

# Dispute Resolution

## ALERT

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INCORPORATING  
**KIETI LAW LLP, KENYA**

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## Class actions: Can an order certifying a class action be appealed?

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### Brief background

In *Nkala and Others v Harmony Gold Mining Co Ltd and Others* [2016] (5) SA 240 (GJ), the applicants applied for certification of a class action which they intended to institute against various mining companies. The class action envisaged two separate and distinct classes, namely a silicosis class and a tuberculosis (TB) class. The classes were defined as follows:

1. The silicosis class: Current and former underground mineworkers who had contracted silicosis, as well as the dependants of underground mineworkers who had died of silicosis, where such mineworkers worked or had worked, after 12 March 1965, on one or more specified gold mines.

2. The tuberculosis class: Current and former underground mineworkers who had contracted TB, as well as the dependants of deceased mineworkers who had died of TB, where such mineworkers worked or had worked, after 12 March 1965, for at least two years on one or more specified gold mines.

The applicants' claims were based in delict, with the applicants alleging that the respondent mining companies unlawfully exposed the mineworkers to excessive levels of harmful silica dust, thereby breaching their common law, statutory and constitutional duties to ensure the safety of the mineworkers' living and work spaces and resulting in the mineworkers contracting silicosis or tuberculosis.



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A two-stage approach to the matter was proposed by the applicants – first, issues common to both classes would be determined, and, thereafter, the issues specific to individual members of the classes would follow for determination. Potential class members would also be granted an opportunity to opt out of the class action in respect of the first stage of proceedings; in respect of the second stage, class members were required to opt in if they wished to further take part in proceedings.

In addition, the applicants requested the court to develop the common law position on the transmissibility of general damages claimed by the applicants. The common law position entailed that where a person suffered personal or bodily injury, and at some later stage died, an action for general damages would only be transmissible to such person's estate if their death occurred after proceedings had commenced and *litis contestatio* (when the pleadings in an action are closed) had been reached.

After considering the matter, a full bench of the Gauteng Division of the High Court, Johannesburg held that it would be in the interests of justice for the class action be certified and the class action was the most appropriate course of action in the circumstances.

Further, regarding the transmissibility of general damages, the court granted a declarator of general application (i.e. not limited to class actions) to the following effect:

- A plaintiff who had commenced suing for general damages arising from harm caused by a wrongful act or omission, but who subsequently died, and whose death occurred prior to *litis contestatio* having been reached, and who would, but for their death, be entitled to maintain the action and recover the general damages in respect thereof, would still be entitled to continue with such action. The action would be for the benefit of the estate of the person whose death had been so caused.

- A defendant who died while an action against them had commenced for general damages arising from harm caused by their wrongful act or omission, and whose case had yet to reach the stage of *litis contestatio*, remained liable for the general damages, and the estate of the defendant had to continue to bear the liability despite the death of the defendant.

In a dissenting judgment, Windell J stated that in her view, the development of the common law rule regarding transmissibility of general damages prior to *litis contestatio* should be restricted to class actions, as per the order sought by the applicants, so that where a class member died after the institution of the certification application and prior to the finalisation of the class action, the general damages that such class member would have been entitled to claim would be transmitted to their estate.

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## Appeal to the Supreme Court of Appeal

On 6 February 2023, the Supreme Court of Appeal (SCA) handed down judgment in *DRDGold Ltd and Another v Nkala and Others* (Case no 688/2016) [2023] ZASCA 9, which was an appeal brought by two appellant mining companies against both the certification order, as well as the declarator on the transmissibility of general damages. The issue for determination before the SCA was whether the High Court's certification and declaratory orders were appealable. It should be noted that at that stage, the respondent mineworkers had withdrawn all claims in respect of the TB class against the appellants.

In its judgment, the SCA stated that it was important in the present context to keep in mind that appealability has to do with whether the SCA has jurisdiction to hear the appeal. Section 171 of the Constitution provides that all courts function in terms of national legislation and their rules and procedures must be provided for in terms of this legislation. Referring to section 16 of the Superior Courts Act 10 of 2013, the SCA held that the jurisdictional requirements for a civil appeal from the High Court sitting as a court of first instance were as follows:

- first, there must be a "decision" of the High Court within the meaning of section 16(1)(a); and
- second, the required leave to appeal must have been granted under section 17(2) by either the High Court or the SCA.

## An appealable decision

As to what a "decision" in section 16(1) means, the SCA referred to *Zweni v Minister of Law and Order* [1993] (1) SA 523 (A), wherein Harms AJA explained that:

*"(A) 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."*



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However, the SCA cautioned that the attributes set out in *Zweni* did not purport to be exhaustive, and that there were instances where a judgment or order would be appealable because it had a final and definitive effect on the proceedings (without the other *Zweni* attributes having been met), or where the interests of justice required that a decision should be subject to appeal before the termination of the proceedings.

What the interests of justice required would be depended on the relevant facts and circumstances of each individual case. Concluding its discussion of the matter, the SCA held that in the case of a High Court sitting as a court of first instance, the principal requirement was a reasonable prospect of success on

appeal. When the decision sought to be appealed against did not dispose of all the issues between the parties, there was an additional requirement, namely that the appeal – if leave were given – would lead to a just and reasonably prompt resolution of the real issue between the parties.

In respect of certification applications, the SCA held that certification is no more than a procedural device aimed at facilitating the determination of the class action. It had no final effect and it was susceptible to alteration by the court hearing the class action (the certification in the present matter was in fact already in need of variation to make provision for the consequences of the settlement agreement). The certification was not definitive of any rights and did not dispose of any portion of the relief claimed in

the main proceedings, which was, the class action. The certification therefore possessed none of the *Zweni* attributes and had no final and definitive effect on the class action.

In considering whether the interests of justice nevertheless qualified the certification as an appealable decision, the SCA concluded that the appellants' contention that their participation in the class action would cause them to suffer undue prejudice, – the appellants argued that they would play only a small part in the overall class action – could be suitably managed at the trial by way of having issues conveniently determined separately.

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In relation to the declarator regarding the transmissibility of general damages, the SCA held that this too was not an appealable decision, as the claims by individual identified class members will only be made in the second stage of the class action and it was not definitive of the rights of any existing claimant. It certainly did not dispose of any relief claimed in the class action. Considering whether the interests of justice required that an appeal against the declarator be entertained at this stage, the SCA held that an appeal against the declarator would not lead to a just and expeditious decision of the main issues between the parties.

In light of the above, the SCA concluded that it lacked jurisdiction to entertain an appeal against the certification or the declarator and the matter was struck from the roll with costs.

### Conclusion

Although the facts of each matter would have to be considered independently, it is difficult to conceive of a certification order that would be appealable based on the SCA's reasoning in the above matter. It remains to be seen whether the appellants will appeal against the judgment.

[Anja Hofmeyr](#)



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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