REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 44060/18

(1)	REPORTABLE: (YES) / NO
(2)	OF INTEREST TO OTHER JUDGES: (YES)/NO
(3)	REVISED.
.....	26/07/2019
Signature	Date

In the *ex parte* application of:

BONGANI NKALA & 67 OTHERS **APPLICANTS**

IN RE: Application to approve a settlement agreement in respect of the certified class action between Bongani Nkala and 65 Others v Harmony Gold Mining Company Limited and 31 Others.

JUDGMENT

WINDELL J.

INTRODUCTION

[1] This is an application for the approval of a settlement agreement in a class action. The application is brought *ex parte* by the surviving class representatives and 20 of the respondent mining companies[1] ("the Settling Companies"), and is unopposed.

[2] On 13 May 2016 this court certified a class action against companies operating in the gold mining industry, with two separate and distinct classes; a silicosis class and a tuberculosis class *("the Nkala certification application" or "Nkala").*[2] The court also ordered that any settlement agreement reached by the class representatives on behalf of a class must be approved by the court to be valid.[3] A settlement agreement was subsequently concluded between the class representatives and the Settling Companies and signed on 3 May 2018. Clause 2.1.1 of the settlement agreement provides for the suspension of the operation of the settlement agreement until it is sanctioned by a court of law.

[3] The class representatives and the Settling Companies, hereinafter referred to as "the applicants", have consequently joined forces to apply for the settlement

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[1] African Rainbow Minerals Ltd, Anglo American SA Ltd, Anglogold Ashanti Ltd, Avgold Ltd, Freegold (Harmony) (Proprietary) Ltd, Free State Consolidated Gold Mines (Operations) Ltd, Gold Fields Ltd, Gold Fields Operations Ltd, Newshelf 899 (Proprietary Ltd), Beatrix Mines (Proprietary) Ltd, Farworks/682 (Proprietary) Ltd, Driefontein Consolidated (Proprietary) Ltd, GFL Mining Services Ltd, GFI Joint Venture Holdings (Proprietary) Ltd, Harmony Gold Mining Company Ltd, Unisel Gold Mines Ltd, Loraine Gold Mines Ltd, Randfontein Estates Ltd, Sibanye Gold Ltd, Leslie Gold Mines Ltd, Bracken Mines Ltd, and K2018259017 (South Africa) (Proprietary) Ltd. At the time of the settlement agreement Leslie Gold Mines Ltd was in final winding up and Bracken Mines Ltd was dissolved. Both were erroneously included as parties to the settlement agreement. They have subsequently been removed. See Second Addendum to the Settlement agreement dated 12 December 2018.

[2] *Nkala and Others v Harmony Gold Mining Companies Limited and Others* [2016] 3 All SA 233 (GJ).

[3] *Nkala* Court Order at [13].

agreement to be approved and made an order of court. Eight of the mining companies that were respondents in *Nkala* are not parties to the settlement agreement. They are DRD Gold Limited ("DRD"), East Rand Proprietary Mines Limited ("ERPM"), Randgold and Exploration Company Limited, Evander Gold Mining Company Limited, Blyvooruitzicht Gold Mining Company Limited, Doornfontein Gold Mining Company Limited, Simmer and Jack Mines Limited and African Rainbow Minerals Gold Limited. They are referred to collectively as "the Non-Settling Companies".

[4] The *Nkala* judgment is currently on appeal before the Supreme Court of Appeal ("the SCA") and the certification order is suspended in terms of section 18(1) of the Superior Courts Act 10 of 2013. The SCA has postponed the hearing of the appeal to allow for the possible settlement of the matter. The settlement agreement, if approved, will bind all eligible mineworkers and dependants who do not opt out of its terms, and will fully and finally settle all silicosis and tuberculosis claims of those class members, as against the Settling Companies. The applicants consequently seek an order that in the event that the settlement agreement becomes effective, the *Nkala* class action will be terminated as against the Settling Companies. The Settling Companies will then be obliged to withdraw their appeal against the *Nkala* certification order.[4] Barring any subsequent agreement with the Non-Settling companies, the appeals instituted by them will however proceed.

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[4] This undertaking is recorded in clause 2.12 of the settlement agreement, which provides as follows: "*Without unreasonable delay after the effective date, each Company which has appealed the Class Action Litigation shall withdraw its appeal instituted in the Supreme Court of Appeal of South Africa under the case citation Harmony Gold Mining Company and Others v Bongani Nkala and Others, case number 688/12 (the Appeal). The provisions of this clause 2.12 do not impose any obligation on any of the Companies to secure the withdrawal of its Appeal in respect of the interests of any third party that is an appellant in that Appeal but is not a party to this Agreement.*"

[5] The settlement agreement, in a nutshell, provides for the payment of benefits to mineworkers and the dependants of deceased mineworkers, who contracted silicosis or pulmonary tuberculosis as a result of their employment by the Settling Companies, through the Tshiamiso Trust ("the Trust"). The Trust will be funded by six of the Settling Companies namely African Rainbow Minerals Limited, Anglo American South Africa Limited, AngloGold Ashanti Limited, Gold Fields Limited, Harmony Gold Mining Company Limited and Sibanye Gold Limited, who are also the founders of the Trust ("the Founders"). Their liability to fund the Trust is unlimited.[5] The Trust is, in terms of the trust deed, obliged to identify and locate eligible mineworkers and dependants. Claims may be submitted to and received by the Trust for a period of 12 years from the date the Trust becomes effective. The effective date of the Trust is the date on which the suspensive conditions in the settlement agreement are fulfilled. The suspensive conditions, set out in clause 2.1 of the settlement agreement, are the following:

> [1] The court's approval of the settlement agreement and confirmation of the court's termination of the class action litigation as against the Settling Companies.
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> [2] Confirmation that the number of claimants that have elected to opt out of the settlement agreement within the prescribed period do not exceed 2000 (two thousand). This condition may be waived by the Settling Companies.
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> [3] The lodgement of the trust deed with the Master and the issuing of letters of authority by the Master to the first trustees of the Trust.

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[5] The Founders' liability is to be secured by guarantees to the Trust, which, collectively, amount to R5 000 000 000 (R5 billion).

[6] The Trust must process and assess the claims and pay eligible mineworkers and dependants in the amounts stipulated in the trust deed. The aim of the settlement agreement is to provide compensation to those beneficiaries, in addition to – and, in most instances, in excess of – the compensation available under the Occupational Diseases in Mines and Works Act 78 of 1973 ("ODIMWA").

PROCEDURE FOLLOWED

[7] There is no established procedure in South Africa for obtaining the approval of a settlement agreement in a class action. The applicants pursued the present application by using a two–stage procedure followed in other jurisdictions.[6] The two-stage procedure provides for prior notice to the class of the proposed settlement, followed by an approval hearing. In the current proceedings, the applicants have used the mechanism of a rule *nisi* in order to execute the two-stage procedure. We are satisfied that the procedure followed by the applicants affords protection to the proposed class members by giving them ample opportunity to familiarise themselves with the terms of the settlement agreement; to consider their rights in relation to the settlement in advance of the return day; and to raise any objections they may have.

[8] The first stage of the proceedings was brought on behalf of the applicants *ex parte* on 13 December 2018. The court granted an order ("the court order") and certified 4 (four) new separate classes ("the Settlement Classes") solely for the

[6] See, for example, rule 23(e) of the United States Federal Rules of Civil Procedure and section 33V of the Federal Court of Australia Act, read with section 14 of the Federal Court's 'Class Actions Practice Note' (GPN-CA) (which replaced Practice Note CM17).

purpose of binding their members to the settlement agreement if the members did not opt out.[7] The court also certified the class representatives (1st to 48th applicants) and the legal representatives ("the class lawyers") for the Settlement Classes. The class lawyers are: Richard Spoor Inc. ("RSI") for the 1st to 20th applicants, Abraham Kiewitz Inc. ("AK") for the 21st to 39th applicants, and the Legal Resources Centre ("LRC") for the 40th to 48th applicants. The certification is provisional as the court order provides that the certification of the Settlement Classes will terminate with immediate effect if the settlement agreement is not approved, or if the settlement agreement does not become operative.

[9] At the same time, the court issued a rule *nisi* in order to regulate the publication of a notice of the settlement agreement ("the Settlement Hearing Notice") to the Settlement Classes and any interested parties to afford them an opportunity to object to it and to show cause: (1) why the settlement agreement should not be made an order of court; (2) why it should not be binding on all members of the Settlement Classes who do not opt out and; (3) why the class action certified in *Nkala* should not be terminated as against the Settling Companies. [8] Paragraphs 6 to 12 and 14 of the court order regulate the various procedural steps ("the notice requirements") that must be taken to publish the rule *nisi* and the settlement agreement, and to facilitate a full hearing of the matter on the return day.

[10] This is the return date of the rule *nisi* and the second stage of the two-stage procedure.

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[7] *Ex parte Nkala and Others*, Unreported judgment of Mojapelo DJP dated 13 December 2018.

[8] Notice in Schedule 7 of the Addendum to the Settlement Agreement headed "the First Notice: Notice of Proposed Class settlement".

COMPLIANCE WITH THE NOTICE REQUIREMENTS IN THE COURT ORDER

[11] The applicants were directed to publish the Settlement Hearing Notice to the Settlement Classes and any interested parties to inform them of the approval hearing and of the steps to be taken to participate in the hearing. In addition, the court order required service of the rule *nisi* and settlement agreement on the Non-Settling Companies and on Xulu Attorneys Inc., which at the time, had indicated that it would be opposing the application. The publication requirements were detailed in paragraphs 6.1 to 6.4 of the court order, and were required to be fulfilled by 20 February 2019.

[12] The court order imposed certain duties on the class lawyers, the Settling Companies and the Founders of the Trust, in relation to service of the Settlement Hearing Notice. The class lawyers and the attorneys for the Settling Companies filed service affidavits setting out in detail the steps that were taken to publish the Settlement Hearing Notice.

[13] There were instances where strict compliance with the requirements of the court order was not possible and the applicants seek condonation for the resultant non-compliance with the court order. It was, for instance, not possible to publish in certain of the identified newspapers, either because they had gone out of business, or did not publish weekly (as required by the court order), or because they would not accept the Settlement Hearing Notice for publication. It was, as a further example, also not possible to broadcast on all of the identified radio stations, either because they were no longer in business, or because they were not willing or able to broadcast the Radio Advert. Where that occurred, the

Founders identified an alternative newspaper with a similar circulation or radio station with a similar target audience and broadcast area stipulated in the court order, and caused the Settlement Hearing Notice to be published in that alternative newspaper or radio station instead. That ensured that the requirements of notice and publication were met, even where strict compliance with the requirements of the court order was not possible. The Settling Companies and the class lawyers similarly followed alternative processes and created alternative notification processes where strict compliance was not possible. There was thus, notwithstanding minor deviations, substantial compliance with the requirements.

[14] The Founders established a Call Centre in 2016, in collaboration with the Compensation Commissioner for Occupational Diseases ("CCOD"), to deal with queries relating to occupational lung disease compensation under ODIMWA and it has been a central point of contact in this regard for ex-mineworkers. The Settlement Hearing Notice and Radio Advert provided a toll-free number for the Call Centre, and recorded that individuals could call or send a "*please call me*" if they sought further information on the settlement. XDS (Pty) Ltd ("XDS"), the company that manages the Call Centre, was instructed to accept calls pertaining to the settlement agreement and to contact anyone who sent a "*please call me*" and direct them either to the class lawyers or to the various places where the settlement agreement, the court order and judgment, the Settlement Hearing Notice and other related information could be found. The number of Call Centre staff was increased to handle the additional call volume, and staff was trained to address queries related to the settlement. Calls to the Call Centre, as well as outbound calls responding to "*please call me*", increased

exponentially during the period that the Settlement Hearing Notice was published and the Radio Advert was broadcast. XDS's Call Centre agents have reported that the high call volumes during that period related to the settlement, and that many callers indicated that they sought their compensation to be paid as soon as possible.

[15] The Settling Companies caused the Settlement Hearing Notice to be translated into English, Afrikaans, isiZulu, isiXhosa, Sesotho, Sepedi, Setswana, Tsonga, SiSwati, Ndebele, Portuguese and Chichewa. In total, the Settlement Hearing Notice was published on 220 noticeboards across the mines owned, operated or controlled by the Settling Companies.

[16] It is trite that, in appropriate cases, there might be sufficient compliance with a mandatory requirement even where there has not been exact compliance. If there was substantial compliance, and it achieved the relevant object, it would be regarded as constituting sufficient compliance.[9] The applicants correctly pointed out that the purpose of the publication requirements in the court order is to ensure that adequate notice was given to all those who have an interest in the approval of the settlement agreement before the return day, so that any objections to the settlement agreement could be fully ventilated in court. Given the extensive collective effort to publish the notice in South Africa and neighbouring countries, through various institutions commonly in contact with current and former gold mine workers, through the Call Centre, and through publication of notices in newspapers, on radio and online, and in the appropriate

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[9] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO South African Social Security Agency* 2014 (1) SA 604 (CC) at [22(b)].

languages, we are satisfied that interested parties have duly been alerted to the existence and terms of the settlement agreement and of the opportunity to object before this court to its approval. Any non-compliance with the court order in this regard is condoned.

STANDARD TO BE APPLIED IN APPROVING THE SETTLEMENT AGREEMENT

[17] In *Nkala* this court held that any court considering a class settlement must assess whether it is "*fair, reasonable, adequate and that it protects the interests of the class*" before approving it.[10] Courts in Australia,[11] the United States,[12] and British Columbia[13] have adopted a similar standard. This requirement distinguishes settlement of a class action from other settlement agreements in ordinary actions. This is because the settlement agreement, if approved, will be binding on absent class members unless they subsequently opt out, and is proposing to compromise the rights of absent class members.[14] This court must therefore adopt a protective or "fiduciary" role during these proceedings and is enjoined to carefully assess the settlement to ensure that it is in the interests of absent class members, and that it is not concluded solely in

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[10] *Nkala* at [39].

[11] Section 33V of the Federal Court of Australia Act, 1975 provides: "*11.1. When applying for Court approval of a settlement, the parties will usually need to persuade the Court that:*

(a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and

(b) the proposed settlement has been undertaken in the interests of group members, as well as those of the applicant, and not just in the interests of the applicant and the respondent/s."

[12] Rule 23(e)(2) of the United States Federal Rules of the Civil Procedure states: *"(2) If the [settlement] proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable and adequate."*

[13] In *Dabbs v Sun Life Assurance Co of Canada* [1998] O.J. No 1598 (Gen Div), the Court found that a settlement agreement must be fair reasonable and in the best interest of the class.

[14] Newberg on Class Actions. Fifth Edition, Westlaw. Chapter 13.40. "Fiduciary Role of Court".

the interests of the class representatives and the class lawyers. While approval courts will generally presume that a settlement negotiated at arms' length is concluded in good faith and without collusion, they nevertheless bring a strict level of scrutiny to bear.[15]

[18] Fairness, reasonableness and adequacy are all concerned with whether the proposed settlement provides sufficient value to class members, in return for the surrender of their right to litigate. The court thus generally compares what class members will receive under the settlement with what they could notionally have recovered through individual actions or seeing the class action to completion, taking into account the risks and costs associated with the latter.[16] This calls for a balanced inquiry. In *Dabbs v Sun Life Assurance Co of Canada*[17] the court had to consider what judicial scrutiny entails. It held as follows:

> *"...class actions settlements "must be seriously scrutinized by judges" and should "be viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.*
>
> *Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation."*

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[15] Newberg on Class Actions Chapter 13:40.
[16] Class Action Litigation in South Africa. M. Du Plessis (Juta 2017) at p88.
[17] (1999) 40 O.R. (3d) 429 (Gen. Div). The Court made reference to a paper delivered by a certain Professor Watson. Is the Price still right? Class Proceedings in Ontario". Paper delivered at a CIAJ Conference in Toronto, October 1997.

[19] Mulherron[18] discusses some of the factors courts have taken into account in assessing the fairness, reasonableness and adequacy of a settlement agreement in a class action.[19] In *US v Seymour Recycling Corp*[20] the issue of compromise and the function of an approval court was reiterated and the court stated the following:

> *"any settlement is the result of compromise - each party surrendering something in order to prevent unprofitable litigation, and the risk and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. Further the court must engage in an independent evaluation of the agreement, eschewing a rubber stamp approval"*

[20] In the South African context, the overarching consideration must be whether the settlement is in the interests of justice. In *Eke v Parsons*[21] the Constitutional Court ("the CC") warned against taking a too formalistic approach towards settlement agreements. With reference to *Ex parte Le Grange and Another: In re Le Grange v Le Grange*[22] the CC held as follows: [23]

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[18] R. Mulherron. The Class Action in Common Law Legal Systems: A Comparative Perspective. (Hart Publishing , 2004) at page 399 -407.
[19](1)The terms of the settlement.(2) The amount or value offered to each class member.(3)The cost, complexity, risk and likely duration of the litigation if the settlement were not approved.(4) The attitude of class members to settlement. (5) The risk of maintaining and succeeding in representative proceedings. (6) The risks of further litigation and of recovery. (7) The views and recommendations of experts or neutral parties.(8) Good faith and the absence of collusion between the class representatives and the defendants.
[20] 554 F Supp 1334,1337-38 (SD Ind 1982)
[21] *Eke v Parsons* 2016 (3) SA 37 (CC) paras 22-24; 33-34 and 36.
[22] [2013] ZAECGHC 75. It is reported as PL v YL 2013 (6) SA 28 (ECG).
[23] [2013] ZAECGHC 75.

"[22] Surely then, an expedited end to litigation may not only be in the parties' interest, it may also serve the interests of the administration of justice. This finds support at common law. Le Grange quotes Huber with approval:

> *'A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.'*

[23] Le Grange says:

> *'(T)he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for a trial, the case load is reduced. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently*
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> .....
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> *If one is then to proceed from the premise that the wider interests under consideration [are those] of the administration of justice, then the court is required, when exercising its discretion whether to make a settlement agreement an order of the court, to give consideration not only to the need to make orders that are readily enforceable, but also to assess"*

[21] The current settlement approval proceedings are non-adversarial. The application is supported by affidavits deposed to by the individual class representatives, the class lawyers and the Settling Companies, which set out

their attitudes towards the settlement. Supporting affidavits from various experts, setting out in detail the terms of the settlement and the value offered to each claimant, were also filed in support of the application. All the parties are in in favour of the settlement agreement and recommend that it be approved.

THE MAIN FEATURES OF THE SETTLEMENT AGREEMENT

The establishment of the Trust

[22] The Trust is aptly named the Tshiamiso Trust. Tshiamiso means "to make good" or "to correct" in Setswana. The object of the Trust is defined in clause 3 of the trust deed which reads as follows:

> *"The object of the Trust is to give effect to the Settlement Agreement and provide Benefits to Eligible Claimants (being the beneficiaries of the Trust) in the amounts and upon the terms set out in this Trust deed* ***(Trust Object).*** *The activities of the Trust shall be directed at, and the Trust Fund shall be used for the pursuit of, the Trust Object."*

[23] The Founders are jointly liable, in terms of the proportions set out and/or determined in accordance with Clause 27 of the trust deed, to fund the payment of benefits to be made by the Trust. Their liability to fund the Trust is unlimited and is secured by guarantees to the Trust, which, collectively, amount to R5 000 000 000 (R5 billion). Clause 8.3 of the trust deed provides that the Founders will also make a once-off initial (start-up) contribution of R5 000 000 (R5 million) towards the Trust administration in order to ensure that the Trust is in a position

to commence its work as soon as possible after the settlement agreement's conditions precedent are fulfilled. The applicants are of the view that this amount will be sufficient for the Trust to establish the systems that are required and to begin screening claimants and processing claims. Thereafter the Founders will provide further payments to fund the administrative needs of the Trust, up to a maximum of R845 000 000 (R845 million). The determination of such needs will be done by the Trustees, assisted by experts.

[24] Benefits will be funded in the same way. In terms of the trust deed, the Founders are required to make initial contributions in an aggregate amount of R1 420 000 000 (R1,42 billion), for the first 2 years of the Trust's life. Thereafter the Founders will provide further payments to fund the amounts required by the Trust to pay benefits to eligible claimants. The Trustees, on an annual basis and duly assisted by experts, will determine the contributions that are payable by the Founders to enable the Trust to settle the benefits that will be due to eligible claimants. If there is a shortfall in the amount that has been determined by the Trustees for a particular year, the Founders will pay the additional amount determined by the Trustees. The trust administration funding and the benefits funding are separated to ensure that the money intended to pay eligible claimants is not used for administration expenses or for any other purpose.

[25] The Founders have incorporated an agent ("the agent") for purposes of representing them in certain matters governed by the trust deed. The class lawyers have appointed Mr Richard Spoor ("Mr Spoor") to represent the claimants' interests in certain matters governed by the trust deed ("the claimants' agent"). The agent and the claimants' agent bear joint responsibility to

nominate experts who will be called upon to resolve disputes that may arise relating to contributions made by the Founders. The agent and the claimants' agent are also responsible for the appointment, replacement and removal of trustees under defined circumstances. The consent of both agents is required for any amendment to the trust deed, provided that no amendment adversely affects the rights of eligible claimants. The agent and the claimants' agent must meet annually with the trustees to assess the efficiency with which claims are processed and to consider improvements that can be made.

[26] The Trust will be administered by no less than five and no more than seven trustees at any given time. The trustees are charged with the administration of the trust within the confines of the trust deed and the Trust Property Control Act 57 of 1988 ("the Trust Property Control Act"). They have a fiduciary duty to ensure that eligible claimants receive the benefits to which they are entitled in terms of the trust deed. The trustees are vested with the power, and are obliged to, *inter alia,* administer the trust funds in the interest of the beneficiaries: to locate claimants; to ensure that claims are properly managed and processed; to see to it that benefits are paid to eligible claimants; and to conduct reviews and dispute resolution. The trustees are obliged to establish a Trust Advisory Committee, which is to comprise of representatives from government, trade unions, community leaders, non-governmental organisations, and any other bodies or entities which the trustees may appoint. The Trust Advisory Committee will meet at least twice each year to advise, give input, and raise concerns with the trustees on matters relating to the Trust.

[27] The Trust will receive claims for a period of 12 years and will operate for an additional period of 1 year to finalise any outstanding claims that were lodged with it during the preceding 12 years. Dr Deborah Budlender ("Dr Budlender"), an independent policy researcher employed by RSI and AK, explained in her affidavit that the 12-year period takes account of the latency period for the possible contracting of silicosis. She is of the opinion that symptoms of the diseases will in all likelihood manifest during the lifespan of the Trust. We believe that a 12-year period will provide sufficient time to alert claimants to the existence of the Trust and to enable claimants to lodge their claims.

The Settlement Classes

[28] The settlement covers all persons who qualify as members of the Settlement Classes. The Settlement Classes are broader and more inclusive than the classes that were certified in *Nkala*.[24] It was necessary to amend the

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[24] Defined as follows in Paragraph 1 and 2 of the *Nkala* Court Order:

> [1] Current and former underground mineworkers who have contracted silicosis, and the dependants of underground mineworkers who died of silicosis (whether or not accompanied by any other disease)
>
> (i) where such mineworkers work or have worked on one or more of the gold mines listed on the attached 'annexure A' after 12 March 1965;
>
> (ii) whose claims are not among the claims which, by agreement, are to be determined by arbitration in the matter of *Blom and Others v Anglo American South Africa Ltd*; and
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> (iii) who are not named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Ltd under case Nos HQ11X03245, HQ11X03246, HQ12X02667, and HQ12X05544 (the silicosis class); and
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> [2] Current and former underground mineworkers who contracted pulmonary Tuberculosis, and the dependants of diseased underground mineworkers who died of pulmonary tuberculosis (but excluding silico-tuberculosis), where such mineworkers work or have worked for the last two years on one or more of the gold mines listed in Annexure "A" [to the court's order], after 12 March 1965 (the TB class).

classes to include more mineworkers, to achieve better integration with the statutory regime under ODIMWA, and to recognise that compensation is payable under the settlement agreement only in respect of years worked on mines owned or controlled by the Settling Companies, and not on years worked on the mines of Non-Settling Companies.

[29] The Settlement Classes consist of two silicosis and two tuberculosis classes. Class 1 comprises all persons:

> [1] who, as at the effective date are undertaking, or prior to the effective date have undertaken, risk work;
>
> [2] who, on or before the effective date, have or will have contracted silicosis or will have been exposed to silica dust;
>
> [3] who undertake or have undertaken risk work on one or more of the qualifying mines after 12 March 1965; and
>
> [4] who are not listed in Schedule D of the trust deed (which comprise the named or identifiable groups of persons whose claims have been settled previously).[25]

[30] Class 2 comprises the dependants of any of the persons contemplated in Class 1 who is deceased as at the effective date.

[31] Class 3 comprises all persons:

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[25] Qhuheka claimants whose claims against Anglo American South Africa limited and Anglogold Ashanti Limited have been settled on 4 March 2016 and Blom claimants whose claims have been settled against Anglo American South Africa Limited on 19 September 2013. A list of claimants affected can be found in Schedule D annexed to the Trust deed.

[1] who, as at the effective date are undertaking, or prior to the effective date have undertaken, risk work;

[2] who on, before or after the effective date have or will have contracted tuberculosis; and

[3] who undertake or have undertaken risk work on one or more of the qualifying mines after 12 March 1965.

[32] Class 4 comprises the dependants of any of the persons contemplated in Class 3 who is deceased as at the effective date.

[33] One of the most important features in the definition of the Settlement Classes is the replacement of the term "underground mineworkers", used in the definition of the certification classes, with the term "risk work". During the negotiation of the settlement the parties agreed that the Trust scheme must cover mineworkers who performed work on the surface of the mine, where they could have been exposed to excessive dust levels – for example in a laundry where clothing of underground mineworkers is washed.[26] "Risk work" for purposes of the Settlement Classes thus includes:

[1] ODIMWA risk work at controlled mines (should these be declared);

[2] All underground work, irrespective of whether it was performed at a controlled mine in terms of ODIMWA;

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[26] "Risk work" was originally defined in the trust deed as "*risk work as contemplated in ODIMWA (as at the Signature Date)*". The parties however overlooked the fact that the ODIMWA definition of *"risk work"* does not encompass all of the parts of a mine and all of the mines that the parties to the settlement negotiation sought to cover. In order to remedy this oversight, the parties concluded the addendum to amend Clause 1.1.68 of the trust deed.

> [3] Surface work where there is potential excessive exposure to silica dust, regardless of whether it was performed at a controlled mine in terms of ODIMWA and regardless of whether it was performed underground or aboveground.[27]

[34] As stated above, the eligibility of members of the Settlement Classes to receive compensation under the settlement is qualified by the terms of the settlement agreement and the trust deed. The key eligibility requirement is the undertaking of *"risk work"* at a *"qualifying mine"* during a *"qualifying period"*. Qualifying mines are the mines in respect of which each of the Settling Companies is responsible for the purposes of the settlement agreement. The qualifying periods are the periods during which the Settling Companies are responsible for those mines for the purposes of the settlement agreement. The qualifying mines and the qualifying periods are set out in Schedule F to the trust deed. Clause 8 of the settlement agreement establishes a mechanism, through arbitration, for the resolution of disputes concerning risk work that was undertaken at qualifying mines but outside the qualifying periods (*"preserved claims"*). Where a mineworker worked at a qualifying mine outside of a qualifying period, his claim will not be treated as a settled claim and he will be entitled to pursue compensation in terms of the preserved claim mechanism under clause 8 or to pursue his claim directly against the relevant Settling Company. In terms of Clause 5.6 of the trust deed, benefits will be reduced or

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[27] Surface work includes: (1) work in a laundry where clothing of underground mineworkers is washed; (2) work on a slimes dam of a gold mine; (3) work in an assay laboratory of a gold mine where the composition of gold bearing ore is analysed, and where the mass of respirable dust from personal sampling is determined; (4) work in a metallurgical plant of a gold mine, including crushing, milling, transporting and smelting of ore; (5) work at the conveyor belt operations which are undertaken to convey broken rock from the underground operations of a gold mine to surface.

modified *pro rata* for the time that a claimant performed risk work at a non-qualifying mine, or at a qualifying mine but outside the qualifying period. The underlying principle that has been agreed to by the parties is that the different exposure periods are assumed to have contributed proportionately in time to the contraction of the qualifying disease. The applicants argue that the alternative approach, namely, apportioning liability on the basis of the actual dust levels or scientifically estimated dust levels to which the claimant was exposed, would have been highly complex, extremely costly and very cumbersome. We agree. Taken together, clause 8 and clause 5.6 mean that where a mineworker worked at a qualifying mine both during and outside qualifying periods, the extent of his benefit to be paid by the Trust will be reduced by a stipulated formula, in order to cater for the period not covered by the settlement agreement.

[35] The Settlement Classes also includes mineworkers who were exposed to silica dust on or before the effective date, but who only developed a qualifying disease after that date, to the extent that such symptoms manifest during the 12- year period of operation of the Trust. Mineworkers who are employed by the Settling Companies only after the effective date of the settlement agreement are not part of the Settlement Classes, and will retain their common law and statutory remedies.

Benefits payable to eligible claimants

[36] Benefits will be payable to eligible claimants with silicosis or tuberculosis or, where those persons have passed away, to their dependants or estates. The benefits paid under the settlement and trust deed are in addition to those

payable under ODIMWA. Eligible claimants will be paid a specific amount depending on the nature and severity of the concerned mineworker's illness. Dr Budlender explains that applying standardised amounts per disease category is far preferable to a system in which each individual claimant's circumstances have to be determined and taken into account to determine the benefit payable to him or her. It is a more efficient and less costly scheme.

[37] In respect of benefits payable to mineworkers suffering from silicosis, three degrees of disease are recognised by the trust deed. They are:

> (1) **Silicosis Class 1**. Sufferers have mild lung function impairment i.e. less than 10% lung function impairment. The Trust benefit for this category of silicosis is R70 000. ODIMWA does not compensate for silicosis of this nature.
>
> (2) **Silicosis Class 2**. Sufferers have moderate lung function impairment i.e. more than 10% and less than 40% lung impairment. Under ODIMWA, members of this class are considered to have Silicosis First Degree. The maximum compensation payable for Silicosis First Degree is R63 100. The Trust benefit for this category of silicosis is R150 000.
>
> (3) **Silicosis Class 3**. Sufferers have serious lung function impairment i.e. more than 40% lung impairment. This corresponds with Silicosis Second Degree under the ODIMWA regime. The maximum compensation payable for Silicosis Second Degree is R140 506. The Trust benefit for this category of silicosis is R250 000.

[38] The trust deed also provides for a special award of up to R500 000, payable at the discretion of the trustees, to any person who is certified as having Silicosis Class 3. Such a person must have at least 10 years cumulative employment; must have undertaken risk work on one or more qualifying mine(s) during the qualifying period; and must have at least one of the following disease processes: progressive massive fibrosis for mineworkers aged less than 50 years; lung cancer; *cor pulmonale*; or massive fibrosis involving the lungs or oesophagus.

[39] Provision is made for two categories of dependant silicosis claims. The first involves a "Dependant Silicosis Claimant Category A". Here, the claimant is the dependant of a mineworker who died during the period between 12 March 1965 and the effective date, and in respect of whom the Medical Certification Panel determines that silicosis was the primary cause of death. The benefit provided for "Dependant Silicosis Claimant Category A" under the trust deed is R100 000 per concerned mineworker. The second involves a "Dependant Silicosis Claimant Category B". The claimant here is the dependant of a mineworker who died in the period between 1 January 2008 and the effective date, who does not satisfy the requirements in respect of category A, but in respect of whom the medical certification panel or the Trust Certification Committee determines that the deceased had Silicosis Class 2 or Class 3. This category caters for difficulties of proof, particularly in relation to showing that silicosis was the primary cause of death. The benefit provided for "Dependant Silicosis Claimant Category B" under the trust deed is R70 000.

[40] The Trust will pay benefits to tuberculosis claimants as follows:

[1] *"Tuberculosis Claimant".*

This is someone who undertook risk work at a qualifying mine during a qualifying period for a cumulative period of at least two years between 1 March 1994 and the effective date; and who was diagnosed with tuberculosis while so employed or within 1 year of leaving employment. If the lung function impairment caused by tuberculosis is in the *"first degree"* as defined in Schedule H to the trust deed, the benefit payable is R50 000 per affected person. By comparison, under ODIMWA the maximum compensation payable for 'first degree tuberculosis", is R63 100. If the lung function impairment caused by tuberculosis is in the *"second degree"* as defined in Schedule H to the trust deed, the benefit payable is R100 000. Under ODIMWA, the maximum compensation payable for "second degree tuberculosis" is R104 506.

[2] *"Historical Tuberculosis Claimant".*

This is someone who, between 1 March 1965 and 28 February 1994, undertook risk work at a qualifying mine during a qualifying period, for a cumulative period of at least two years; and who was issued with a *"tuberculosis certificate"* under the provisions of ODIMWA, while he was employed or within 1 year of his leaving employment. If the tuberculosis certificate does not disclose the degree of impairment, the benefit payable is R10 000. If the tuberculosis certificate discloses that the degree of impairment was in the *"first degree"*, the benefit payable is R50 000. If the tuberculosis certificate discloses that the degree of impairment was in the *"second degree"*, the benefit payable is R100 000.

[3] *"Dependant Tuberculosis Claimant"*.

This is the dependant of a mineworker with two or more years' cumulative service of undertaking risk work at a qualifying mine during a qualifying period and who is determined by the medical certification panel of the Trust as having had tuberculosis which was the primary cause of his death before the effective date, while employed or within 1 year of leaving his employment. The benefit provided for is R100 000 per affected worker.

[41] The Trust does not provide for progression of the disease condition and claimants will receive only one benefit. This represents a negotiated compromise between the parties. In exchange for removing the possibility of claimants filing new claims if their disease progresses, the parties agreed to increased values of the benefits payable in each disease category. The result has three advantages: First, it eases the claimants' administrative burden. This is important in light of the fact that most claimants are poor and live in rural and remote parts of Southern Africa. (Mr Spoor is of the opinion that very few, if any, would be likely to return to the Trust even if their disease were to progress.) Second, it ensures that claimants can receive meaningful compensation in a timeous manner. (Having regard to the mortality rates and advanced ages of qualifying claimants, Mr Spoor submits that it is preferable to secure higher benefits for them as soon as possible.) Third, it minimises the Trust's administration costs because the Trust will be able to focus its resources on locating, examining and paying as many eligible claimants as possible.

[42] The benefits are payable by the Trust as once-off, lump-sum payments. Dr Budlender discusses the comparative benefits of this method of payment in her affidavit and opines that the choice of lump sum awards rather than recurrent payments is more cost effective than paying benefits in monthly instalments. It also gives ex-mineworkers and their families more control over the use of their money. Trust benefits will be adjusted annually, from the last day of the month on the third anniversary of the payment date (the payment date is the last day of the calendar month immediately following the calendar month in which the effective date falls), in accordance with the Consumer Price Index for the preceding year. The trustees are required to establish a financial literacy programme to assist claimants to manage their awards and must also establish a fraud protection programme.

[43] Claimants who are alive as at the effective date but who die before submitting a claim, or who die after submitting a claim but before their claim is paid, will be treated as living claimants and the full value of their claim will be paid to their estates.

[44] The process to be followed by claimants for submitting their claims to the Trust is set out in clause 12 of the trust deed. Two reviewing authorities shall be established to resolve disputes lodged by a claimant (within 30 days) over determination in the claims process (clause 12.15 of the trust deed). These are:

> [1] The Medical Reviewing Authority, which will hear and resolve disputes over any certificate of medical finding or medical ineligibility by the Medical Certification Panel. The Medical Reviewing Authority shall be an

independent medical practitioner appointed by the trustees, with wide investigative powers and the power to confirm and uphold or rescind a certificate of medical finding (clause 12.15.5 of the trust deed);

[2] The Certification Reviewing Authority will hear and resolve disputes over any certification of eligibility or non-eligibility by the Trust Certification Committee. The Certification Reviewing Authority shall be an independent person appointed by the trustees with wide investigative powers and the power to confirm and uphold or rescind a Trust certification (clause 12.15.6 of the trust deed).

Termination and indemnity

[45] As stated, the establishment of the Trust is intended to fully and finally settle all silicosis and tuberculosis claims that could be brought against the Settling Companies by class members who do not opt out. The class representatives accept as much. It is for this reason that they agree to an order that the *Nkala* class action will be terminated as against the Settling Companies if the settlement agreement becomes effective. We are of the view that such an order will be justified because there would be no basis for permitting the *Nkala* class action to proceed against the Settling Companies in respect of silicosis and tuberculosis related claims under these circumstances. The Settling Companies would have settled their proportionate share of any liability in full, and are entitled to be safeguarded against a finding of liability or the apportionment of damages against them in any future claims that may be brought by class members against the Non-Settling Companies.

[46] In terms of clause 4.2 of the settlement agreement the parties also agreed that:

> *"4.2. The Settling Claimants shall henceforth:*
>
> *4.2.1. not make claims against a Third Party and any of the Companies or Affiliates (as at the Signature Date) together, whether jointly or jointly and severally; and*
>
> *4.2.2. pursue claims, other than in respect of the Preserved Claims, only against Third Parties, whether jointly, severally or jointly and severally, such that Settling Claimants shall be limited to the degree of liability proven against a Third Party or the Third Parties at a trial or trials, in accordance with section 2(10) of the Apportionment of Damages Act 34 of 1956 and/or such that Settling Claimants shall not be entitled to claim or recover from a Third Party or Third Parties any damages for which a Third Party or Third Parties is or are entitled to a contribution or indemnification from any of the Companies or their Affiliates (as at the Signature Date)."*

[47] The effect of this provision is that class members cannot pursue Settling Companies for any further damages, whether arising out of claims for contributions or for indemnification by third parties. Members of the Settlement Classes retain their rights against Non-Settling Companies for exposure to silica dust whilst in their employment. The class representatives have undertaken that, in the event that they pursue any future claims against Non-Settling Companies,

they will not seek to establish any liability on the part of the Settling Companies. This means that the Settling Companies will not have any interest in those proceedings.

IS THE SETTLEMENT AGREEMENT FAIR, ADEQUATE AND REASONABLE?

[48] We accept, as a starting point, that the settlement agreement is not intended to, and could never make full redress for the loss and harm suffered by gold mine workers, their families and communities over the last 100 years as a result of the epidemic of lung disease that afflicted them, and the system of migrant labour and racial discrimination that sustained this epidemic. It is therefore important to recognise that, as with all negotiated settlements, the settlement agreement represents a compromise between the parties and their competing interests. The settlement is a private legal settlement of the civil claims of the class members, represented by the class representatives and the class lawyers on the one hand, and the Settling Companies on the other.

The class representatives' approach to the settlement agreement

[49] Prior to the conclusion of the settlement agreement, the class lawyers embarked on an extensive round of consultations with the class representatives, government, trade unions and non-governmental organisations. At all times, extensive reliance was placed on the advice of independent professionals, and, in particular, medical experts, epidemiologists, actuaries and economists. The class representatives also relied on the advice of counsel and the expertise of

RSI and AK's US-based partners, Motley Rice LLC ("Motley Rice") and Hausfeld LLP ("Hausfeld") ("the consulting US law firms"), who have substantial experience in large and complex litigation and class actions. The class representatives are of the opinion that a class action settlement is the best outcome for the classes and the Settling Companies.

[50] A key consideration weighing on the class representatives and the class lawyers' approach to the negotiations was the issue of time and delay. A class action might continue for at least another 5 – but possibly even 10 or more years – before it is resolved. Many of the class members are elderly and many are unwell. During the last 6 years, 18 of the original 56 class representatives in the consolidated application for class certification have died. That is over 30% of the class representatives that instituted the litigation in 2012. RSI has approximately 25 806 individual clients. The great majority are from the traditional labour supplying regions and specifically Lesotho, and the former Transkei area of the Eastern Cape and Botswana. Since AK and RSI began with the *Mankayi*[28] test litigation in 2006, it is estimated that approximately 40% of the former gold mineworkers alive at that date have since passed away. The prospect that the litigation might continue for another 5 or 10 years before it is resolved, is therefore not a favourable one. While we accept that litigating individual claims to conclusion is undoubtedly the best way to determine the exact value of each mineworker's claim, there are many drawbacks in this approach, which were discussed with the class representatives and their social partners. The feedback received was that all reasonable steps to settle the matter should be taken and

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[28] *Mankayi v AngloGold Ashanti* 2011 (3) SA 237 (CC).

that the class representatives were willing to make significant compromises to achieve an early settlement.

[51] Another consideration that informed the decision to settle, from the class representatives' perspective, was the need to mitigate the risk associated with changes in the structure and in the fortunes of mining companies and the gold mining industry in general. It has been submitted that, by all accounts, the gold mining industry is in decline. Many gold mines have indeed been closed and many others have been wound up or became insolvent, often at huge cost to the workers employed by them. The industry is also engaged in an ongoing restructuring that began in the late 1990's. These changes may have a significant impact on the financial position of the Settling Companies and on their ability to pay compensation in the future. RSI's own research indicates that many gold mines are marginal and that their continued sustainability is subject to variables that are often outside of management's control. These factors include the gold price and the Rand/Dollar exchange rate and political risks. It is therefore not a certainty to the class lawyers that in 10 years' time (if not more), when the class action litigation might have come to a conclusion, that all or even most of the Settling Companies would still be in business or that they would have any ability to pay compensation.

[52] The class representatives are satisfied that the settlement agreement provides benefits to class members that would not be attainable in the class litigation. First, significant financing is made available to the Trust to locate potential class members. Second, except in particular circumstances, the trust deed provides that, in the absence of approval ODIMWA certificates, class

members who submit claims to the Trust will receive medical examinations, which will be paid for by the Trust. Third, the settlement agreement establishes a mechanism to provide compensation to class members who develop silicosis or tuberculosis during the lifetime of the Trust – not only those that presently have a claim, provided that exposure to silica dust or the undertaking of risk work took place on or before the effective date. Fourth, the settlement will be aligned with the compensation scheme governed by ODIMWA and facilitated by the Medical Bureau for Occupational Diseases ("MBOD") so that claimants compensated through the MBOD may also be referred to the Trust to receive compensation under the trust deed. Provision is made for the appointment of a government-appointed trustee and it is expected that this will assist to facilitate the alignment of these processes. Fifth, the settlement contains relaxed proof requirements for eligibility for payment and some of the claimants eligible for payment of benefits under the settlement would have no entitlement to damages in the class action. For instance, in respect of "Dependant Silicosis Claimant Category B" claims, the dependants are not required to prove that silicosis is the cause of death of the breadwinner. It suffices if the person was certified to be suffering from Silicosis Class 2 or Class 3 before their death. Another example is the tuberculosis claimants, who need not establish that they contracted tuberculosis as a result of exposure to dust to claim from the Trust, only that they have contracted tuberculosis and have the requisite employment history on the gold mines. Mr Spoor states that it is reasonable to assume that a fair proportion of these persons, who will be eligible to receive a benefit under the settlement, would not have been able to prove their claims and would not have been able to recover anything at the conclusion of the trial. In addition, any claimant who is

eligible to claim from the Trust, who dies at any time between the effective date and the end of the lifetime of the Trust, will be treated as a living claimant and their dependants may claim the full benefit for living claimants from the Trust.

[53] The uncertainty of litigation is another factor that weighed heavily on the class representatives. While some of the mining companies may be held liable to members of all the classes over the whole class period, others may be held liable to the members for a limited number of sub-classes or for only a part of the class period, or not at all. This may impact significantly on the numbers of persons who will be successful at the conclusion of the trial and on the quantum of damages that may be awarded. Whether or not parent companies are found to be liable at the close of the first stage of the litigation would have a significant impact both on the number of class members who are compensated and the amount of the compensation received. This is because some of the subsidiary companies that owned and controlled the mines where many class members were employed, have since been wound up and deregistered.[29]

[54] Carina Du Toit ("Ms Du Toit"), an attorney at the LRC, who deposed to an affidavit in support of the settlement agreement, states that the LRC, with support of Legal Aid South Africa, had amassed considerable knowledge and expertise in relation to silicosis and the legal issues arising from claims during their collaboration with the London based law firm, Leigh Day, during the President Steyn litigation or the "Blom" litigation.[30] The President Steyn litigation was finally settled during September 2013, shortly before the test case actions

[29] Leslie Gold Mines Ltd was in final winding up and Bracken Mines Ltd was dissolved at the time of the conclusion of the settlement agreement.
[30] *Blom and Others v Anglo American South Africa Ltd.*

were to be decided by arbitration. The LRC therefore contributed extensive scientific and industry-related research and information during the certification application and the negotiations. The LRC is content that the settlement agreement is the best possible outcome for the class of applicants that the LRC represents.

[55] Ms Du Toit states that the development of the common law on transmissibility of general damages loomed large during the negotiations regarding the benefits for dependant silicosis claimant classes and was one of the last and most difficult issues to be negotiated. A compromise was required from all the parties in order to agree on the benefits for the dependant silicosis claimant classes. The LRC recognises that the settlement agreement does not wholly embrace the High Court's development of the common law on transmissibility of general damages (which is currently on appeal before the SCA). They are however of the opinion that the benefits provided for, in the context of a settlement, is a substantial increase from initial offers and that the settlement is fair and reasonable, particularly considering the difficulty that would likely have arisen at trial to overcome issues regarding prescription, cause of death and proof of damages.

Settling Companies' approach to the settlement negotiations.

[56] The Mining Industry Working Group on Occupational Lung Diseases ("the Working Group), which comprised of the six mining companies, who in turn, are the founders of the Trust and who represent all the Settling Companies, was initially established in 2014 to find a comprehensive and sustainable solution to

tackling compensation for occupation lung diseases among current and former gold mineworkers of the members of the Working Group. Since then the Working Group has been involved in extensive negotiations and consultations – with one another, as well as with the Settling Companies, government and various other stakeholders – to find and give effect to a holistic solution.

[57] The complexity of the negotiation process is described in the affidavit of Mr John William Daniel Brand ("Mr Brand"), an expert in the field of mediation. He states that it was the most complex negotiations he has ever been involved in. The settlement negotiations involved mining companies who have different approaches, needs, interests, risk profiles and cultures. Historically and currently, their policies and procedures regarding the manner of addressing dust control and the monitoring thereof differ. They each have their own unique geological circumstances and are competitors with each other and are potential adversaries in future litigation. Their financial capacities to conclude the settlement also differed. Each of them had different legal, actuarial, accounting and other advisors. On the other side, there were five firms of lawyers representing tens of thousands of claimants and they too, had different priorities. For example, all were concerned about silicosis but some were particularly concerned about tuberculosis and others about dependants. The negotiations involved a multiplicity of complex medical, financial, legal, social and communication issues and overlapped with the complex process of assisting the MBOD and CCOD to upgrade its services and processes. The negotiations required consultation with a multiplicity of non-party stakeholders representing different and overlapping interests. It involved large sums of money and took place against the backdrop of a stressed economic environment in the

gold mining sector. Notwithstanding the complexity, the negotiations had to be expedited to ensure that the costs of litigation were kept to a minimum for all parties and to ensure timely compensation to eligible claimants.

[58] Mr Brand opines that the settlement agreement is innovative and is rated by many, both here and abroad, as one of the most complex multi-party class action settlements in the world. The interests and concerns raised by the class lawyers, the Settling Companies and other stakeholders had to be weighed up in light of the common goal of reaching a settlement that is reasonable, adequate and fair. He cautions that, because the provisions of the settlement agreement are all closely interrelated, any changes to the terms of the settlement agreement may trigger the need to re-negotiate the entire agreement – with the obvious risk that settlement may not be reached again.

[59] The Working Group was chaired by Mr Graham Briggs ("Mr Briggs"). He was previously the Vice President of the Chamber of Mines of South Africa, also known as the Minerals Council of South Africa, and has extensive experience in the operation and management of gold mines in South Africa and abroad. He states that the Working Group agreed to the engagement process not merely to mitigate their own risk, but because they felt a sense of responsibility towards current and former employees who are or might in future be affected by the diseases under consideration. They identified, amongst others, two interrelated issues that needed to be dealt with among its members, namely: The challenges affecting the MBOD and CCOD in paying statutory compensation to workers; and, the possible settlement of the *Nkala* litigation.

[60] The Working Group became aware, through its engagements, of massive backlogs in the MBOD and CCOD which meant that mineworkers were practically unable to access the statutory compensation to which they were entitled.[31] In many cases the mineworkers had been left without access to proper medical evaluation or support. In its efforts to assist in the improvement of the MBOD and CCOD's operations, the Working Group has, to date, contributed more than R121 000 000 (R121 million) to the MBOD and CCOD and it has seconded and engaged staff to assist them. So far, this has allowed the MBOD and CCOD to improve and upgrade its processes and administration. Through financial contributions from the members of the Working Group and the Minerals Council of South Africa, the MBOD, the CCOD and the Department of Health have established one-stop service centres in labour-sending areas, which will assist claimants with medical examinations and compiling and lodging their claims. In their supporting affidavits, Mr Brand, Mr Briggs and Dr Malcolm Barry Kistnasamy ("Dr Kistnasamy"), who is the Compensation Commissioner for Occupational Diseases, describe in detail the extensive efforts that the Founders have made in improving the administration and the efficiency of the MBOD and CCOD. Mr Briggs opines that the settlement agreement will provide significant benefits to the class members as they will be able to relatively quickly access medical testing and, where applicable, compensation for their conditions not just from the Trust, but also from ODIMWA. The alignment of the Trust's administrative functions in locating claimants and in the processing of claims, as

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[31] Mining companies contribute, by way of levy payments, to the Mine and Works Compensation Fund ("the Compensation Fund") that was established by ODIMWA. The monies in the Compensation Fund are intended to be disbursed by the State, through the MBOD/CCOD, to claimants who qualify for statutory compensation. Funds of around R4 billion in the Compensation Fund represent the levies paid by the mining companies. A portion of this amount related to unpaid claims and unreported claims.

well as the overlap in four disease categories with the MBOD and CCOD, will assist and enhance the Trust's ability to carry out its object. The practical significance of the correlation between the four categories of disease is that the Trust may accept an ODIMWA certificate (defined in clause 1.1.6 of the trust deed) as proof of a qualifying disease for purposes of claiming a benefit from the Trust. Importantly, as Dr Budlender underscores *"an award from the Tshiamiso Trust will not disqualify claimants from also successfully claiming an ODIMWA award. Given the backlogs in dealing with ODIMWA awards, if the Trust can function more efficiently, workers will enjoy the benefit sooner and, once located, will also have access to ODIMWA awards"*.

[61] The Working Group took the view that the respondent mining companies were more likely than not to substantially prevail in the class action litigation, but that it would take a considerable period of time to reach finality. This was because the claimants anticipated bringing a class action in two phases. In phase 1 the parties would litigate any common issues that could be dealt with and determined against all (or many) of the mining company defendants in a single action. Phase 1 would take a considerable time to litigate because it related to the conduct of more than 80 mines (each with a number of different shafts) during a period of over 50 years. The discovery process relating to the claims would be massive and cumbersome, and it would entail significant costs and time to carry out. Many experts, including industry experts, would be required to testify during phase 1 of the proceedings. The preparation and court time needed to litigate phase 1 would add to the substantial costs, and would take many months of leading evidence, including cross examination. Whatever the outcome of phase 1, it would be open to any of the parties to lodge an

appeal against the decision. In phase 2, class members would have to opt out to a further process in order to pursue individual issues against particular dependants. That could potentially trigger hundreds or thousands of cases being brought, potentially in parallel to one another, each involving complex issues of prescription, negligence, causation and apportionment of damages. The costs and time associated with defending those cases would be astronomical.

[62] The Settling Companies took into consideration the interests of the mineworkers who were employees or former employees of the member companies and the fact that litigation was unlikely to garner any meaningful benefits for them. They also considered the negative impact on the Settling Companies' reputations for as long as the claims against them remain unresolved. The Working Group came to the conclusion that money and time would be better spent devising long-term solutions to the systemic and deep-rooted issues around occupational lung disease, and thereby procuring real benefits, in as short a time as possible, for current and former sick mineworkers.

The reasonableness of the quantum of the benefits payable to claimants

[63] In determining the reasonableness of the quantum of the benefits, consideration must be had to the quantum at two levels: the quantum of the overall settlement and the quantum of the benefits payable to the individual class members. The applicants believe that the benefits provided for under the settlement agreement, after discounting the risk and costs associated with protracted litigation, are meaningful and that they bear a reasonable relationship to the value of the claims. In her affidavit, Dr Budlender, analyses the benefits

payable by the Trust and their impact on beneficiaries and their families. She concludes that the benefits payable by the Tshiamiso Trust "*will be significant for the vast majority of the mineworkers and their dependants*".

[64] An important factor in consideration of the reasonableness of the quantum of the benefits paid under the settlement agreement is the statutory benefit payable to class members under ODIMWA, which is funded 100% by the mine owners through the payment of levies to the Mine and Works Compensation Fund. The Trust will align with the ODIMWA scheme and the intention is that persons who are certified by the Trust will be eligible to receive their ODIMWA benefit without any further certification by the MBOD. The trust deed is therefore deliberately framed to facilitate the interrelationship between the Trust and the ODIMWA compensation scheme managed by the MBOD and CCOD.

[65] The effect of an eligible claimant who was not previously compensated under ODIMWA is that, absent any benefit modifier (i.e., pro-rated deductions for employment at non-qualifying mines or over non-qualifying periods), the combined benefits payable will be the following:

Silicosis Class 2	R213 000 (being an amount of R63 100 from ODIMWA plus an amount of R150 000 from the Trust)
Silicosis Class 3	R390 506 (being an amount of R140 506 from ODIMWA plus an amount of R250 000 from the Trust)
First Degree Tuberculosis	R113 100 (being an amount of R63 100 from ODIMWA plus an amount of R50 000 from the Trust)
Second Degree Tuberculosis	R240 506 (being an amount of R140 506 from the ODIMWA plus an amount of R100 000 from the Trust)

[66] Mr Spoor is of the opinion that the general damages that may reasonably be recovered by silicosis class members, if the matter goes on trial, is between R60 000 and R400 000.[32] These amounts align with precedents for lung injuries in Koch's quantum yearbook.[33] In his assessment he considered that the members of the silicosis class are fairly homogeneous and are almost uniformly poor. The majority is in their late 50's and 60's and is unemployed, most for several years. In most instances gold mine workers were dismissed on grounds of medical incapacity in less than 10% of the cases. The largest proportion was retrenched or simply stopped working. At the best of times the work is physically demanding and injuries associated with accidents and chronic conditions associated with aging are commonplace. Their last earnings were in the range of R1000 to R5000 per month depending on how long ago they stopped working. There are very few if any of the mineworkers that have less than 10 years underground exposure and the average period of service is approximately 17 years. The degree of lung function impairment among them is heavily weighted towards radiological silicosis or mild lung function impairment. Only a small proportion has incurred any significant medical expenses for the treatment of their medical condition. To the extent that they have received medical attention it pertains mainly to the treatment of pulmonary tuberculosis at public health facilities. Very few have access to private medical care through membership of a medical aid scheme or otherwise.

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[32] R60 000 for radiological silicosis, R125 000 for lung function impairment of less than 10%, R 225 000 for lung function impairment of between 10% - 40%, and R400 000 for lung function impairment greater than 40%.

[33] Koch. The Quantum Yearbook 2018.

[67] Mr Spoor acknowledges that individual claims may be much larger than the average award. If the claimant is young and employed and in a high paying job at the time he or she contract silicosis, the values of that individual's claim could amount to as much as a few million rand. However, such high value claimants are rare and they have the right to opt out of the settlement scheme should they wish to do so.

[68] The value of the dependants' claims is generally low because of the advanced age, high levels of unemployment and low incomes of the breadwinners who die from silicosis or its complications. Based on these demographics, Mr Spoor estimates that the typical dependant's claim would be less than R150 000. This estimate is based on the assumption that the average dependant lost five years' worth of the breadwinner's support; that the mineworker earned R5000 per month; and that 60% of those total earnings would accrue to the dependant. On these assumptions, the dependant's claim would amount to R180 000. Deductions for contingencies would reduce that to below R150 000.

[69] The ODIMWA benefit is funded wholly by the employers and must, in terms of settled law, be off-set against any damages award. Less than 10% of the silicosis class members have received the ODIMWA benefits to which they are entitled. If the matter proceeds to trial the overwhelming majority of class members awards would therefore be reduced by this off-set. This also applies to

dependants' claims, as the statutory benefits provided for under the ODIMWA are transmissible after death and are not reduced.[34]

[70] For the reasons above, the quantum of the damages that the class members might be able to recover through continued litigation, has been "discounted" in the benefits payable by the Trust. The discount on the amounts recoverable by silicosis claimants and silicosis dependants is modest and reflects the parties' assessment of the uncertainty and risk, and the potential costs and benefits associated with litigating the claims to conclusion. It is reasonably anticipated that once a claimant has been screened and compensated under the settlement scheme, they will be made aware of the risk of disease progression and that they will take steps to ensure that they undergo the periodic free medical benefit examinations provided for under ODIMWA. It is anticipated that they will then also receive the statutory compensation that becomes due to them if and when the conditions progress to first degree or second degree silicosis or tuberculosis.

[71] The discounts for members of the tuberculosis-only class and tuberculosis dependants, assuming they succeeded in their claims, are higher. It reflects the fact that the risk of the tuberculosis claims not succeeding in the litigation are larger, particularly given the complex causation issues arising in these claims. The tuberculosis-only claimants are also more diverse when it comes to their demographic and earning profiles. Unlike silicosis, where the disease is very unlikely to occur in persons with less than 10 years' of underground exposure,

[34] Other ODIMWA benefits that would likely be off-set in any damages award is the cost of the periodic medical examinations and the medical benefits that must be provided by the employer to persons who contract a compensable disease while employed.

tuberculosis can and does occur in persons with much shorter exposures. The age range of victims, and hence the range of special and general damages that may be recoverable in individual actions, is thus considerably wider. In the case of tuberculosis-only claimants, they would need to establish that their contracting of tuberculosis was attributable to exposure to excessive quantities of harmful dust rather than to any other cause, and if it was multifactorial, the relative contributions of other factors, such as HIV. The table below reflects the discounts that were applied to the tuberculosis claimants.

TB only class	Settlement benefit	ODIMWA benefit	Total	Estimated civil damages	Discount
TB Claimant First Degree	R50 000	R63 000	R113 000	R225 000	50%
TB Claimant Second Degree	R100 000	R140 506	R240 506	R400 000	40%
Undisclosed Impairment	R10 000	R0	R10 000	Indeterminable	n/a
First Degree	R50 000	R63 000	R113 000	R225 000	50%
Second Degree	R100 000	R140 506	R240 506	R400 000	40%
Dependant TB Claimant	R100 000	R63 000 to R140 506	R163 000 to R240 506	R150 000	None

[72] AK and its partners considered that the damages that may be recovered by tuberculosis claimants might be half of what may be recovered by silicosis claimants on the basis that factors other than dust contributed to the contracting of the tuberculosis. Mr Abraham Kiewitz ("Mr Kiewitz") is content that, in relation to tuberculosis-only dependants' claims, the discount reflects the difficulties in

proving that the breadwinner died of tuberculosis in circumstances where, in the great majority of cases, there is no post-mortem and there is a paucity of other medical information regarding the actual cause of death.

[73] The quantum of the benefits payable compares favourably with the benefits payable to comparable schemes. These include the Cape PLC settlement scheme, which was a UK settlement of claims of several thousand South African asbestos miners; the Asbestos Relief Trust and the Kgalagadi Relief Trust that compensate former asbestos mineworkers with asbestos related lung diseases; and the Qubeka Trust, which was established pursuant to a settlement of litigation undertaken in South Africa on behalf of several thousand former gold mineworkers employed by AngloGold Ashanti and Anglo American. Save in respect of mineworkers who have asbestos-related cancers, the quantum of damages across all other classes is highest in this settlement.

The quantum of the overall settlement

[74] Affordability is always a consideration in any settlement and is a factor that must be taken into account in assessing the reasonableness of the settlement. The settlement agreement provides for the Trust to pay benefits on a defined basis, funded annually as claims are paid, and for that liability to be secured by guarantees to be provided by the Founders. After the third year of operation of the Trust, the value of the benefits will increase annually at the rate of the Consumer Price Index. The main advantage for the beneficiaries is that the value of the benefits will be maintained over the life of the Trust.

[75] Mr Spoor states that if the settlement had to provide for a single capital contribution (defined contribution), then the value of the benefits payable to beneficiaries would have to be adjusted from time to time depending on the number of claims paid. If the number of claims made exceeds the number of claims anticipated, the value of the benefits would need to be adjusted (using actuarial principles) to maintain the solvency of the Trust. While the parties each employed experts and actuaries to calculate the likely number of claims, the lack of reliable data available means that there is a significant margin for error. We are in agreement with the applicants that the claimants are better served if the individual quantum is fixed and secured for the life of the Trust.

[76] The "top-up" financing model (also understood to be a defined benefits model) has taken a considerable degree of risk out of the settlement, and enabled the parties to agree on defined benefits that are higher than would likely have been the case if the settlement had been funded by a once-off capital contribution (i.e. a defined contribution model). Dr Budlender opines that the election of the top-up funding model is sensible, as it is uncertain how many claims will be made against the Trust and the overall amount of benefits it will be required to pay to its beneficiaries.

[77] The adequacy of the administrative budget also greatly impacts the numbers of eligible claimants who are located, screened and compensated over the lifetime of the Trust. This depends largely on how efficiently the Trust achieves its objects. The applicants are convinced that the money allocated to

the administration of the Trust is sufficient for the Trust to fulfil its objects.[35] The Trust has the opportunity to benefit from other initiatives that have been or are being established to ensure the payment of outstanding pension and provident fund moneys owed to gold mine workers. This includes working with regional World Health Organisations programmes focused on addressing tuberculosis across the sub-continent. The class lawyers are therefore confident that the Trust, assisted by experienced trustees, will be adequately resourced to fulfil its mandate of locating and compensating eligible claimants.

The risk of an inefficient Trust administration

[78] The greatest risk in the implementation of the settlement is that the Trust may not be managed and administered efficiently and effectively. We agree with the applicants that the best safeguard against this risk is to appoint capable and competent trustees and provide adequate funding. The applicants have, therefore, taken considerable care to nominate persons who have proven themselves to be capable, competent and who will devote themselves to the

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[35] The consideration that informed this assessment include the following: A chest X-ray from a mobile X-ray unit deployed to a labour supplying area costs approximately R300 per X-ray, a further R300 per lung function test, and further R300 per medical examination. If R50 000 000 (fifty million Rand) per year was devoted to mobile medical units, it would be adequate to screen over 55 000 former gold mineworkers per annum, or over 650 000 over the lifetime of the Trust. However, even that can be improved upon. Technology exists to perform real time X-ray screening using computer aided diagnosis, and this would allow medical staff to eliminate medically non-qualifying claimants immediately, and thereby avoid the need for time consuming and relatively costly lung function test and medical examinations for persons who do not have a lung disease. This would significantly improve efficiencies and costs. Over the last several years, there has been some significant donor Investment, predominantly from the Working Group, in establishing medical screening facilities (so called "one stop shops") in the labour supplying areas, including in neighbouring states. The parties are optimistic that the Trust will be able to leverage the benefits of these investments to enhance efficiencies and reduce the cost to the Trust of medical screenings. This is confirmed in the affidavit of Dr Kistnasamy.

achievement of the Trust's objects. (The *curriculum vitae* of the trustees are attached to the application and confirm this.)

[79] The trust deed sets a high standard of governance and accountability for the trustees. Should this standard be breached, the Trust Property Control Act provides for a wide range of stakeholders to seek remedies through the Master of the High Court and through the High Court itself.

[80] The parties are also vested with the power to replace their nominees from time to time, by agreement between the agent and the claimants' agents. A non-performing trustee may be removed from office under clause 14.5 of the trust deed. Further, through the agent and the claimants' agent, the applicants have reserved the power to monitor the performance of the Trust and to make the interventions where strictly necessary.

[81] The applicants submit that the settlement agreement, which includes the trust deed, are complex documents and have required significant expertise from lawyers, medical professionals, actuaries and auditors, and repeated amendments to get it right. There however still remains scope for dispute and disagreements in the interpretation or application thereof. This eventuality is catered for in the dispute resolution mechanisms established in the trust deed. The agent and the claimants' agent will play an important role in resolving expeditiously any disputes that may arise. In addition to the general provision for arbitration to resolve any dispute between the parties (in clause 26 of the trust deed), the trust deed provides a special mechanism (under clause 10 of the trust deed) to resolve any disputes arising over the amounts payable by any of the

founders. For such disputes the parties have agreed to appoint an expert whose decision will be final and binding.[36]

Incomplete mineworker employment records

[82] The applicants submit that the claims process for the determination whether or not any benefit modifiers apply may, in certain instances, become a challenging process. The challenge arises as a result of inadequate existing work records. While the MBOD should have a complete record of all risk shifts worked by gold mineworkers, this is in fact not the case due to a substantial breakdown of the MBOD's system after 1994, which resulted in records either lost, destroyed or simply not kept.

[83] The class lawyers and the Working Group have taken significant steps to remedy this. With the support of the Working Group the MBOD database has been digitised. This aspect is extensively dealt with in the affidavit by Dr Kistnasamy. In terms of clause 11.1.3 of the trust deed, read with and subject to clause 3.6 of the settlement agreement, the Settling Companies have committed to allowing the trustees to complete a search of their employment records to identify as many persons as reasonably possible who might qualify for compensation under the Trust, to ensure that they are assisted in lodging a claim. In terms of clause 11.2 of the trust deed, read with and subject to clause 3.5 of the settlement agreement, the class lawyers will also contribute their client databases to the Trust. Negotiations are underway to secure access to the

[36] See clause 10 of the trust deed read with the definition of expert in the trust deed.

ODIMWA database and employment data held by The Employment Bureau of Africa ("TEBA").

[84] The Settling Companies have a financial incentive to populate the Trust database with all accurate information available, so as to reduce their liability for the benefits payable to eligible claimants. This is because, under the trust deed, the *onus* rests on the Settling Companies to establish that benefit modifiers are applicable to a claim. Their agent is required to motivate for benefit modification and furnish supporting documentation to the Trust Certification Committee within 90 days (clause 5.6.3 of the trust deed). This court was assured that, as the MBOD database is populated with the employment records of the Settling Companies, it will be possible to confirm claimants' employment histories quickly and reliably.

CONCLUSION

[85] If the class action proceeds to trial, both the class lawyers and the Settling Companies feel confident that they would ultimately be substantially successful. All the parties recognize, however, that the mammoth litigation would have been a long and drawn out process that could last more than 10 years, during which time the legal fees for all the parties would have accumulated to inordinate levels. In the view of the class lawyers, the mortality rate of class members would, over the course of the litigation, likely be around 4% per annum. The result of litigating the action would therefore be to delay justice for many of the class members and to deprive those who die before damages are paid of any modicum of justice. There is also a significant risk that the financial position of

some of the defendant companies may deteriorate to the extent that their ability to satisfy any judgment obtained against them would be doubtful.

[86] Litigation is an inherently risky process. The claimants with the best prospects of success, if the matter is to proceed to trial, were assessed to be living claimants suffering from silicosis. The prospects of success in litigating the tuberculosis-only claim was always more challenging, due to the complexities of proving that tuberculosis is caused by negligent exposure to harmful quantities of dust. Unlike silicosis (which has a single cause – exposure to silica dust), tuberculosis has multiple causes. Thus, even though the association between silica dust exposure and pulmonary tuberculosis is well established, it will be difficult to establish causation. The claimants would have to meet the test for factual causation in *Lee v Minister of Correctional Services*[37] and show that proper systemic measures by the mines would have materially reduced the risk of mineworkers contracting tuberculosis. Other non-occupational factors for contracting tuberculosis (which are common cause), such as person's living conditions, proximity to infected persons, or the person's HIV-status, complicate the enquiry. It is clear that a significant portion of class members who are eligible to receive compensation under the settlement could not be assured of success if the matter were litigated to a conclusion. This is an aspect that weighs heavily in the assessment of whether the settlement agreement is in the interest of justice.

[37] (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC).

[87] The settlement fees and disbursements must be compared with those of ongoing litigation. It is difficult for the applicants to provide an accurate estimate of the expected fees and costs associated with running such a large and complex class action through to completion. The Settling Companies' legal representatives have estimated it could take 10 to 15 years to litigate the class action to completion, and, on that assumption, it would cost an additional R2.466 billion for the matter to be litigated to finality (excluding inflation). In terms of the settlement the Settling Companies are paying the full costs of litigation. The costs to be paid to the class lawyers were negotiated separately from, and after, agreement had been reached on the benefits payable to class members, the tariffs and categories for qualifying diseases, and the administrative costs of the Trust, in order to avoid the risk of a conflict of interest arising. No amount will be deducted from the compensation payable to class members under the Trust, and the class members are indemnified against payment of any legal costs. A settlement avoids the costs and risks of a protracted and highly complex class action.

[88] If the settlement agreement is approved it will mean that class members will receive their benefits within a relatively short period, rather than having to wait until the class action trial has run its course. This is of particular importance given the mortality rates and advanced ages of qualifying claimants. The Trust-administered process for paying benefits to eligible claimants at the specified amounts is a streamlined and relatively simple process, which will expedite the pay-out of benefits. The settlement contains relaxed proof requirements for eligibility for compensation by the Trust and provides benefits to class members that would not be attainable in litigation. The quantum of the benefits under the

Trust is meaningful and the Trust scheme is structured to align with and support the compensation scheme governed by ODIMWA.

[89] Given the complexity of the matter, it is difficult to project the prospects of success if the class action proceeded to trial. Even though the class lawyers remain confident of their prospects, success is not guaranteed. It is not in the public interest that a massive amount of resources be applied to continuing with this litigation when a settlement achieved at an early stage allows the resources of the Settling Companies to be applied to compensate persons suffering from silicosis and tuberculosis, and in appropriate circumstances their families. Minerals are a finite resource and by some accounts the industry is in decline. If the settlement is rejected and the litigation continues, there is the very real risk that the ability of the Settling Companies to fund a settlement of this scale will diminish overtime, particularly as resources that might be otherwise have been applied to compensation are instead applied to ongoing litigation.

[90] The class representatives filed affidavits in which they have all expressed their support for the settlement agreement. They indicate that they are anxious for the settlement to be concluded as speedily as possible, so that members of the Settlement Classes – many of whom are very ill and elderly – will receive compensation in their lifetime. Nobody has suggested that the settlement is not in the interests of class members. We believe that settling the class action is more beneficial for the litigants than litigating the claim. The settlement arrived at caters for the best interest of the applicants and is fair, adequate and reasonable.

THE CLASS NOTICE AND OPT OUT PROCEDURE

[91] There may be class members, particularly those with high value claims, who may prefer to litigate their claims individually. They can elect to opt out of the settlement and not be bound by its terms.

[92] Clause 5.2 of the settlement agreement provides that the agent and the claimants' agent shall, without unreasonable delay after the return date, or on a date to be determined by the court, publish the opt out notice. This notice will be published widely, in the manner prescribed in clause 5.4 of the settlement agreement. The applicants propose that the date of 26 August 2019 be determined to enable the class lawyers and Settling Companies' attorneys to make the necessary prior arrangements for publication.

[93] The opt out notice *inter alia* notifies the members of the Settlement Classes that the Settling Companies want to settle the dispute that is the subject of the class action by paying compensation to members of the Settlement Classes who submit eligible claims to the Trust. It explains the effect of opting out and informs class members that if they do not opt out, they will automatically form part of the Settlement Class. This, however, does not mean that they automatically qualify to receive benefits from the Trust. The benefits they receive from the Trust, and whether they receive any benefits at all, will be determined by the medical examinations and related procedures conducted under the auspices of the Trust and their having worked on the qualifying mines during a qualifying period. Those who wish to opt out must do so by completing a notice with supporting documents and submitting it to the independent auditor appointed for this

purpose within sixty (60) days after the last day of publication of the notice. The notice can be transmitted by hand, post, fax or by email. The notice requires class members who wish to opt out to provide certain information depending on whether the person seeking to opt out is a mineworker or a dependant of a deceased mineworker or a person acting on behalf of a minor dependant of a deceased mineworker. The required information includes personal information and supporting documentation.[38]

[94] Ninety (90) days after the publication of the opt out notice the independent auditor must deliver a notice to the agent and the class lawyers advising whether more than two thousand (2000) class members have opted out of the settlement. If more than 2000 class members opt out, the settlement agreement will not come into effect unless the Settling Companies waive that suspensive condition. If the "opt-out threshold" is not achieved (or the condition is waived by the Settling Companies) and the other suspensive conditions in clause 2.1 are fulfilled, then the settlement agreement will become effective. Clause 5.3 of the settlement agreement provides that the agent and the class lawyers will be responsible for publishing a third notice, which shall: (1) Announce the settlement of the claims contemplated in the agreement; (2) Announce that the settlement agreement has become unconditional: (3) Invite the settling claimants to lodge their claims with the Trust, and; (4) Set out the claims lodgement process. The method of publication is the same as that for the

[38] Personal information include their name, date of birth, address, the name of their employer, their employee number and whether they are a current or an ex-worker. Personal details of the dependant, if they are dependants of deceased mineworkers. Supporting documentation, including the identity document of the current or deceased mineworker, proof of their employment, the death certificate (if applicable) and proof of residence.

previous class notices, and is defined in clause 5.4 of the settlement agreement. An initial publication period of thirty (30) days is proposed.

[95] A toll-free Call Centre will be maintained to receive any queries pertaining to the opt-out process. Class members can also send free "please call me" messages to a help-line (to be specified in the opt-out notice), or contact the class lawyers.

SUBMISSIONS FROM OTHER PARTIES

[96] The court order permitted any member of the Settlement Classes and other interested parties to be heard on the return date by delivering notice of their intention to participate in the hearing in the form attached as annexure D to the court order and by delivering an affidavit dealing with their proposed participation by no later than 20 March 2019. Four parties have reacted to that invitation. They are the Southern African Miners' Association ("SAMA"); Xulu Attorneys Inc ; DRD Gold; and ERPM.

SAMA

[97] SAMA initially filed a notice to participate in the approval hearing and filed an affidavit and a counter application. Its fundamental objective was to secure the rights and interests of SAMA and its members and in particular their right to participate in the management of the Trust. SAMA has subsequently withdrawn its opposition and retracted the submissions made in their heads of argument. It

has subsequently informed the applicants that it is anxious to see that the settlement agreement be confirmed as soon as possible so that effect can be given thereto.

Xulu Attorneys Inc.

[98] Xulu Attorneys Inc. instituted a self-standing application in July 2018, which is currently litigated under a separate case number and is being case-managed. In that application it seeks an order recognising Xulu Attorneys Inc. as the legal representative of certain alleged class members, and an order directing the Trust to pay it a reasonable percentage of (or amount from) its alleged clients' claims under the Trust scheme. The class lawyers and Settling Companies have opposed the application and the matter is still pending.

[99] Xulu Attorneys filed a "notice of intention to oppose" the approval of the settlement agreement on 28 January 2019. The notice does not comply with annexure D to the court order, nor does it set out any grounds of opposition. Xulu Attorneys subsequently failed to file an affidavit or written submissions as required by the court order, despite being informed by the Settling Companies' attorneys that its notice was insufficient to afford it a right to participate in the approval hearing. Xulu Attorneys Inc. did not appear on the return date and no oral submissions were made on its behalf, despite the fact that the said attorneys were aware of the hearing date and the obligation to submit written submissions.

DRD and ERPM

[100] DRD and ERPM have, through their attorneys, addressed a letter to the applicants recording that they have no interest in the settlement agreement or its approval by this court. They did not file a notice to oppose and did not make any submissions to this court. In the letter, which the applicants brought to the attention of the court, they raised two issues:

> [1] Certification of the Settlement Classes and approval of the settlement agreement will serve to vary the classes certified in *Nkala*, and it is not competent for the High Court to vary an order that is the subject matter of an appeal ("the variation complaint").
>
> [2] Only the SCA has jurisdiction to approve the settlement agreement because it would involve setting aside the *Nkala* certification order, which constitutes a judgment *in rem* (" the *in rem* complaint").

The variation complaint

[101] DRD and ERPM's first submission is that the effect of the settlement agreement, coupled with the confirmation of the rule *nisi*, is to vary the *Nkala* certification order. It is contended that the High Court cannot competently do that whilst that order is under appeal or, indeed, at all.

[102] In the *Nkala* certification proceedings, this court certified the class action, not the classes that pursue it or the defendants against whom it is pursued. The

focus of its enquiry was thus the nature of the claim pursued, not the identity of the plaintiffs or defendants implicated in that claim. The claim persists even where some defendants to that claim settle their liability or otherwise fall out of the proceedings.

[103] The present application seeks the certification of new classes for settlement purposes, and the approval of the settlement agreement. If it is granted, the Settling Companies' liability in respect of the claims at issue in the *Nkala* class action will be settled and they will be excluded from having to participate in the certified class action. But the class action itself – and the claims that it seeks to determine – would nevertheless proceed.

[104] The current proceedings do not vary the *Nkala* certification order and this court has jurisdiction to grant the relief sought in these proceedings.

The in rem complaint

[105] DRD's and ERPM's second submission is that only the SCA can approve a settlement agreement **that sets aside an order *in rem*** and the court lacks jurisdiction to approve the settlement agreement (emphasis added).

[106] To properly understand the contention it is necessary to first establish what a judgment *in rem* is. In *Maartens and Others v South African National Parks*[39] the court described it as follows:

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[39] *Maartens and Others v South African National Parks* (C 117/2001) [2004] ZALC at [5].

> *"a judgment which is conclusive as against all the world in whatever it settles as to the status of a person or property, or as to the right or title to the property and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. All persons regardless of whether or not they are parties to any legal proceedings are bound by a judgment in rem and as such are estopped from averring that the status of persons or things, or the right or title to property is other than what the Court has by its judgment declared or made it to be."*

[107] DRD and ERPM's contentions have no merit for the following reasons. Firstly, the certification order is not a judgment *in rem*. It is an interlocutory order of a procedural nature. It permits the aggregation of various claims against a number of defendants. It is not determinative of the parties' rights or status, far less against the world at large. Secondly, the applicants do not seek, through the settlement agreement, to set aside the certification order. This court has jurisdiction to consider and grant the relief sought in these proceedings and the Settling Companies do not require the SCA's imprimatur to conclude the settlement agreement or to have it made an order of court.

LEGAL FEES

[108] In terms of clause 6.1 and 6.2 of the settlement agreement, the Settling Companies are obliged to pay the fees and disbursements of the class lawyers, including the costs of the two US consulting law firms, within 10 business days of the effective date. The settlement agreement provides for payment of the following amounts:

[1] R15 million (incl. VAT) to the LRC.

[2] R163.3 million (incl. VAT) to AK and Hausfeld between them.

[3] R191.7 million (incl. VAT) to RSI and Motley Rice between them.

[109] The Settling Companies confirm that the payments to be made to LRC,RSI, AK and the consulting US law firms are "*fair and reasonable having regard to, among other things: the period over which Richard Spoor and Abraham Kiewitz have been engaged in the litigation, the scale and complexity of the litigation, the costs incurred by the respective parties to date, and are likely to be incurred if the litigation were to run to finality, and the quality of the services provided to advance the matter to this point.*"[40]

[110] RSI and AK have agreed that they will not seek to recover any fees and costs from their clients and class members. No costs will therefore be deducted from the benefits payable to the individual claimants in terms of the contingency fee agreements entered into between RSI and AK and their clients. The issue of legal costs was negotiated between RSI, AK, the consulting US law firms and the Settling Companies only after agreement had been reached on the fixed administrative costs of the Trust, the categories of qualifying diseases to be compensated and the general tariffs payable for each disease category. This was done deliberately to avoid any possibility of a trade-off between the quantum and other material terms of the settlement agreement on the one hand and the legal fees and disbursements on the other.

[40] Clause 6.4 of the settlement agreement.

LRC

[111] The LRC is a public interest law clinic. It does not charge fees to its clients nor does it seek to generate profit from legal proceedings. Its general practice, which it has adopted in this matter, is to recover legal costs if successful. The LRC has dedicated significant time and resources over the course of more than 15 years pursuing litigation on behalf of mineworkers who contracted silicosis on South African goldmines. It has been an integral part of the claimants' attorneys' team for the past 6 years in the class action litigation.

[112] In terms of clause 6.1 of the settlement agreement, R15 000 000 (R15 million) was set aside for the full and final settlement of the LRC's legal costs and disbursements. The LRC seeks approval of R12 234 469.57 which includes R 11 069 729 (including VAT at 15%) for legal fees and R 1 164 740.23 for disbursements.[41] There has been no opposition or challenge to the LRC's calculation of its costs or the facts upon which its calculations are based.

[113] The LRC has calculated its costs on the basis permitted by section 79A of the Attorneys Act 53 of 1979 and Section 20 of the Legal Aid Act 34 of 2014. Clause 6.1 of the settlement agreement implicitly accepts that it is entitled to do so. In its bill of costs, the LRC's fees and disbursements are broken down annually from 2013 to 2019. The amount of R 12 234 469.57 has been

[41] During the process of verifying each item in the breakdown of costs, the LRC became aware that the estimate of R15 million, which had been provided by the LRC finance department, was partly based on incorrect information. The finance department inadvertently failed to differentiate between the two separate silicosis matters that overlapped during 2013. It incorrectly included time and work for a different matter being run by the LRC (the President Steyn litigation). In addition, legal staff used the case numbers for the silicosis class action and the President Steyn litigation matter interchangeably in their timesheets. After this mistake was detected, the bill of costs was checked and the work on the President Steyn litigation was removed. As a result, the LRC's final costs total to R12 234 469.57 rather than R15 million.

calculated with reference to contemporaneous timesheets, invoices and documents. The LRC does not seek any contingency fees or any other fee in addition to its costs and disbursements.

[114] The LRC has taken additional steps to verify the reasonableness and accuracy of its bill of costs and has employed a cost consultant, Mr Pèru Du Toit,[42] to review the bill of costs and source material. The bill of costs was also sent for review and confirmation by those involved in the litigation.[43] We are satisfied that every effort has been made to verify the dates, the nature of the work and time spent on each task and that care has been taken to ensure that the bill of costs is an accurate reflection of the work done by the LRC in the class action litigation.

[115] The time and rates used in the calculation of the bill of costs must reflect reasonable remuneration for work necessarily and properly done for the attainment of justice. The time and rates used by the LRC meet this requirement. It has charged reasonable hourly rates for the time spent by its in-house counsel, attorneys, candidate attorneys, paralegals and researchers on the matter. Given that the party-party scale was used, the rates used by the LRC for its attorneys and counsel are low compared to commercial rates.

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[42] Mr Du Toit has filed an affidavit, confirming that he had unlimited access to all the documents relevant to the class action litigation and that he consulted frequently with the attorney compiling the bill of costs. In his affidavit, he states that the breakdown of costs is a fair and reasonable account of the work performed by the LRC in the class action. In particular, he confirms that items with a high time allocation are accurate and justified.

[43] Mr Jason Brickhill and Ms Sayi Nindi, who have both filed confirmatory affidavits, reviewed and confirmed the correctness of the bill insofar as it relates to the work that they performed as the LRC lead lawyers in the class action litigation from 2013 to 2016.Ms C du Toit confirmed the remainder of the bill as the lead attorney from 2016 to date.

[116] The LRC has meticulously calculated its costs and disbursements. The amount of R 12 234 469.57 is a fair and reasonable amount for the work done on the matter. As such, the amount is approved.

RSI and AK's legal costs

[117] The amount of work done by RSI and AK in laying the foundation for the class action and obtaining certification was, by any measure, extraordinary. The work in the litigation has spanned almost 10 years – commencing for RSI in May 2010 and for AK in 2011. The costs these firms have incurred include the costs of establishing and maintaining a branch office of RSI in Johannesburg;[44] the costs of establishing satellite offices in the areas where most class members reside;[45] the costs of employing and facilitating the work of paralegals to take instructions from tens of thousands of former gold mineworkers, mostly in rural villages and towns in South Africa and neighbouring countries; the costs of communicating with clients primarily through public meetings and consultations at the satellite offices; the costs of medical examinations and obtaining medico legal expert reports for approximately 300 clients; the costs of employing medical mining and occupational health experts; the costs of employing researchers;[46] the costs associated with establishing, maintaining and

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[44] The branch office was dedicated almost exclusively to the running of the class litigation out of the High Court of Johannesburg, and which served as the address for service and filing of pleadings.

[45] Historically, the principal "labour supplying areas" for the gold mine sector, included Lesotho, the Eastern Cape, Botswana and the Free State. AK also established satellite offices in the Eastern Cape, Swaziland, Lesotho and Mozambique.

[46] Mostly over a three-year period, from 2010 to 2012 to conduct research into, inter alia, the history of lung disease in gold mines; knowledge of the prevention of occupational lung diseases and control of dust in mines; the history of the laws and regulations governing health and safety in the mines and compensation for occupational diseases in South Africa and internationally; the work processes involved in gold mining in South Africa; the history of the

operating the data processing and storage systems required to manage the litigation; the costs of counsel; the costs associated with the extensive engagement with stake holders across Southern Africa including national, and local government structures; numerous trade unions; non-governmental organisations and agencies; the costs and fees of the consulting US law firms;[47] the costs associated with negotiating the settlement, including seeking advice from experts and consultants on the establishment and operation of the Trust and the fairness of the settlement; and the costs associated with these approval proceedings, including compliance with the steps required following any approval by the court. While the costs of experts, researchers and counsel were incurred as and when they were required, the majority of the costs associated with the maintenance and support of the clients were fixed ongoing costs, which required a constant supply of funding. This includes the costs associated with the employment of paralegals and managers, office and equipment rentals, transport, IT services and the like.

[118] Mr Spoor states that neither RSI nor AK would in their own right have been able to cover even a fraction of the costs associated with the class action. They accordingly required significant funding to support the litigation if it was ever to get off the ground. As a result, RSI and AK relied principally on funding from the consulting US law firms. In November 2018 Motley Rice had

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gold mining industry in South Africa and the ownership and operational structures of the gold mines in South Africa.

[47] The US based lawyers were responsible for arranging and providing the funding for the litigation, providing the information technology infrastructure for managing the class action, including the large databases for capturing and storing all the relevant data accumulated, administering the financial management of the class action, providing all of the foreign-based input and expertise into the class action, locating and engaging international experts on aspects of class actions, flying out to South Africa for purposes of meetings and consultations, playing a leading role in the conduct of the negotiations on behalf of the class.

advanced approximately R49 million to RSI to cover the costs of the class action, while Hausfeld had advanced approximately R50 million to AK to finance the running-costs in the litigation.

[119] RSI and AK entered into contingency fee agreements with the class representatives and with each of the 38 000-plus class members that mandated RSI or AK to represent them. Their fee arrangements were authorised in the *Nkala* certification order and the court specifically confirmed that the RSI and AK contingency fee agreements comply with section 2(2) of the Contingency Fee Act 66 of 1997 (CFA).

[120] RSI appointed two attorneys and cost consultants, Mr Leon Hurter and Mr Nick du Preez, to determine the fees and disbursements that would be payable to the class lawyers under the provisions of the contingency fee agreements authorised by the court. Mr du Preez has more than 20 years' experience in the field of costs and Mr Hurter has close on 30 years' experience, including having served as taxing master and chief taxing master in this court. The cost consultants prepared an account of the fees and disbursements that would be payable to RSI on an attorney-and-own-client scale under the contingency fee agreements. The cost consultants confirm in their affidavits that the information furnished to them enabled them adequately to prepare a "Summary of Fees and Disbursements" which accounts for the fees and disbursements that would be payable to RSI under its contingency fee agreement. The cost consultants detail their assessment of the fees and disbursements incurred in the matter as against the requirements of the contingency fee agreements. They concluded that the RSI fees and disbursements comply with the requirements in

the RSI contingency fee agreement, and are fair and reasonable given the nature and scale of the work done. The cost consultants further concluded that if RSI were to have recovered legal costs under the contingency fee agreement at the 200% success fee and subject to the additional cap of 15% of the total award, it would have been entitled to recover a total of R260 866 739.92 (R260,86 million) for fees and disbursements.[48] Since R191, 7 million is payable to RSI under the settlement agreement, Hurter concludes that RSI has in fact under-recovered by R69 166 739.92 under the RSI contingency fee agreement.

[121] AK also appointed two cost consultants, Mr Johan Ackerman and Ms Maya Arendse, to assess the fees and disbursements that would be payable to AK in terms of its fee agreement, and to assess the reasonableness of the fees and hours spent given the nature of the work and the disbursements. Mr Ackerman has more than 20 years' experience in the field of costs and has served as an assistant registrar and taxing master. Ms Arendse has 26 years' experience in the field. The assessment was done to ensure that the costs payable to AK under the settlement agreement comply with, and do not exceed, the costs that AK would have been entitled to recover under its fee agreement. They also filed affidavits and "Summaries of Fees and Disbursements" for AK. They concluded that AK's fees and disbursements are fair and reasonable and that it complied with AK's contingency fee agreement. AK's 200% success fee under

[48] A fee of R129 017 373.90 (incl. VAT), which includes: (a) Generic attorneys' fees of R36 939 302.36 doubled as a success fee to R73 878 604.72; (b) R55 138 769.17 for client-specific work by paralegals. Disbursements of R131 849 366.02 (incl. VAT), made up of: (a) Motley Rice Fee of R102 506 423.67; and (b) Other disbursements of R29 342 942. 35 (incl. VAT).

the AK contingency fee agreement would have totalled R216 169 859.10.[49] Under the settlement agreement, AK is receiving R163.3 million towards all the firm's legal costs (fees and disbursements). This represents an under-recovery of R52 869 859.10 or 32.3% of what AK is entitled to under the contingency fee agreement if the 200% success fee were applied.

[122] The consulting US law firms also instructed a US-based expert on costs in class action litigation, Professor Fitzpatrick, on the fees payable to the US-based attorneys under the settlement agreement. Professor Fitzpatrick confirms the reasonableness of the US-based attorneys' fees by US standards and the overall reasonableness of the legal costs payable to the class legal representatives under the settlement (again, by US standards).

[123] RSI, AK, and the consulting US law firms, set out on affidavit the legal costs they have incurred, and will still incur, in the *Nkala* litigation and in the settlement process. Mr Spoor and Mr Kiewitz explain in detail why the legal costs payable under the settlement agreement comply with the RSI and AK contingency fee agreements, and why the legal costs are fair and reasonable in the context of the unprecedented scale of the litigation. Because the contingency fee agreements were found to be compliant with the Contingency Fees Act in *Nkala*, it follows that if the fees and disbursements payable in terms of the settlement are compliant with those agreements, they will also be compliant with the Act.

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[49]Calculated as follows R90 274 505.37 (incl. VAT) for AK's professional uplift fees, with the 200% uplift on professional hourly rates for generic work; and R125 895 353. 75 (incl. VAT) in respect of AK's disbursements, of which R85 561 078.03 is Hausfeld consultancy costs.

[124] If regard is had to the period RSI and AK have been involved in the litigation and the scale and complexity of the litigation, the amounts provided for in the settlement agreement is fair and reasonable and is approved.

FINDING

[125] All the parties made an effort to ensure that the settlement agreement is reasonable, adequate and fair. The terms of the settlement agreement demonstrate that they succeeded in their efforts. The negotiations yielded the best possible settlement terms that the parties and stakeholders could find in the circumstances. We wish to express our indebtedness to all the legal teams which represented various parties in this matter for the commendable manner in which they discharged their duties to their clients and to this court.

[126] The applicants have prepared a draft order which they have placed before court. They request that it be made an order of court by agreement between the parties.

[127] The draft order with annexures is hereby made an order of court.

L.WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

P.M. MOJAPELO

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Applicants:	Gilbert Marcus SC
	Vincent Maleka SC
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Attorneys for the 1st to 20th Applicants:	Richard Spoor Inc Attorneys
Attorneys for the 21th to 39th Applicants:	Abraham Kiewitz Inc.
Attorneys for the 40th to 48th Applicants:	Legal Resources Centre
Date of hearing:	29 May 2019 to 30 May 2019
Date of judgment:	