



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable
Case no: 688/2016

In the matter between:

DRDGOLD LIMITED

FIRST APPELLANT

EAST RAND PROPRIETARY MINES LIMITED

SECOND APPELLANT

and

**BONGANI NKALA AND
SIXTY EIGHT OTHERS**

FIRST TO SIXTY NINTH RESPONDENTS

Neutral citation: *DRDGOLD Limited and Another v Nkala and Others* (688/2016)
[2023] ZASCA 9 (6 February 2023)

Coram: PONNAN, VAN DER MERWE, MOLEMELA and MOTHLE JJA and
SALIE AJA

Heard: 11 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 am on 6 February 2023.

Summary: Appeal – jurisdiction of Supreme Court of Appeal to hear appeal from High Court sitting as court of first instance – Section 16(1) of Superior Courts Act 10 of 2013 applicable – twofold jurisdictional requirements: that necessary leave to appeal was granted and that order sought to be challenged constitutes 'decision' – meaning of 'decision' in s 16(1) – same as 'judgment or order' under Supreme Court Act 59 of 1959 – order certifying class action and declarator in regard to transmissibility of claims for general damages – general attributes for appealability absent – interests of justice not qualifying orders as appealable decisions – matter struck from roll.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mojapelo DJP and Vally and Windell JJ, sitting as court of first instance):

The matter is struck from the roll with costs, including the costs of three counsel.

JUDGMENT

Van der Merwe JA (Ponnan, Molemela and Mothle JJA and Salie AJA concurring):

[1] In a consolidated application, the respondents, acting as proposed class representatives, approached the Gauteng Division of the High Court, Johannesburg for the certification of a class action. I shall shortly describe the nature of the claims sought to be pursued under the class action. The respondents also sought a declaratory order in respect of the transmissibility of class action claims for general damages. The application was initially brought against no less than 32 respondents (the mining companies), most of whom opposed the relief claimed.

[2] The matter came before a specially constituted court of three judges (Mojapelo DJP, Vally J and Windell J), sitting as a court of first instance. It unanimously ordered the certification of the class action as claimed (the certification). The majority (Mojapelo DJP and Vally J) also granted a declaratory order (the declarator) that was not limited to class actions as the respondents had intended. The declarator purported to be of general application. According to her dissenting judgment on this issue, Windell J would have granted the declarator that the respondents had sought. Several of the mining companies applied for leave to appeal against the certification and the declarator. The court a quo granted them leave to appeal to this court against the declarator, but refused leave to appeal against the certification. Mainly because of the settlement agreement that I shall soon allude to, only the first appellant, DRDGOLD

Limited (DRD), and the second appellant, East Rand Proprietary Mines Limited (ERPM), prosecuted the appeal. This court granted leave to the appellants to appeal against the certification as well.

[3] At the request of this court, the parties addressed us at the hearing on the appealability of both the certification and the declarator. For the reasons that follow, I have come to the conclusion that neither is appealable at this stage. In the result, this judgment deals only with the question of appealability. It does so against the following background.

Background

[4] It is common cause that over several decades many thousands of underground mineworkers in South African gold mines contracted silicosis and/or pulmonary tuberculosis (tuberculosis). The cause of silicosis is the inhalation of harmful quantities of silica dust. Silicosis is a painful, incurable and progressive disease, often resulting in death. Tuberculosis, on the other hand, is a treatable bacterial lung disease. The respondents contend, however, that exposure to excessive silica dust levels increases the risk of contracting tuberculosis.

[5] The mining companies represented virtually the entire goldmining industry in South Africa. They included so-called 'parent companies', that is, companies that were sought to be visited with liability because of their controlling interests in the operating mining companies. In the court a quo, the respondents presented prima facie evidence of prolonged industry-wide underground exposure of mineworkers (invariably male persons) to unhealthy levels of silica dust. They alleged that the mining companies, acting in concert or independently in a similar fashion, negligently and wrongfully failed on an industry-wide basis to properly address this health hazard. Therefore, so the respondents said, every mineworker that had worked underground in a gold mine and thus contracted silicosis and/or tuberculosis – or his dependants – had a delictual claim for damages against the mining company or companies for which he worked, as well as against the applicable 'parent companies'. The respondents contended that the commonality between the claims of these claimants amply justified the certification of a class action.

[6] On the strength of these contentions, the respondent sought the certification of a class action against the mining companies in respect of two classes that would be determined in two separate stages. The two classes were described as a silicosis class and a tuberculosis class. The application envisaged that the common issues would be determined during the first stage and that the individual claims would be finalised during the second stage.

[7] As I have said, the court a quo granted the certification in the terms sought. In doing so, it exercised a strict or true discretion under s 173 of the Constitution. See *Mukaddam v Pioneer Foods (Pty) Ltd & Others* 2013 (5) SA 89 (CC) paras 42-48. Paragraphs 1-5 of the certification read as follows:

1. It is declared that the following group of persons constitutes a class:
 - 1.1 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)-
 - 1.1.1 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;
 - 1.1.2 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 Limited*; and
 - 1.1.3 who are not named plaintiffs in the action instituted in the United Kingdom against *Anglo American South Africa Limited* under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544 (the silicosis class).
2. It is declared that the following group of persons constitutes a class:
 - 2.1 Current and former underground mineworkers who have contracted pulmonary tuberculosis, and the dependants of deceased underground mineworkers who died of pulmonary tuberculosis (but excluding silico-tuberculosis), where such mineworkers work or have worked for at least two years on one or more of the gold mines listed on the attached "Annexure A" after 12 March 1965 (the pulmonary tuberculosis class).
3. The attorneys of record for the applicants are certified as the legal representatives of the members of the classes for the further conduct of the class action as follows:
 - 3.1 Abraham Kiewitz Incorporated (Abrahams), Richard Spoor Inc. Attorneys (Spoor) and the Legal Resources Centre (LRC) are certified as the joint legal representatives of the members of the silicosis class;

- 3.2 Abrahams is certified as the legal representative of the members of the pulmonary tuberculosis class: and
- 3.3 The fee arrangements set out in annexures RS13 and RS21 to the replying affidavit of Richard Spoor are authorised in respect of the legal representative of the classes.
4. In the further conduct of these proceedings (the class action), the following applicants, whomever are surviving at the time of the class action, are granted leave to act as class representatives –
 - 4.1 The first to fifty-second applicants are granted leave to act as representatives of the silicosis class of which they are members;
 - 4.2 The thirty-third, thirty-fifth, thirty-sixth and the fifty-third to sixty-ninth applicants are granted leave to act as representatives of the pulmonary tuberculosis class of which they are members (the class representatives).
5. It is declared that the class representatives in para 4 above have the requisite standing to bring the class action and to represent the members of the silicosis class and the pulmonary tuberculosis class in claims for damages.'

The said Annexure A listed 82 mines.

[8] In para 6 (read with paras 7 and 11) of the order, the court gave extensive directions for giving notice of the class action to the members of the classes.

Paragraphs 9 and 10 provided for the election to 'opt out' or 'opt in', in these terms:

'9. It is ordered that the members of the classes will be bound by the judgment or judgments in the first stage of the class action against the mining companies, unless they give written notice to Abrahams, Spoor, or the LRC by 31 January 2017, that they wish to be excluded as members of any of the classes against each or any of the respondents.

10. It is ordered that:

10.1 upon conclusion of the first stage of the class action, the members of the silicosis class must give written notice to Abrahams, Spoor or the LRC by a date to be determined by the court at that time:

10.1.1 that they wish to opt in and be included as members of the silicosis class in the second stage of the class action; and

10.1.2 which respondent or respondents they seek to hold liable in the second stage of the class action.

10.2 upon conclusion of the first stage of the class action, the members of the pulmonary tuberculosis class must give written notice to Abrahams by a date to be determined by the court at that time:

- 10.2.1 that they wish to opt in and be included as members of the pulmonary tuberculosis class in the second stage of the class action; and
- 10.2.2 which respondent or respondents they seek to hold liable in the second stage of the class action.
- 10.3 only members who give such notice timeously will have the benefit of and be bound by the judgments in the second stage of the class action as against the respondent or respondents that are found to be liable to them.'

[9] The effect of these provisions is as follows. Unless a claimant who falls within the definition of one of the classes elects to 'opt out' in terms of para 9, he or she would be bound by any judgment in respect of the first stage. In order to have his or her individual claim determined during the second stage, a class member has to 'opt in' in terms of para 10.

[10] Our common law provides that upon the death of a person, a claim for patrimonial loss passes to the executor of the deceased's estate. As a general rule, a claim for non-patrimonial loss (such as general damages for pain and suffering and loss of the amenities of life or damages for defamation), because of its personal nature, is not transmitted to the estate of the deceased. At least since the decision of *Executors of Meyer v Gericke* (1880) F 14 and consistently thereafter, however, our courts have recognised an exception to that general principle. The exception is that a claim for non-patrimonial damages that is the subject of a pending action, is transmitted to the estate of a deceased person if *litis contestatio* has been reached at the time of his or her death. *Litis contestatio* is reached when the pleadings in an action are closed. As to this legal position, see *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 610 (AD) at 606G-H and 608D-H.

[11] It was against this background that the respondents asked (in an amended notice of motion) for a declaratory order developing the law to provide that, in class actions, a claim for general damages of a class member that passed away after the institution of the certification application but before *litis contestatio*, is transmissible to his or her estate. As I have said, in making the declarator, the court a quo (by majority) went beyond the order sought. The declarator reads:

'It is declared that any claimant, who has claimed for general damages, and who has died or dies prior to the finalisation of his case, will have such general damages transmissible to his estate, regardless of whether he has joined the class action or not. The claim of general damages in this case shall be transmissible from the date when the certification application was launched in August 2012.'

Before us the respondents indicated that their case remained that the development of the common law in this regard had to be confined to class actions.

[12] The settlement agreement that I have referred to, was entered into during May 2018 and was finally approved by the court a quo on 26 July 2019 (as was required by para 13 of its order). It is not necessary to set out the provisions of this comprehensive agreement. What is necessary, however, is to describe the major impact of the settlement agreement on the certification. As a result, the certification stands only against six mining companies (the appellants and four others) and in respect of seven mines. Three of these four mining companies did not oppose the certification and the fourth, Randgold and Exploration Company Limited (Randgold) is sought to be held liable as a 'parent company'. It should also be mentioned that the respondents withdrew all claims in respect of the tuberculosis class against the appellants. Thus, the certification applies to the appellants only in respect of the silicosis class.

Appealability: the law

[13] It is important to keep in mind that in the present context, appealability has to do with whether this court has jurisdiction to hear an appeal. See *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA); [2005] 3 All SA 541 (SCA) (*Western Areas*) para 6. This court has no original jurisdiction and its common law inherent power to regulate its own procedures – now entrenched in s 173 of the Constitution – does not clothe it with jurisdiction. See *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) (*Moch*) at 7E-G and *New Clicks South Africa (Pty) Ltd v Minister of Health & Another* 2005 (3) SA 238 (SCA) para 19. This court's jurisdiction is derived only from the Constitution and statute.

[14] Section 168(3) of the Constitution provides:

(a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.

(b) The Supreme Court of Appeal may decide only –

- (i) appeals;
- (ii) issues connected with appeals; and
- (iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.’

In terms of s 171 of the Constitution, all courts function in terms of national legislation and their rules and procedures must be provided for in terms of national legislation. In *Western Areas* para 16, Howie P explained that this meant that ‘. . . one cannot look at s 168(3) alone because it does not bear on appealability. One has to look at s 171 of the Constitution and that leads one, *inter alia*, to the Supreme Court Act’.

[15] The Superior Courts Act 10 of 2013 (the Superior Courts Act) repealed the Supreme Court Act 59 of 1959 with effect from 23 August 2013. All of the applications that formed part of the consolidated application for certification were launched prior to the commencement of the Superior Courts Act. This raises the question whether the jurisdiction of this court to hear this matter remains to be determined under the repealed Supreme Court Act. As will soon become apparent, it would make no material difference whether the issue of appealability is determined under the Superior Courts Act or its predecessor.

[16] Section 16(1)(a) of the Superior Courts Act provides:

‘(1) Subject to section 15(1), the Constitution and any other law -

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted –

- (i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6);
- or
- (ii) if the court consisted of more than one judge, to the Supreme Court of Appeal.’

[17] Similar to the position under the Supreme Court Act, the jurisdictional requirements for a civil appeal from the High Court sitting as a court of first instance

are twofold. See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) (*Zweni*) at 531B-C. These are that:

- (a) There is a 'decision' of the high court within the meaning of s 16(1)(a); and
- (b) The required leave to appeal has been granted under s 17(2) by either the high court or this court.

It goes without saying that both requirements must be present. See *Cronshaw & Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 689C-D and *National Director of Public Prosecutions v King* [2010] 3 All SA 304 (SCA); 2010 (2) SACR 146 (SCA) (*King*) para 40.

[18] It is convenient to commence with the second jurisdictional requirement. It is simply whether, as a fact, the necessary leave to appeal to this court has been granted. As Brand JA said in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 SCA; [2015] 2 All SA 322 (SCA) para 13:

'Leave to appeal therefore constitutes what has become known, particularly in administrative law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute.'

[19] What then, is a 'decision' contemplated in s 16(1)? To answer this question, one must examine the corresponding position under the Supreme Court Act. Section 20(1) thereof provided:

'An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the appellate division or a full court as the case may be.'

[20] In *Zweni* this court considered s 20(1). At 532C-D Harms AJA explained:

'The expression "judgment or order" in s 20(1) of the Act has a special, almost technical, meaning; all decisions given in the course of the resolution of a dispute between litigants are not "judgments or orders"'

He proceeded to say that in this context the word 'judgment' might have two meanings. The first was the reasoning of the court and the second its pronouncement on the relief claimed. He said that s 20(1) concerned only the second meaning. This was in accordance with the trite principle that an appeal lies against an order and not against

the reasoning on which the order is based. Harms AJA famously concluded at 5321-533A:

'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.'

[21] In *Zweni* the court did not consider s 21(1) of the Supreme Court Act. It provided:

'In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.' This court, however, construed 'decision' in s 21(1) to have the same meaning as 'judgment or order' in s 20(1). See *Moch* at 8B-D and cases cited there, as well as *Western Areas* para 19.

[22] As is apparent from the exposition of the three *Zweni* attributes itself, it did not purport to be exhaustive. This was emphasised in *Moch*, where Hefer JA considered the appealability of the dismissal of an application for recusal. He pointed out that should it be found that the judge ought to have recused himself, the entire proceedings before him had to be regarded as a nullity. He accordingly held (at 10C-11B) that although the decision did not have all the *Zweni* attributes, it was nevertheless appealable because it had a final and definitive effect on the proceedings. Much the same approach was followed in *King* paras 42 and 45.

[23] In *Western Areas* this court had occasion to consider the issue of appealability in accordance with the prescripts of s 39(2) of the Constitution. Howie P concluded as follows at para 28:

'I am accordingly of the view that it would accord with the obligation imposed by s 39(2) of the Constitution to construe the word "decision" in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which this extended meaning could have in civil

proceedings is unnecessary to decide. It need hardly be said that what the interests of justice require depends on the facts of each particular case.’

In *Philani-Ma-Afrika & Others v Mailula & Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) para 20, this court further developed the law in this regard by applying the reasoning in *Western Areas* to a civil matter. It said that ‘what is of paramount importance in deciding whether a judgment is appealable is the interests of justice’.

[24] Thus, the following legal position crystallised under the Supreme Court Act. An order that met the three *Zweni* requirements would be an appealable decision. In accordance with the general rule against piecemeal entertainment of appeals, an order that did not have all the *Zweni* attributes, would generally not be an appealable decision. Such an order would nevertheless qualify as an appealable decision if it had a final and definitive effect on the proceedings or if the interests of justice required it to be regarded as an appealable decision.

[25] What the interests of justice required was not determined by a closed list of considerations and depended on the relevant facts and circumstances of each individual case. Nevertheless, this court gave important guidance in this regard. In *Beinash v Wixley* 1997 (3) SA 721 SCA; [1997] 2 All SA 241 SCA Mahomed CJ said (at 729H-730E):

‘There can be no doubt that the decision of the then Witwatersrand Local Division to set aside the impugned subpoena was a “judgment or order” in the ordinary sense of the word which, if wrong, could be corrected on appeal. The real question is whether it can be corrected forthwith and independently of the outcome of the main proceedings or whether the appellant is constrained to await the outcome of the main proceedings before the decision can be attacked as one of the grounds of appeal – in which event the decision of the court *a quo* now under discussion would not be a “judgment or order” in the technical sense but a ruling.

“The question which is generally asked . . . is whether the particular decision is appealable. Usually what is being asked relates to not whether the decision is capable of being corrected by an appeal court, but rather to the appropriate time for doing so. In effect the question is whether the particular decision may be placed before a Court of appeal in isolation, and before the proceedings have run their full course.” (*per* Nugent J in *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 676H.)

This problem often arises when one or other party seeks to appeal against some preliminary or interlocutory decision, which is made by a court before it has arrived at a final conclusion

on the merits of the dispute between the parties. The approach of the court in such circumstances is a flexible approach. In the words of Harms AJA in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531J-532A:

“The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution.”

What the court does is to have regard to all the relevant factors impacting on this issue. It asks whether the decision sought to be corrected would, if decided in a particular way, be decisive of the case as a whole or a substantial portion of the relief claimed, or whether such decision anticipates an issue to be determined in the main proceedings. The objective is to ascertain what course would best “bring about the just and expeditious decision of the major substantive dispute between the parties.’

[26] In *King* para 44 Harms DP quoted this passage with approval. And, in a separate judgment in *King*, concurred in by all the members of the court, Nugent JA in paras 50-51 further propounded this ‘increasingly flexible and pragmatic’ approach. It was thus firmly established under the Supreme Court Act that whether an appeal would lead to a just and expeditious determination of the real or major dispute between the parties, was an important consideration in deciding whether an order was to be regarded as an appealable decision.

[27] In a number of decisions this court has held, directly or indirectly, that the meaning of ‘decision’ in s 16(1) of the Superior Courts Act is the same as that of ‘judgment or order’ and ‘decision’ under the Supreme Court Act. See, for instance, *Nova Property Group Holdings & v Cobbett* [2016] ZASCA 63; 2016 (4) SA 317 (SCA) paras 8-9; *Firststrand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 paras 10-15 and *Neotel (Pty) Ltd v Telkom SOC & Others* [2017] ZASCA 47 paras 12-13. I have no doubt that these decisions were correctly decided on this point and added my voice thereto in *Van Huyssteen & Others v Pepkor Speciality (Pty) Ltd & Another* [2020] ZASCA 78 para 18. See also *United Democratic Movement & Another v Lebashe Investment Group (Pty) Ltd & Others* [2022] ZACC 34 para 45. The legislature is presumed to know the law and gave no indication of an intention to depart from the well-established meaning of ‘decision’ in this context. I therefore conclude that the meaning of ‘decision’ in s 16(1) of the Superior Courts Act is the same as that of ‘decision’ and ‘judgment or order’ under the Supreme Court Act.

[28] There is one last matter that I need to mention under this heading. The Supreme Court Act did not enumerate the requirements for granting leave to appeal to this court. They were developed over time by the courts. In the case of the High Court sitting as a court of first instance, the principal requirement was, of course, 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. This was that ‘the appeal – if leave were given – would lead to a just and reasonably prompt resolution of the real issue between the parties’. See *Zweni* at 531D-E and *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 SCA para 16.

[29] These requirements for leave to appeal are now codified in s 17(1) of the Superior Courts Act. It reads:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[30] As I have demonstrated, the requirement in s 17(1)(c) is also a consideration for the determination of whether it is in the interests of justice to regard an order as a ‘decision’ under s 16(1). This dual purpose has not always been clearly recognised or articulated. It is necessarily implicit in s 17(1) that the judge or judges concerned have to consider whether or not the order sought to be appealed against is appealable, that is whether it qualifies as a ‘decision’. Leave to appeal has on numerous occasions been refused on this ground. The inclusion of s 17(1)(c) as a leave to appeal requirement therefore fits into the picture.

Jurisdiction in this matter

[31] In essence, the certification is no more than a procedural device aimed at facilitating the determination of the class action. It has no final effect. The appellants

correctly accepted that it is susceptible to alteration by the court hearing the class action. The certification is in fact already in need of variation to make provision for the consequences of the settlement agreement. I venture to say that adjustability to meet the procedural challenges of a class action is an essential quality of a certification order. The certification is not definitive of any rights and does not dispose of any portion of the relief claimed in the main proceedings, that is, the class action. The certification therefore possesses none of the *Zweni* attributes and has no final and definitive effect on the class action.

[32] Consequently, the question is whether the interests of justice nevertheless qualify the certification as an appealable decision. As I understood it, the appellants' contention was that should the certification not be set aside on appeal at this stage, their participation in the class action would cause them to suffer undue prejudice. The basis of the submission was that the appellants would play only a small part in the class action. In this regard the appellants particularly relied on the alleged impact of three factors. These were:

- (a) the withdrawal of the tuberculosis class claims against the appellants, as well as that no 'parent company' liability lies against them;
- (b) the cessation of underground mining by DRD in 2000 and by ERPM in 2008;
- (c) the compromise of all creditors' claims against ERPM in 2001.

[33] In respect of (a) the appellants complained of having to be part of a class action in respect of the tuberculosis class and 'parent company' liability, whilst they could have no liability in respect thereof. However, the trial court will have wide procedural options at its disposal, under the Uniform Rules and in the exercise of its inherent power in terms of s 173 of the Constitution. It is clear from the evidence that there would be a significant overlap of the issues and evidence relating to the two classes and 'parent company' liability. But there is no reason why the appellants should be obliged to participate in a hearing of issues that related only to the tuberculosis class or 'parent company' liability. These issues could be separated in terms of Uniform Rule 33 and the appellants could be excused from attending the determination of such separated issues. The only remaining 'parent company' is Randgold and its assertion that it never had a controlling interest in a mining company could conveniently be determined separately. The appellants' complaint of prejudice in this regard appears

to be exaggerated and I am by no means satisfied that this factor favours a piecemeal appeal.

[34] Proposition (b) paints only part of the picture. By its own admission DRD was engaged in underground gold mining at: the Durban Roodepoort Deep Gold Mine from 1895 to 2000; the Buffelsfontein Gold Mine, which from 1999 included the Hartebeesfontein Gold Mine, from 1997 to 2005; and the Blyvooruitzicht Gold Mine, which had merged with the Doornfontein Gold Mine, from 1999 to 2012. ERPM was engaged in underground gold mining at the East Rand Proprietary Mine from 1965 to 2008. Subject to ERPM being unsuccessful in respect of (c), the participation of each of the appellants in underground gold mining constitutes a significant portion of the ambit of the remaining class action. I fail to see how they could be materially prejudiced in this respect.

[35] In respect of (c) the facts are that ERPM was discharged from liquidation in consequence of a scheme of arrangement that was sanctioned by the High Court on 17 April 2001. ERPM contends that the scheme of arrangement had the effect of compromising the claims of all its creditors, existing or contingent. On this basis ERPM's case is that all silicosis class claims that arose before 17 April 2001 were compromised and thus extinguished. The respondents do not accept this and argue that it is a matter of complexity that must be determined in the class action. This issue is, in my view, particularly suited for initial separate determination. If the issue is decided against ERPM, it would participate in a class action on the basis of its involvement in underground mining for more than 40 years up to 2008. And if it is successful on this point, its limited involvement in underground mining could be suitably managed at the trial. For these reasons I conclude that the certification is not appealable at this stage.

[36] It remains to consider whether the declarator is a 'decision' under s 16(1). At first blush it may appear to be an appealable decision. But closer analysis reveals that that is not so. As I have demonstrated, claims by individual identified claimants will only be made in the second stage. Whilst the declarator may not be susceptible to alteration, it is not definitive of the rights of any existing claimant. It is certainly not

dispositive of any relief claimed in the class action. The declarator therefore is also not an appealable decision under the *Zweni* test.

[37] Once again, the question is whether the interests of justice qualify it as such. At the outset I have to say that the impact of the declarator on other matters should not concern us. Its legal sustainability may in due course be challenged there. Two main considerations convinced me that the interests of justice do not require that an appeal against the declarator be entertained at this stage. These considerations show that an appeal against the declarator would not lead to a just and expeditious decision of the main issues between the parties.

[38] The first consideration is that to a large extent the declarator 'hangs in the air' with regards to the class action. It will be recalled that it pertains to 'any claimant who has claimed for general damages, and who has died prior to the finalisation of his (sic) case'. As I have said, individual claims would only be brought by claimants that 'opt in' in respect of the second stage of the class action. Moreover, only then would it be determined against which mining company or companies a particular claim is made. In the light hereof, the application of the vague second part of the declarator – that the claim for general damages in this case shall be transmissible from the date when the certification application was launched – appears to be fraught with difficulty. In the result, there is considerable uncertainty as to the proper construction of the declarator and its applicability. It follows that it may in due course be held that a claimant only 'has claimed for general damages' at the second stage. Consequently, given the difficulties alluded to, it is not inconceivable that the declarator may turn out to have no material impact. The nature and history of the matter indicate that this may also result from other causes, such as settlement.

[39] The second consideration is this. By and large the potential class members are poor and vulnerable people. The consolidated application was launched more than ten years ago. Should we entertain an appeal against the declarator at this stage, there may be a further appeal, particularly if we should construe the declarator to the dissatisfaction of either the appellants or the respondents. These processes may postpone *litis contestatio* in the class action, yet may culminate in a decision that *litis contestatio* remains determinative for the transmission of claims for non-patrimonial

damages. That may cause the extinction of any number of claims for general damages of claimants that passed away before *litis contestatio*. For me, the overwhelming interests of justice consideration is that the finalisation of the class action should be expedited. In the result, the interests of justice do not qualify the declarator as an appealable decision.

[40] To conclude, neither the certification nor the declarator is a decision under s 16(1) of the Superior Courts Act. Even though leave to appeal against both was granted, this court lacks jurisdiction to entertain an appeal against the certification or the declarator. The matter should be struck from the roll with costs. The respondents employed two counsel in respect of the certification and three other counsel in respect of the declarator. The appellants made use of three counsel. I believe that it would be fair and just to direct the appellants to bear the costs of the employment of three counsel by the respondents.

[41] The matter is struck from the roll with costs, including the costs of three counsel.



C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances

| | |
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| For appellants: | B Leech SC with M Wesley SC and R Carvalho |
| Instructed by: | Malan Scholes Inc, Johannesburg Claude Reid Attorneys, Bloemfontein |
| For 1 st – 30 th respondents: | A Dodson SC with J Bleazard G Marcus SC with E Webber and M Seme |
| Instructed by: | Richard Spoor Inc, Johannesburg Honey Attorneys Inc, Bloemfontein |
| For 31 st – 39 th and 53 rd – 69 th respondents: | A Dodson SC with J Bleazard G Marcus SC with E Webber and M Seme |
| Instructed by: | Abrahams Kiewitz Inc, Belville Honey Attorneys Inc, Bloemfontein |
| For 40 th – 52 nd respondents: | A Dodson SC with J Bleazard G Marcus SC with E Webber and M Seme |
| Instructed by: | Legal Resources Centre, Johannesburg Honey Attorneys Inc, Bloemfontein. |