is also a latent occupational lung disease caused by exposure to silica dust. Pulmonary tuberculosis is a bacterial lung disease which can be treated if detected early, but can also be fatal. Silica exposure greatly increases the risk of contracting the disease.

21.4. The medical literature has also established that exposure to silica dust causes silico-tuberculosis (a combination of silicosis and tuberculosis), chronic obstructive lung disease, and lung cancer. These diseases are also latent, and are disabling, and can be fatal.

21.5. The relationship between contracting the aforementioned occupational lung diseases and exposure to unsafe and dusty working conditions has been known for at least a century.

21.6. In the early 1900s there was a high rate of "accelerated silicosis" in miners from Cornwall, England, who were brought in to work on the gold mines in South Africa. It was determined that the disease rates depended on the productions process. As newly-developed machinery (i.e. power drills) and unsafe work practices created more dust, the rates of disease increased.

22. Clapp's affidavit has been executed before a notary public in Boston, Massachusetts, United States of America. I am advised that Clapp will in due course re-file the same affidavit, duly commissioned by the Head of the South African diplomatic or consular mission in the Unites States of America in

accordance with the provisions of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963, alternatively Clapp will have his affidavit and signature thereto authenticated in accordance with Rule 63 of the Uniform Rules of Court.

23. In South Africa, there is an unfortunate correlation between silicosis and other occupational lung diseases, on the one hand, and race on the other. As confirmed by Jaine Roberts ("Roberts") in her affidavit filed herewith:

23.1. Estimates of the number of black gold miners who have contracted silicosis and other occupational lung diseases from their work in gold mines range from approximately 320 000 to 500 000.

23.2. The highest recorded rates of tuberculosis (TB) in the world have been found on the South African gold mines, and this figure has consistently risen over the decades.

23.3. In South African gold mines, there are between about 3000 and 7000 cases of TB per 100,000 miners. That rate of disease means that the South African gold mines have resulted in tuberculosis rates which are up to twenty-eight times greater than the standard for a declared emergency by the World Health Organization.

23.4. The prevalence of silicosis among South African gold miners was first reported with regard to white miners in 1916, when it was estimated that about 25% were affected. Although it was known that black gold miners had greater exposure to dirt and dust in their jobs in the mines, and thus

suffered the most severe exposure to silica, the health of black gold miners was not studied while the black gold miners were on the mines and there was no medical follow-up of black gold miners when they left the mines.

23.5. It is now firmly established, as a result of occupational disease studies carried out on black gold miners in the last decade that the rates of silicosis and pulmonary tuberculosis in black gold miners have been at "epidemic" proportions for nearly a century.

23.6. A recent review summarizing the evidence regarding silica exposure and health and safety, authored by Drs Rees and Murray, indicated that dust control continues to be inadequate in the gold mining sector.

23.7. The extremely high rates of occupational lung disease among South African gold miners have been referred to in the literature as a "hidden epidemic". This epidemic has been widely recognized 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 has ended.

23.8. According to the review of the literature, the gold mining industry's "migratory labour system" has been a central feature of the gold mining

industry. The mining industry relied on the Chamber of Mines of South Africa ("Chamber of Mines") to transport black Africans from their homelands to Johannesburg to be processed, and then transported to a gold mine to work. Workers would generally work on repeated one year contracts, and then, as they aged, be "retrenched," or "repatriated" to their homelands. Some called it "medical repatriation," or "recuperation." Workers with the first signs of illness were often dismissed for economic reasons, and once they were gone there was no medical follow-up, with any legal responsibility which the mine owners had to the miners being confined to the paltry payments mine owners made into the statutory workers' compensation fund, which black miners were generally unaware of and ill-prepared to partake in.

23.9. Once back in their homelands, miners would often become progressively more ill from these latent occupational lung diseases, be unable to work or support their families, be unable to access medical care for diagnosis and treatment, and be unable to access legal resources to assist in obtaining compensation.

24. Occupational lung diseases caused by silica exposure in gold mining, particularly silicosis and pulmonary tuberculosis, were investigated by the South African Weldon Miners Phthisis Commission as early as 1903. The Commission was appointed by the then Governor of the Transvaal to inquire into and report upon the prevalence and causes of the lung disease known then as "Miners Phthisis," and to make recommendations as to preventive and curative measures.

25. Since then – and thus for about the last 110 years – these occupational lung diseases have been the subject of numerous international conferences on mine health and safety, further commissions of inquiry, and mine safety and health statutes and regulations. One of the most notable examples was the 1994 Commission of Inquiry into Safety and Health in the Mining Industry, commonly known as the Leon Commission of Inquiry ("the Leon Commission").

26. Amongst the key considerations and findings of the Leon Commission, of which I attach hereto an extract thereof, marked "**CPA1**", are:

26.1 No evidence was submitted to the Commission to suggest that occupational diseases had been adequately controlled by the industry as a result of the existing regulatory system (page 46 thereof);

26.2 Evidence suggests that in almost all instances there [was] evidence of under ascertainment of the number of cases, and that stabilisation of the workforce [was] likely to increase the incidence and the prevalence of occupational diseases among the smaller number of persons now employed in mines (page 47 thereof);

26.3 In the period of about 20 years, 128 575 mineworkers have been certified as having acquired occupational lung diseases. The actual number is certainly much higher as a result of under ascertainment among migrant labourers who have returned to their rural homes in any one of several labour reservoirs within South Africa or the neighbouring States.

Practically nothing is known about the fate of the persons with certified occupational lung disease (page 50 thereof);

26.4 The number of cases of tuberculosis certified among currently employed black miners is evidence of a failure of control in the mining industry and in the country as a whole (page 51 thereof);

26.5 There [was] no evidence to indicate a decline in the prevalence or severity of any occupational disease in the mining industry during past 20 years (page 53 thereof).

Occupational lung diseases suffered by Harmony gold miners

27. Harmony has owned and operated underground gold mines since its incorporation in 1950. Between about 1997 and 2004, Harmony acquired significant additional gold mining entities and rights in South Africa. Harmony has owned or does own several gold mines in South Africa, including the following:

27.1 Free State Operations consisting of:

27.1.1 Harmony, Virginia and Merriespruit mines;

27.1.2 Unisel (as from September 1996 to present);

27.1.3 Saaiplaas 2 and 3 (as from April 1997 to present);

27.1.4 President Brand mines 2, 3 and 5 (as from May 1998 to present);

27.1.5 Saaiplaas 2 and 3, now known as Masimong complex (as from September 1998 to present);

27.2 Randfontein Operations consisting of:

27.2.1 Doornkop and Doornkop South Reef Mines (as from January 2000 to present);

27.3 Elandskraal Operations consisting of:

27.3.1 Elandsrand and Deelkraal Mines, now known as Kusasalethu (as from April 2001 to present);

27.4 Evander Operations consisting of:

27.4.1 Kinros, Bracken, Leslie and Winkelhaak mines (as from August 1998 to present);

27.5 Free Gold Operations consisting of:

27.5.1 St. Helena mine;

27.5.2 Joel, Tshepong, Matjhabeing, Bambanani and Phakisa mines, also known as Free Gold, (as from January 2002 to present);

27.6 ARMgold Operations consisting of:

27.6.1 Welkom and Orkney mines (as from September 2003);

27.7 Avgold Operations consisting of:

27.7.1 Target and Target North mines, formerly Lorainne mines (as from May 2004);

27.8 Kalgold Operations (as from July 1999 to present)

28. Harmony is currently the third largest producer of gold in South Africa and ranks as one of the largest gold producers in the world. In 2006, it employed 48,283 permanent employees in the South Africa mining sector.

Occupational lung diseases suffered by Harmony gold miners

29. The Chief Executive Officer and the Chief Operating Officer of Harmony are ultimately responsible for health and safety at all of the Harmony gold mines. This responsibility has been delegated to the relevant medical officers and mine managers for implementation and monitoring.

30. Harmony and its officers have known for years that silica exposure in gold mines causes silicosis and other occupational diseases. At the time of Harmony's establishment in 1950, it was already well known in the South African gold mining industry that there was a high correlation between the amount of dust breathed by miners and the incidence of silicosis in that population. Harmony has been and continues to be a member of the Chamber of Mines, a voluntary, prominent industry employers' organisation, established in 1889 and exists to serve its members and promote their interests in the South African mining industry. The Chamber of Mines has known since the early 1900's of the relationship between the amount of dust breathed in underground gold mines and the incidence of silicosis.

31. This knowledge is demonstrated by the public, scientific discussions at that time on the issue of dust and its correlation with silicosis. Amongst others, this is evident from the Proceedings of the Pneumoconiosis Conference held at the

University of Witwatersrand, Johannesburg in 1959 ("1959 Pneumoconiosis Proceedings"), of which I attach hereto an extract thereof, marked "**CPA2**" and the scientific work of D.G Beadle, whose 1967 paper entitled, "*An epidemiological Study of the Relationship between the Amount of Dust Breathed and the Incidence of Silicosis in South African Gold Miners*" ("Beadle's paper") is attached hereto marked "**CPA3**." Beadle's paper is based on a scientific study, started in 1956 in South African goldmines and was still continuing at that time, of which the purpose was to provide a sound scientific basis for the correlation between actual dust levels in gold mines and the incidence of pneumoconiosis ("silicosis"). From the data obtained then, measurements were made of dust breathed in the daily underground shifts of approximately 650 miners from specific occupational groups and it was found that a significant number of miners in those same occupational groups (not necessarily the same individuals) contracted silicosis.

32. Harmony's knowledge that there was a high correlation between the amount of dust breathed by miners and the incidence of silicosis in that population is further evident from its own historical medical reports, internal reports and its recent annual reports. I refer to a few of them as follows:

32.1. As early as 1962 and well before then, Harmony, through Central Mining – Rand Mines Group, released annual medical reports ("medical reports") on the state of health of its employees. In its 1962 medical report (page 7 thereof), the Chief Medical Officer reported morbidity rates that had progressively increased from 2.20 per 1000 miners in 1952 to a rate of 7.15 per 1000 miners in 1961, with a slight decrease to 6.79 per

1000 miners in 1962. On page 9 thereof, 193 cases of "pneumoconiosis" ("silicosis") were reported in that year, with the incidence rate having gone up to 2.69 per 1000 miners for that year compared to the rate of 1.98 per 1000 miners the previous year. I attach hereto copies of page 7 and 9 respectively of the said 1962 medical report, marked "**CPA4**" hereto.

32.2. In its 1963 medical report (page 8 thereof), Harmony reported 405 case of pulmonary tuberculosis, representing a rate of 5.88 per 1000 miners, of which 2 died and 141 cases of pneumoconiosis (page 9 thereof). I attach hereto copies of pages 8 and 9 of the said report, marked "**CPA5**" hereto.

32.3. Notwithstanding the high levels of disease rates reported by Harmony, they were clearly understatements of the true rates of occupational lung disease as made clear by subsequent epidemiological studies of gold miners done by independent scientists, which showed epidemic rates, as reviewed in the Clapp and Roberts affidavits respectively.

32.4. The trend of Harmony miners contracting silicosis and other occupational diseases has continued throughout the many decades until today. In its 2011 annual report, Harmony reports that 19 cases of silicosis per 1000 workers have been identified and 3 061 cases of tuberculosis per 100 000 workers have been identified (page 4 thereof). I attach hereto copies of pages 4 and 9 respectively, extracted from Harmony's 2011 integrated annual report ("2011 annual report"), marked "**CPA6**" hereto.

32.5. Also evident from the said 2011 annual report (page 9 thereof), is the increase in the number of certified cases of silicosis from 2005 to 2009 with a moderate reduction in 2010 and 2011. According to the report, 747 suspected cases of silicosis were identified and 392 cases certified for compensation.

32.6. Harmony's 2006 Sustainability Development Report confirms the classification of silica dust as a carcinogen (a substance that can cause cancer) and that lung damage caused by exposure to silica dust is known to play a major role in the development of tuberculosis. I attach hereto an extract thereof, marked "**CPA7**" hereto.

33. It would or should have been known to Harmony and its officers over the many decades that silicosis and other dust related occupational lung diseases are preventable through, amongst others, the effective use of engineering controls and work practices. Such knowledge is demonstrated by the availability of scientific literature dating back to as early as the 1920's, when A Mavrogordata wrote a paper entitled "*The Value of the Konimeter – Being an Investigation into the Methods and Results of Dust-Sampling as at Present Practiced in the Mines of the Witwatersrand*" ("Mavrogordata's paper"), published by the South African Institute for Medical Research. An extract of the said paper is attached hereto marked "**CPA8**".

34. Subsequent scientific and other reports that refer to the use of engineering controls and work practices are found, amongst others, the Chamber of Mines'

1975 Research and Development Annual Report (pages 25 and 26 thereof), attached hereto, marked "**CPA9**", the paper by Dr. L R Gardiner entitled "*Feasibility of Personal Gravimetric Dust Sampling for Health Hazard Assessment in the South African Mining Industry*" ("Gardiner's paper") delivered at the Mine Safety & Health Congress in November 1987, attached hereto, marked "**CPA10**" and the February 1999 Alert of the National Centre for Occupational Health, Department of Health, ("the NCOH's February 1999 Alert"), of which I attach pages 1 and 8 thereof, marked "**CPA11**" hereto. Gardiner's paper is concerned with the feasibility of introducing personal gravimetric dust sampling to the South African mining industry, primarily as an improved means for assessing the health hazard from dust exposure but also as an integral part in the effectiveness of dust control programmes.

35. Harmony would or should have known that measuring dust exposures for particular jobs, recording accurate exposure histories, and performing dust studies and epidemiological studies were necessary to prevent its workers from suffering occupational lung disease. The methods which Harmony could or should have used include, amongst others, the identification and measurement of dust sources, engineering controls and work practices to reduce dust generation and to capture dust at the source, wet drilling, design and maintenance of ventilation, and, as a temporary last resort correct use of personal protective equipment such as respirators. This is demonstrated in the available scientific and other literature, as is evident from Mavrogordata's paper ("CPA8" hereto, pages 261 to 266 thereof), an extract of Pneumoconiosis Abstracts Volume III-1951-1955, marked "**CPA12**," hereto and NCOH's February 1999 Alert.

36. Harmony would or should have also known that high or peak dust concentration were an important causal factor for disease. Such findings are evident from the Dust Survey and Control Project of the Pneumoconiosis Research Unit of the South African Council for Scientific and Industrial Research (pages 33 and 34 thereof) marked "**CPA13**" hereto.

37. These types of effective control methods are not only identified in the scientific literature, but were also required to be implemented by Harmony and other South African gold mining companies. As specified in detail herein below, the statutes and regulations in effect over the many decades required owners and managers of gold mines to prevent harmful dust exposures, utilizing ventilation, engineering controls, work practices, and personal protective equipment.

38. In spite of this knowledge, Harmony failed to implement effective dust control measures. It is well established in the scientific literature that there was no significant improvement in environmental conditions in South Africa gold mines, as is evident from Beadle's paper ("CPA3" hereto, page 7 thereof). Professor Neil White's 1994 commissioned report ("White's 1994 commissioned report"), submitted to the Leon Commission reinforces this fact when he states (page 4 thereof) "These statistics suggest little or no overall improvement in the environmental situation in the industry since the 1930's. During the mid 1980's the silicosis certification rate rose to 6 per thousand currently employed workers per year." I attach hereto copies of pages 4, 11 and 49 thereof, marked "**CPA14**."

39. The available scientific literature furthermore documents the fact that the South African gold mining companies, including Harmony have failed to implement the

known control practices to prevent occupational lung diseases. The dust sampling methods used in the South African gold mining industry at that time were, according to Gardiner's paper, deemed to "not adequately satisfy the principles of dust sampling laid down at the Johannesburg Pneumoconiosis Conference in 1959," hence the motivation for the introduction of personal gravimetric dust sampling to the South African mining industry.

40. Notwithstanding being aware of the lack of adequate dust control engineering practices and work practices described above and that the presence of dusty working conditions would cause its miners to contract occupational lung diseases, Harmony, like many other South African gold mining companies, failed to take reasonable measures to address the poor conditions prevalent in its mines. In this regard, COMRO, the research organization of the Chamber of Mines, in its 1975 Annual Report (CPA9 hereto, page 26 thereof) reported that attention is being given to the possibility of adopting gravimetric sampling methods for annual surveys, using SIMPEDS, a personal gravimetric sampler developed by the Safety in Mines Research Establishment in the United Kingdom. However, sixteen years later, it reported in its 1991 Annual Report (page 9 thereof), that "Personal gravimetric sampling is replacing traditional environmental dust monitoring for levy purposes but is considered to be unnecessary costly and onerous in its present form." I attach hereto an extract thereof, marked "CPA15". As advised earlier on, Harmony has and continues to be a member of the Chamber of Mines.

41. As a consequence, thousands of its former and current miners now suffer from those occupational lung diseases referred to herein, and countless have died as

a result thereof. Those diseases could have been prevented by effective dust control engineering practices and work practices.

42. In addition, Harmony did not merely maintain poor environmental conditions in its mines. As is confirmed by the affidavit of the Applicants, there have also been crowded and unsanitary living conditions in the "miners' hostels." Such conditions, in addition to the excess exposure to silica dust, were a further contributing factor to the high rate of tuberculosis among its workforce.

43. Harmony would or should have also known for decades that silicosis and other occupational lung diseases associated with gold mining are *latent* diseases, meaning the onset of disease would occur years or even decades after silica exposure in the mines. Notwithstanding, it failed to carry out adequate medical follow-up on its black gold mining retired employees, to assure adequate medical diagnosis, medical care and compensation.

44. Like other South African gold mining companies, Harmony failed to maintain adequate exposure histories of its black employees, a key element to adequately assessing workers most at risk to the adverse effect of exposure, as demonstrated early on in Mavrogordata's paper at ("CPA8" hereof, page 260 thereof) and the 1959 Pneumoconiosis Proceedings ("CPA2" hereto, page 616 thereof).

45. Harmony would or should have known that after terminating the employment of a black miner, the miner would return to his rural home in any of the several labour reservoirs in South Africa or a neighbouring country where he'd come from,

where medical resources for diagnosis and treatment, and legal and administrative resources, to make compensation claims were not readily available. Thus, the inevitable result was under-diagnosis of occupational lung disease in black gold miners, and a lack of compensation to those miners for the diseases suffered, as documented by Roberts' affidavit and White's 1994 commissioned paper ("CPA14 hereto, page 49 thereof).

46. Notwithstanding being aware of the latent nature of occupational lung diseases, and the lack of medical resources in the areas of origin or neighbouring countries to diagnose and treat these diseases, it failed to perform adequate medical follow-ups on its black gold miners. It was foreseeable that such medical follow-ups would have led to early diagnosis, facilitating mitigation of the severity of disease and damages suffered by these miners, as well as facilitating compensation.

47. As a result of the above conditions, the Applicants and the members of the class (i.e. other miners who worked and some who continues to work in one or more of Harmony's gold mines in South Africa) have at least one of the following occupational lung diseases:

47.1. Silicosis;

47.2. Silico-tuberculosis;

47.3. Tuberculosis;

47.4. Lung cancer;

47.5. Chronic Obstructive Airways Disease; and

47.6. other types of occupational diseases referred to in the Occupational Diseases in Mines and Works Act 78 of 1973.

(I refer to those diseases as "occupational lung diseases" in this affidavit.)

The reasons why the intended action should proceed as a class action

48. Before explaining why the intended action should proceed by way of a class action, it is appropriate to make a few preliminary remarks about the status of class actions under South African law:

48.1. At present there is no legislation, nor any procedural rules, governing the manner in which class actions should be instituted, despite: (a) the fact that many other jurisdictions have enacted comprehensive class action legislation; and (b) the Law Commission's recommendation in 1998 that the principles underlying class actions should be introduced by an Act of Parliament (as a matter of urgency) and the necessary procedures by rules of Court.[3]

48.2. Notwithstanding the absence of any such legislation or procedural rules, there has been some judicial recognition of class actions, and some judicial development of the concept. In the case of *Ngxuza*[4], the Honourable Justice Froneman recommended that certification be sought from the High Court as a procedural step before the action itself is

[3] SALC Report at par 3.1.4
[4] *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E) at 624E

launched, something which is in line with the recommendations of the Law Commission.

48.3. Subsequent to *Ngxuza*, a certification procedure was invoked for the first time in the case of the *Children's Resource Centre Trust*, currently on appeal before the Supreme Court of Appeal.

49. In light of the absence of any rules governing the manner in which class actions should be instituted, I respectfully aver that it would be appropriate for this Court to follow the guidelines set forth by the Law Commission, and thus, too, the position endorsed by Judge Froneman. Indeed, this was the approach followed by the Western Cape High Court in the *Children's Resource Centre Trust* matter.

50. The Law Commission has identified the following components of a class action:[5]

50.1. there exists an identifiable class of persons;

50.2. a cause of action is *prima facie* disclosed;

50.3. there are issues of fact and law common to the class members;

50.4. a suitable representative is available to represent the interests of the class;

50.5. the interests of justice warrant a class action (or, phrased differently, a class action is, in all the circumstances, the appropriate method of proceeding with the action).

[5] SALC Report at par 5.6.2

In what follows, I shall demonstrate compliance with each of these requirements in the present case.

(i) **There exists an identifiable class of persons**

51. This criterion appears to include a number of facets.

52. The first is that there must be a sufficient number of potential litigants to justify a class action. The Law Commission has recommended in this regard that, in deciding whether to grant certification, the Court should consider whether there are so many potential pursuers (or petitioners) that it would be impracticable for them to sue together in a single conventional action.[6]

53. As is evidently accepted in jurisdictions which recognise class actions, it is not, however, necessary that every class member be named or known. But what is required is that any particular person's claim to membership in the class be determinable by stated, objective criteria.

54. Thus, there must be enough prospective plaintiffs to cause conventional action proceedings to be difficult or impractical (or, in other words, to warrant class action proceedings), and the prospective class of plaintiffs must be capable of being ascertained with sufficient precision.

55. As is evident from the research referred to above, the number of former mineworkers who contracted silicosis and other occupational lung diseases in

[6] SALC Report at par 5.6.5

South African gold mines runs into hundreds of thousands. A significant number of the miners who have contracted occupational lung disease have worked for Harmony. This is evident from the affidavits of the Applicants and is further supported by the historical medical reports and annual reports of Harmony referred to above. It is also confirmed by the fact that Abrahams Kiewitz have already been retained by more than 3 000 former mineworkers who have occupational lung disease, a substantial number of whom have worked for Harmony. The number of former mineworkers represented by Abrahams Kietwitz continues to grow as more and more claimants approach the firm for legal representation.

56. In the circumstances, I submit that the requirement of numerosity has been met.

57. The class is also capable of being defined with some precision. I submit that the class should be identified as follows:

> "All mineworkers (former or current) who worked or continue to work in any of the following South Africa gold mines at the time owned by Harmony Gold Mining Company Limited:
>
> Free State Operations consisting of:
>
> - Harmony, Virginia and Merriespruit mines;
> - Unisel (as from September 1996 to present);
> - Saaiplaas 2 and 3 (as from April 1997 to present);
> - President Brand mines 2, 3 and 5 (as from May 1998 to present);
> - Saaiplaas 2 and 3, now known as the Masimong complex (as from September 1998 to present);
>
> Randfontein Operations consisting of:

- Doornkop and Doornkop South Reef Mines (as from January 2000 to present);

Elandskraal Operations consisting of:

- Elandsrand and Deelkraal Mines, now known as Kusasalethu (as from April 2001 to present);

Evander Operations consisting of:

- Kinros, Bracken, Leslie and Winkelhaak mines (as from August 1998 to present);

Free Gold Operations consisting of:

- St. Helena gold mine (as from 30 October 2002 to present);
- Joel, Tshepong, Matjhabeing, Bambanani and Phakisa mines, also known as Free Gold, (as from January 2002 to present);

ARMgold Operations consisting of:

- Welkom and Orkney mines (as from September 2003);

Avgold Operations consisting of:

- Target and Target North mines, formerly Lorainne mines (as from May 2004);

Kalgold Operations (as from July 1999 to present)

and who have one or more of the following occupational lung diseases: Silicosis; Silico-tuberculosis; Tuberculosis; Lung Cancer; Chronic Obstructive Lung Disease or any other occupational disease recognised in terms of the Occupational Diseases in Mines and Works Act 78 of 1973."

58. I therefore respectfully submit that the class, as identified above, complies with the legal requirements for class identification.

(ii) A cause of action is disclosed

59. According to the Law Commission, one school of thought is that a court considering whether to grant certification should assess the general suitability of

the intended litigation for a class action procedure but should not be required to undertake a preliminary assessment of the merits of the Applicants' case.[7] Others take the view that a Court ought to satisfy itself that the application for certification has at least a *prima facie* cause of action. On either scenario, there would however be no in-depth examination of the merits or prospects of success of the claim in subsequent trial proceedings.

60. For present purposes, it will be accepted that there should, as in Canada, be a preliminary merits test at the certification stage. However, all that is required at this juncture is for the Court to satisfy itself that the Applicants have a *prima facie* cause of action for certification. Any more detailed enquiry into the merits would be inappropriate at the certification stage, and unfairly prejudice the Applicants' application for certification, and the class which they are desirous of representing.

61. It is submitted that the Applicants comfortably pass any preliminary merits test, and that the proposed class undoubtedly has a *prima facie* case against Harmony.

61.1. Harmony has had, and continues to have, an obligation to maintain safe and healthy working conditions in its mines, and to protect its miners from contracting occupational lung diseases, such as those identified herein. Such a duty arises from the common law, statutory and more recently, constitutional, obligations which Harmony owes to the Applicants and the class they represents.

[7] SALC Report at par 5.6.9

61.2. Harmony has furthermore breached those duties, and those breaches have caused the members of the class to sustain occupational lung diseases, as well as other damages and losses pursuant thereto.

62. As regards Harmony's common law obligations, I respectfully submit that:

62.1. Harmony owed a duty of care to the Applicants and the class to maintain a healthy and safe working environment, and healthy and safe working conditions, in its mines and to protect its workers from contracting occupational lung diseases.

62.2. Harmony failed to ensure that the working conditions in its mines were safe and healthy and failed to protect its workers from contracting occupational lung diseases. As a result, Harmony breached the duty of care it owed to the Applicants and the class.

62.3. As a result of its failure, Harmony's actions constitute actionable wrongful conduct against the Applicants and the class, that resulted in foreseeable harm, including physical injury, general deterioration of health, loss of life expectancy, pain and suffering, foreseeable psychological trauma, disfigurement or scarring, loss of amenities, loss of enjoyment of life, and loss of income and loss of ability to support their families. As a consequence thereof, the Applicants and members of the class suffered damages.

63. As regards its statutory obligations, I respectfully submit, without being exhaustive, that Harmony at least breached the following statutory provisions:

63.1. Harmony breached the statutory duties imposed on it in terms of the Mines and Works Act 27 of 1956 (now repealed) and the regulations enacted pursuant thereto, by *inter alia* endangering the health and safety of its miners.

63.2. Of particular importance in the Mines and Works Act 1956 were: (i) section 12(1)(g), which permitted the Governor General to make regulations as to the safety and health of persons employed in or about the mines, works and machinery, and generally of persons, property and public traffic; (ii) section 13(1), which permitted a manager of a mine or works to make special rules (not inconsistent with the Act) for *inter alia* the prevention of accidents; and (iii) section 15, which stated that a person commits an offence if the safety of a mineworker is for any reason endangered or serious bodily injury occurs.

63.3. Also important are the regulations promulgated under the statutes. For example:

(a) The regulations contained in Government Notice No. R. 1609, published in Government Gazette No. 346 of 28 September, 1962 (pursuant to section 20(2) of the Mines and Works Act 1956), which became operative on 1 October 1962, provided *inter alia*: (i) in Regulation 56(3), that in all portions of the mine

where the natural ventilating current was insufficient, suitable mechanical appliances for ventilation shall be provided and operated; (ii) in Regulation 61, that no person shall enter or remain in, or be caused or permitted to enter or remain in, any place in or at a mine if the air contains harmful dust, smoke, dust or fumes perceptible by sight, smell or other senses, unless the person is wearing effective apparatus to prevent the inhaling of such dust, smoke, gas or fumes; (iii) in Regulation 101, that no drilling shall take place without sufficient water to prevent dust; (iv) in Regulation 156(3), that the manager shall provide for the safety and proper discipline of persons employed at the mine or the works; (v) in Regulation 158, that the times of the working shifts and blasting operations in every section of the mine should be so arranged that the miners were not exposed to fumes and dust from blasting, unless that was unavoidable; and that every person not involved in blasting operations should be hoisted to the surface or removed to the intake side of all places in which blasting is to be done, or remain in a waiting place free from fumes and dust before blasting commences; and (vi) in Regulation 161(5), that each shift boss shall at least once during his shift inspect every portion of the section of the mine assigned to him in which persons are working, or through which they may have to pass, and shall ascertain the condition thereof as regards ventilation, sanitation, and other factors, and generally so far as the safety and health of persons are

concerned, and more particularly as regards the observance of the regulations for the prevention of dust;

(b) The regulations contained in Government Notice R. 329, published in Government Gazette No. 1056 of 12 March 1965 (In terms of section 12 of the Mines and Works Act 1956), provided *inter alia*: (i) in Regulation 6(1), that the concentration of dust, noxious fumes or harmful gases in the ambient air shall not exceed such standards as may from time to time be specified by the Government Mining Engineer; (ii) in Regulation 6.6(2), that the workings of every part of a mine where persons are required to travel or work shall be properly ventilated to maintain safe and healthy environmental conditions for workmen and the ventilating air shall be such that it will dilute and render harmless any inflammable or noxious gases and dust in the ambient air; (iii) in Regulation 6.6.(4), that no person shall enter or remain in, or be caused or permitted to enter or remain in, any part of the workings of a mine if the air contains harmful smoke, gas, fumes, or dust perceptible by sight, smell or other sense unless such person is wearing effective apparatus to prevent the inhalation of such smoke, gas, fumes or dust; and (iv) in Regulation 6.6.(6), that in the general body of air at any place where persons are required to work or travel, under normal working conditions, the concentration of dust shall not exceed such standards as may from time to time be specified by the Government Mining Engineer;

(c) The regulations contained in Government Notice No. R999, published in Government Gazette No. 2741 of 26 June 1970, which further amended the original regulations adopted pursuant to the Mines and Works Act 1956, provided *inter alia*: (i) in Regulation 2.16.1, that a mine manager must appoint a person to report on dust sampling and ventilation; (ii) in Regulation 10.19.1, that water just be provided for dust-allaying purposes; and (iii) in Regulation 10.20, that machines should be fitted with means to control dust.

63.4. Harmony also breached the provisions of the Minerals Act 50 of 1991 by endangering the safety and health of its miners. In particular, there was a breach of section 31(1)(a)(ii), which obliged a mine owner to appoint a manager to take all reasonable measures to ensure the safety and health of employees.

63.5. Harmony has in addition breached the provisions of the Mine Health and Safety Act 29 of 1996 by failing to ensure that it provides a safe and healthy environment. In this regard: (i) section (6)(1)(a) requires that an employer must supply all necessary health and safety equipment and health and safety facilities to each employee; (ii) section 6(2) requires that an employer must ensure sufficient quantities of all necessary personal protective equipment available; (iii) section 11(1)(a) obliges an employer to identify hazards to health and safety to which employees may be exposed while they are at work; (iv) section 11(1)(b) requires an employer to assess risks to

health and safety to which employees may be exposed while they are at work; (v) section 11(2)(a) requires that an employer determine all measures necessary to eliminate any recorded risk; (vi) section 11(2)(b) requires an employer to determine all measures necessary to control risk at source; (vii) section 11(2)(c) requires an employer to determine all measures necessary to minimize the risk; (viii) section 11(2)(d)(i) obliges an employer to provide protective equipment; (ix) section 11(2)(d)(ii) obliges an employer to implement programmes to monitor risk to which employees are exposed; (x) section 11(4)(a) obliges an employer to review risks and determine if elimination, minimization, or control of risk is possible; (xi) section 11(5)(a)(ii) requires an employer to conduct an investigation into every serious illness; and (xii) section 11(5)(a)(iii) requires an employer to conduct an investigation into every health-threatening occurrence.

64. Failure to comply with these statutes and regulations, the primary purpose of which was, or is, to prevent the occupational diseases described herein, constituted a breach of the duties which Harmony owed to the Applicants and the class and caused the injuries complained of herein.

65. In respect of its constitutional obligations, I respectfully aver that Harmony has infringed at least the following rights of the Applicants and the members of the class they represent:

65.1. section 12(1)(c) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), as well as the equivalent right under the 1993

Constitution, which concerns the right to be free from all forms of violence from either public or private sources; and

65.2. section 24 of the Constitution, as well as the equivalent right under the 1993 Constitution, which concerns the right to a clean and healthy environment.

It is accepted that the Constitution and the 1993 Constitution do not operate retrospectively, and so breaches of rights in the 1996 Constitution could only have been committed from 4 February 1997, and breaches of the equivalent rights in the 1993 Constitution could only have been committed from April 1994. Harmony's breach of these constitutional obligations caused the injuries complained of herein.

(iii) There are issues of fact and law common to the class members

66. According to the Law Commission, a criterion for certification should be that the potential litigants are an identifiable group whose claims or defences give rise to common issues of law or fact.[8]

67. It is common knowledge and exhaustively documented that gold mining companies such as the Harmony relied on migrant labour from rural areas of South Africa, and rural areas of neighbouring countries such as Lesotho, Malawi, Swaziland, Mozambique, and Botswana.

[8] SALC Report at par 5.6.19

68. It would or should also have been known to Harmony and the Chamber of Mines that miners would return to their rural homes after retirement, dismissal or retrenchment from the gold mines.

69. It was furthermore known that the occupational lung diseases associated with gold mining could often be "latent," meaning that it would take a number of years after working in the mines for the diseases to manifest and be diagnosable.

70. In addition, it was known that access to medical care for the diagnosis and treatment of occupational lung diseases, as well as access to attorneys and the courts, was practically non-existent in the miners' "homelands" areas.

71. Thus it would or should have been known to Harmony, the Chamber of Mines, and the gold mining industry that hundreds of thousands of gold miners would leave their employment from the mines, then years later suffer debilitating occupational diseases and be without the medical and legal resources to seek redress.

72. The potential class members are thus similarly situated in many highly significant respects. There is also significant overlap in the factual and legal aspects of their claims.

73. The most important factual questions that are common to the claims of all potential class members would appear to include the following:

73.1. whether exposure to crystalline silica dust ("silica") in Harmony's goldmines caused members of the class to contract silicosis, silico-tuberculosis, tuberculosis, chronic obstructive lung disease, and lung cancer or any other occupational disease recognised in terms of the Occupational Diseases in Mines and Works Act 78 of 1973 (in other words, the diseases defined above as "occupational lung diseases");

73.2. whether Harmony failed to maintain conditions in their goldmines to protect members of the class from contracting occupational lung diseases;

73.3. whether the medical literature and information available to Harmony demonstrated that exposure to silica in South African mines caused occupational lung diseases;

73.4. whether Harmony knew or ought to have reasonably known that a lack of health and safety controls in the mines leads to occupational lung disease in the miners;

73.5. whether Harmony knew or ought to have reasonably known that the occupational lung diseases caused by exposure to silica in the mines were "latent" diseases;

73.6. whether Harmony knew or ought to have reasonably known that when the miners returned to their homes after being discharged from employment by the mining company, there would be a lack of necessary

medical resources in these communities to diagnose and treat occupational lung diseases;

73.7. whether Harmony knew or ought to have reasonably known that when the miners returned to their homes after being discharged from employment by the mining company, there would be a lack of legal and other necessary resources for miners to adequately pursue compensation for occupational lung disease in those communities;

73.8. whether Harmony informed miners of the risks of occupational lung diseases associated with working in the mines;

73.9. whether Harmony informed miners of the signs and symptoms of occupational lung diseases;

73.10. whether Harmony adequately monitored the health of its miner employees to mitigate any effects of excess silica exposure;

73.11. whether Harmony provided living quarters to the miners which increased their risks of contracting infectious occupational lung diseases such as tuberculosis;

74. The most important legal questions that are common to the claims of all potential class members, alternatively (in the case of the statutory and constitutional obligations) a significant majority thereof, include the following:

74.1. whether Harmony had a legal duty under the common law to provide health and safety conditions in the mines adequate to protect the workers from contracting occupational lung diseases;

74.2. whether Harmony had a legal duty under (i) the Mines and Works Act 27 of 1956, (ii) the Minerals Act 50 of 1991, and/or (iii) the Mine Health and Safety Act 29 of 1996, as well as the respective regulations adopted thereunder, to provide health and safety conditions in the mines adequate to protect the workers from contracting occupational lung diseases;

74.3. whether Harmony had a legal duty under (i) section 12(1)(c) of the Constitution (or the equivalent section under the 1993 Constitution), and/or (ii) section 24 of the Constitution (or the equivalent provision in the 1993 Constitution) to provide health and safety conditions in the mines adequate to protect the workers from contracting occupational lung diseases;

74.4. whether Harmony breached its common law obligations, its statutory obligations and/or its constitutional obligations;

74.5. whether a breach of South African occupational health and safety statutes and regulations is *res ipsa loquitur* on the question of causation in this context, and if not, whether the breaches identified caused the members of the class to suffer occupational lung diseases;

74.6. whether a breach of South African occupational health and safety statutes and regulations constitutes grounds for the imposition of strict liability;

74.7. whether the principle of joint and several liability applies in this case to miners exposed to silica in the goldmines of multiple employers; and

74.8. whether compensatory damages are available to miners under sections 12(1)(c) and/or or 24 of the Constitution.

75. I respectfully submit that the common factual and legal issues significantly outweigh any differences between the individual claims.

76. In the event of the class action being certified, a combined summons will be issued against Harmony on behalf of the class. It is contemplated that the relief in the summons will be sought in two phases:

76.1. The first leg will pertain to declaratory relief that will deal with the common factual and legal issues. The declaratory relief will be sought on behalf of the entire class.

76.2. The second leg of the relief will arise only in the event of the class being successful in respect of the declaratory relief. It is envisaged that members of the class would at that point be entitled to individually join or intervene in the action by each submitting his own individual claim for

damages against Harmony. Such joinder or intervention will be in accordance with the Uniform Rules of Court.

(iv) A suitable class representative is available and leading the class

77. I submit that Applicants are suitable persons to represent the class, as is evident from the information contained in their individual affidavits.

78. The Applicants' claims are typical and representative of the claims to be alleged by the class members. All class members will have suffered the same categories of injury (i.e. the occupational lung diseases, noted above, and associated damages), caused by the same conditions in mines owned and operated by Harmony, and will be asserting the same legal claims against Harmony. The evidence pertaining to liability and causation and the methodologies for determining and calculating damages, will be the same for the Applicants and each member of the class.

79. In any event, the Applicants should be permitted to represent the class under either section 38 or section 173 of the Constitution, with due regard to the rights 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 action to be instituted in order for the right of access to Court to be protected.

80. Although the Law Commission did not propose a requirement involving the legal representatives requesting leave to represent the class, I respectfully aver that Abrahams Kiewitz and I are competent and experienced to lead this class.

81. Of relevance in this regard is the following:

81.1. the fact that I have more than ten years' experience in working with a foreign US law firm, Hausfeld LLP, on class actions; and

81.2. the fact that I am the attorney of record in the *Children's Resources Centre Trust* case referred to above, in which certification of a class action was first invoked (and which matter is currently pending before the Supreme Court of Appeal).

(v) The interests of justice and general considerations regarding the appropriate procedure

82. I respectfully aver that the interests of justice require that the relief sought in the notice of motion be granted.

83. I reiterate that a class action in circumstances such as those contemplated in the present case is not only competent, but envisaged, under the constitutional framework. I also emphasize that, unless this matter proceeds by way of a class action, it is highly likely that the individual claims of most of the members of the class will never be able to be realised, and that the members of the class will thus be denied their right of access to court.

84. The institution of a class action in proceedings such as the present is both possible, and required, under the Constitution in the light of the fact that:

84.1. Section 173 of the Constitution gives this Honourable Court the inherent power to regulate its own process and develop the common law, taking into account the interests of justice. This is precisely the kind of case where the court, using its inherent powers, should allow the matter to proceed as a class action. A class action would be the only realistic way for the class members to realise their legal rights, and also provide the most efficient and fair way for the issues to be decided.

84.2. It would also further the purpose, object and spirit of the Bill of Rights, as well as give effect to section 34 of the Constitution (the right of access to courts) for the case to proceed as a class action. I again emphasize that, without a class action of the kind which is proposed herein, the many former mineworkers who are afflicted with occupational lung diseases will not be able to realize their rights or pursue their claims against Harmony.

84.3. Insofar as it is alleged that rights in the Bill of Rights were infringed by Harmony, a class action would in any event be permissible under section 38(c) of the Constitution, which expressly provides that a person acting in the interest of a class of persons may approach a court for appropriate relief, alleging that a right in the Bill of Rights has been infringed or threatened. As stated above, it will be alleged in the class action that

Harmony's actions violated at least section 12(1)(c) of the Bill of Rights and the equivalent provision under the 1993 Constitution.

85. While section 38(c) of the Constitution only expressly recognises class actions in Bills of Rights cases, there is no conceivable reason why a class action should not be competent in respect of cases based on other causes of action, or cases based on common-law and statutory breaches, as well as constitutional infractions. This is all the more so where a class action is necessary in order to give effect to potential plaintiffs' rights of access to court. There is also, in any event, provision for a class action in environmental matters under section 32(1)(c) of the National Environmental Management Act 107 of 1998. To the extent necessary, this issue will be addressed further in argument.

86. The circumstances in which the afflicted former mineworkers find themselves also makes a class action a highly appropriate method of proceeding with the action against Harmony, and indeed the only viable proceedings.

87. As there are thousands of former and current Harmony mineworkers who have occupational lung diseases, it would be impractical for them to sue as named co-plaintiffs in a single conventional action or for them to institute separate, individual actions, even were they to be capable of bringing actions on their own (which they patently are not). Requiring the class members to each bring their own actions, or to each prove their own claims in an action in which they are joint plaintiffs would not only preclude them from ever prosecuting their claims, but would also be contrary to the principles of judicial economy and justice.

88. Thus, not only would a class action result in the most efficient use of this Honourable Court's resources, it is also likely to be the only realistic way that many of the affected miners would be able to obtain redress for their injuries. The injured mineworkers, who now suffer from debilitating respiratory injuries, do not have the necessary resources to fund separate, and individual, lawsuits against Harmony. Even if an injured former mineworker were able to raise funds to run a case against Harmony by himself, the costs of his individual action, including expert witnesses and counsel fees, could moreover outweigh the compensation which the injured mineworker may recover – an outcome which would be avoided if the legal costs and fees for procuring expert evidence were to be spread among hundreds or thousands of claimants.

89. The extreme poverty in which most members of the class now live, their lack of access to information, and their lack of access to resources and more particularly legal representation, are also further reasons why proceeding by way of a class action is appropriate.

). In conclusion, it would not only increase the efficiencies for the Honourable Court if the injured former mineworkers' claims were to be prosecuted by way of a class action, but a class action would also afford the injured former mineworkers access to justice, which they would otherwise be denied.

Declaratory order by way of "opt-out" and quantum by way of "opt-in"

91. As stated, I respectfully aver that, in this case, the establishment of an "opt-out" class in respect of the declaratory relief would best serve the interests of the

class. The many common issues of fact and law can best be decided on a class-wide basis, and indeed can only realistically be addressed in this manner. This approach will automatically safeguard the interests of all members of the class, and place them in a position to claim damages which they would otherwise not be able to obtain.

92. The establishment of an "opt-out" class for this portion of the proposed action would mean that members of the class would not be able to pursue individual actions for damages against Harmony, as a result of their contracting an occupational lung disease, unless they notify Abrahams Kiewitz, who in turn must notify Harmony and this Honourable Court that they wish to be excluded from the class. However, as I have mentioned, the affected persons cannot, in reality, bring actions against Harmony on their own. An "opt-out" mechanism thus does not deprive the current and former mineworkers of any right which they could have exercised. Instead, it affords former mineworkers who are afflicted by an occupational lung disease an automatic right to participate in a claim for damages against their erstwhile employer, and is thus only to their benefit.

93. As I have also mentioned, it is proposed that questions of quantum be dealt with by way of an "opt-in" approach. This is because the determination of the damages suffered by each member of the class is something better determined on an individual basis, subsequent to findings on liability and general causation. An "opt-in approach" as regards quantum will also ensure that all class members in respect of whom questions of quantum pertain will be readily identifiable and that any damages received will easily be able to be paid to the affected persons.

Notice to the class

94. I respectfully aver that the following notification would be reasonable and adequate, at least as an initial step, to bring to the attention of members of the class this Honourable Court's certification order:

Publication of the notice set out below in one edition in each of the *Sunday Times*, *The Star*, *The Daily Sun*, in English, isiXhosa or Sotho:

"All Harmony mineworkers (former or current),

Kindly be advised that:

THE CLASS ACTION

A class action has been certified by the South Gauteng High Court on _____ against HARMONY GOLD MINING COMPANY LIMITED, AFRICAN RAINBOW MINERALS GOLD LIMITED, ARMGOLD-HARMONY FREEGOLD JOINT VENTURE COMPANY, AVGOLD LIMITED, EVANDER GOLD MINES LIMITED, RANDFONTEIN ESTATES LIMITED (Collectively known as Harmony) to permit any current or former miner worker who has any "occupational lung disease" such as silicosis, tuberculosis, silico-tuberculosis, chronic obstructive lung disease, or lung cancer or any other types of occupational diseases referred to in the Occupational Diseases in Mines and Works Act 78 of 1973 and who previously worked or continue to work in any one of the following South African gold mines for the period owned by Harmony:

Free State Operations consisting of:

- *Harmony, Virginia and Merriespruit mines;*
- *Unisel (as from September 1996 to present);*
- *Saaiplaas 2 and 3 (as from April 1997 to present);*
- *President Brand mines 2, 3 and 5 (as from May 1998 to present);*
- *Saaiplaas 2 and 3, now known as the Masimong complex (as from September 1998 to present);*

Randfontein Operations consisting of:

- *Doornkop and Doornkop South Reef Mines (as from January 2000 to present);*

Elandskraal Operations consisting of:

- *Elandsrand and Deelkraal Mines, now known as Kusasalethu (as from April 2001 to present);*

Evander Operations consisting of:

- *Kinros, Bracken, Leslie and Winkelhaak mines (as from August 1998 to present);*

Free Gold Operations consisting of:

- *St. Helena mine (as from 30 October 2002 to present);*
- *Joel, Tshepong, Matjhabeing, Bambanani and Phakisa mines, also known as Free Gold, (as from January 2002 to present);*

ARMgold Operations consisting of:

- *Welkom and Orkney mines (as from September 2003);*

Avgold Operations consisting of:

- *Target and Target North mines, formerly Lorainne mines (as from May 2004);*

Kalgold Operations (as from July 1999 to present)

to institute a claim for damages against Harmony.

THE CERTIFICATION ORDER

Mr. Charles Abrahams of Abrahams Kiewitz Attorneys (Abrahams Kiewitz) has been appointed as the legal representative for the Class. Abrahams Kiewitz has entered into a contingency fee agreement with the representative Plaintiffs with respect to legal fees and disbursements. The agreement provides that Abrahams Kiewitz will not receive payment for their work unless and until the class action is successful or costs are received from Harmony.

COSTS TO THE CLASS IF THE ACTION IS SUCCESSFUL

The agreement provides that, if the action is successful, Abrahams Kiewitz will be

entitled to a fee payable out of the amount recovered under the judgment or settlement of the action, which amount would require court approval.

PARTICIPATION IN THE CLASS ACTION

Members of the Class who want to participate in the class action are automatically included and need not do anything at this stage. If the Court determines the common issues in favour of the Class, each class member will be entitled to participate further. If a class member chooses to do so, he or she should approach Abrahams Kiewitz to provide the firm with instructions to participate in the second part of the action, in which the amount of damages due to the Class members is determined.

OPT-OUT

If you do not want to participate in the class action you must opt-out. If you want to opt-out, you must send a signed written notice, including your name, address, telephone number to: Abrahams Kiewitz Attorneys, Suite 518, 5th Floor, Tygerlake Building, Niagara Way, Tyger Falls, Carl Cronje Drive, Tygervalley, Bellville, WESTERN CAPE, by no later than [_____]. You may email such notice to silicosis@ak.law.za alternative fax to 021 914 1455.

Each class member who does not opt-out will be bound by the terms of any judgment or settlement whether favourable or not and will not be allowed to proceed with an independent action."

95. As it is not certain how effective the above notice will be, given that most of the members of the class live in rural areas, and some live in foreign countries, the Applicants reserve the right to seek leave to approach the court again, on the same papers duly amplified, for an order in respect of further notices to the class.

Fees and costs

96. By the nature of this matter, Abrahams Kiewitz have entered into a contingency fees agreement with the Applicants, as permitted under the Contingency Fees Act, 66 of 1997. As is apparent from the previous section of this affidavit, provision has already been made in the notice to the class informing them thereof. As can also be seen from the contemplated notice to class members, it is foreseen that, in the event of the class action ultimately being successful, this Honourable Court will be asked to approve the contingency fees Abrahams Kiewitz would be entitled to in respect of the class action. However, no issue arises in this regard at this stage.

97. As for the costs of disbursements in relation to the notice to the class, I respectfully submit that Harmony should bear the costs thereof, having due regard to the following:

97.1. the Applicants are persons of meagre means and will not be in a position to bear the costs thereof;

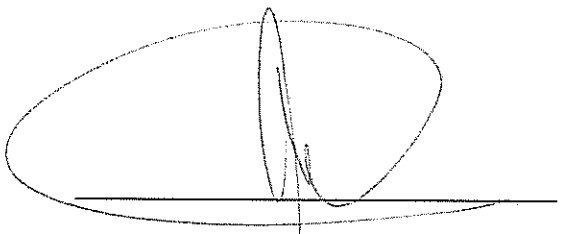
97.2. the Applicants are, in any event, in ill-health as a result of Harmony's conduct and for that reason too, could not conceivably bear the costs of notifying the class;

97.3. there is a clear public interest in the pursuit of the class action litigation, and, as stated, the intended action relates to a breach of common law, statutory and constitutional rights;

97.4. Harmony, as a large company with significant turnover, is easily able to pay the costs of notifying the class, and is certainly incomparably better placed than the Applicants in that regard.

98. As for the costs of suit, given the complexity of this matter as well as the novel procedure it entails, it necessitated the use of one senior counsel and three juniors. In the event of this application being successful, the costs to be paid by Harmony should include the costs of three counsel.

99. In the light of the foregoing I respectfully submit that a proper case has been made out for the relief sought in the notice of motion.



CHARLES PETER ABRAHAMS

I certify that:

1. The deponent acknowledged to me that:

1.1 he knows and understands the contents of this declaration;

1.2 he has no objection to taking the prescribed oath;

1.3 he considers the prescribed oath to be binding on his conscience.

2. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God".

3. The deponent signed this declaration in my presence at the address set out hereunder on this the 15TH day of AUGUST 2012.

COMMISSIONER OF OATHS

PIETER COSTHUIZE
Commissioner of Oaths
Practising Attorney R.S.A.
Address : Suite 3 Kenridge Office Cent
Tel : 021 914 4556