UNIVERSITY OF CAPE TOWN

FACULTY OF POLITICS

"THEY SENT ME HOME TO DIE" – OCCUPATIONAL DISEASES AND THE GOLD MINING INDUSTRY IN POST-APARTHEID SOUTH AFRICA

CATHY-ANN POTGIETER

PTGCAT001

Submitted in partial fulfilment of the requirements for the degree of Master of Philosophy at the University of Cape Town, 2022

25 818 words, excluding the acknowledgments, endnotes and references.

Supervisor: Dr Helen Scanlon

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Cathy-Ann Potgieter
LLB (UCT)
MPhil Candidate (UCT)
February 2022
University of Cape Town, Western Cape

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ACKNOWLEDGMENTS

I would like to thank the following people, without whom I would not have been able to complete this thesis:

My supervisor, Dr Helen Scanlon, for her unwavering support, encouragement, honesty and patience. I would not have been able to complete this degree without her genuine investment in my ideas, and I will forever be grateful for everything that I have learned from her.

My parents, Herman and Anet Potgieter, who instilled within me the importance of questioning societal and political conditions and injustice at an extremely young age, and watered my seeds of passion and curiosity even in times of personal drought.

My sister, Jessie Potgieter, for holding my hand through the entire process.

My friend, Malcolm Lambson, for his constructive criticism, helpful proof-reading, and general support.

Finally, I would like to express my gratitude and appreciation for my friends for their consistent encouragement and support.

I would not have realised my potential and capacity for perseverance without having these people in my corner.

ABSTRACT

In 2016 a class action suit was certified in the case of *Nkala & Others v Harmony Gold Mining Company Limited & Others* (2016). The action was instituted by representatives of thousands of current and former miners from Southern African countries. Their intent was to claim damages from mining companies for causing their contraction of silicosis and/or tuberculosis as a result of poor working conditions. Before the Court could make any pronouncement on liability, the parties reached an agreement out of court whereby the mining companies set up the Tshiamiso Trust to provide for compensation. This thesis contextualises the *Nkala* case in post-apartheid South Africa, where economic inequalities have intensified despite the constitutional transition. Where the law was used in the past to support injustice, the intention of law-making after the transition was to create a new framework that sought to protect human rights, including socio-economic rights. The extent to which it is able to effect justice to those most profoundly impacted by apartheid policies falls under scrutiny in the face of prevailing inequality, especially in the context of mining labour relations. This thesis therefore questions whether this new framework has been able to deliver the promise of justice for miners who find themselves located within a context of over a century of racialised labour exploitation and extremely hazardous working conditions. That the applicants in the *Nkala* case had to resort to the common law to vindicate their rights to adequate compensation despite the existence of legislation that purports to provide for this calls into question the practical efficacy of such rights-based legislation. Where the Court in the *Nkala* case acknowledged the inadequacy of the legislative mechanism for occupational disease and injury, the potential of the Trust in providing for meaningful compensation must fall under scrutiny. The role that compensation plays in the broader context of remedial justice will therefore be analysed to consider where the outcome of the *Nkala* case may fall short in addressing the structural injustices caused by the mining industry.

1. CHAPTER ONE: INTRODUCTION

1.1 *Introduction*

In 2012 a class action suit was instituted at the South Gauteng High Court for more than 15 000 prospective class members. The applicants were both current miners and former miners from Southern African countries who claimed to have contracted silicosis and/or tuberculosis as a result of working at the cited mines from 1965 to 2012.[i] The class also included dependents of deceased miners. This came to be known as the case of *Nkala & Others v Harmony Gold Mining Company Limited & Others* (2016), in which 29 respondent gold mining companies in South Africa were cited[ii] for their alleged negligence and endangerment (conduct which is asserted to have spanned over a century) of their employees.[iii] The applicants rooted their claim in the law of delict, a body of private laws that regulates civil wrongs of intentional or negligent breaches of duties of care between private parties that result in pecuniary loss or bodily harm.[iv] The claim came as a result of the dissatisfaction of claimants with the existing compensatory legislative mechanism, that is, the Occupational Diseases in Mines and Works Act of 1973 (ODIMWA).[v] The Court confirmed ODIMWA to be inadequate in redressing the harms caused by occupational lung disease.[vi] The extent to which the out-of-court settlement between the parties (resulting in the establishment of the Tshiamiso Trust[vii]) have a remedial impact on the structural harms in question (via the provision of compensation) will be analysed against ineffectiveness of ODIMWA. The reality of such a compensatory scheme in the context of an unequal society such as South Africa must be analysed against its inadequacy to confront the structural conditions under which thousands of miners and former miners contracted silicosis and/or tuberculosis.

The *Nkala* case finds its context rooted within centuries of exploitation of cheap sources of migrant labour in the South Africa, and the mining sector has become inextricably linked to the prevalence of tuberculosis and silicosis in the region.[viii] The conditions under which miners work and live, as well as the migrant labour system upon which the industry depends, have been key vectors for the spread of tuberculosis and silicosis. Both lung conditions are now legally recognised as occupational diseases for which the applicants in the *Nkala* case have sought damages.[ix] Understanding this occupational health crisis cannot be restricted to the internal mining conditions. While conditions in the mines expose miners to pulmonary risks of contracting tuberculosis, the social conditions outside the mines transform these hazards into population-wide epidemics.[x] Tuberculosis risk factors include the effects of migration to and from the mines, human immunodeficiency virus (HIV), health care disruptions, congregate living, and the health and safety conditions within the mines that are major causes of contraction of the disease in the first place.[xi] Tuberculosis susceptibility is directly associated with the extent of exposure to silica dust present in the mines, the high-density housing and poor living conditions that exacerbate exposure to tubercule bacilli, and the longer periods of renewed contracts resulting in intensified family separation. This creates social interactions and sexual networks conducive to the further spread of

tuberculosis, as well as higher rates of HIV infection.[xii] In turn, such increased rates of HIV infection renders people more vulnerable to the contraction of active tuberculosis.

Mining remains one of the most dangerous occupations in the Southern African region. A 2018 mortality study of 306 297 southern African ex-miners who left the mining industry between 2001 and 2013 revealed that their overall mortality for occupational disease or injury was twenty percent higher than that of the general population.[xiii] It is noteworthy that of the 33 094 deaths recorded in the above study, 93 percent of victims were Black.[xiv] The Black mining labour force forms a large part of the Southern African working-class population, which has been profoundly affected by the policies of the regional colonial administration and the subsequent apartheid system that exploited their labour.[xv] Workers continue to be exploited under the new constitutional paradigm, despite the formal ending of apartheid. The Court in the *Nkala* case confirmed that, during the class period, the mining companies pursued working practices that discriminated against Black miners to such an extent that they have suffered significantly higher rates of silicosis and tuberculosis than their white counterparts.[xvi] This is because Black miners' wages were as low as ten percent of that which white miners were paid.[xvii] For example, in 1981 the *New York Times* reported that the average annual wage for white miners in 1971 was R 83 545, while the average for Black miners was R 3 973.[xviii] This further compromised Black miners' ability to combat the negative effects of exposure and illness.[xix] While there is no wage discrimination today, the historical reservation of skilled labour for white workers has limited job opportunities for the Black Southern African population. The average monthly salary for gold miners is less than R 12 500 today, which is little when considering that most miners are the only source of income for their families on top of the burden of healthcare.[xx] The silicosis and tuberculosis epidemics therefore do not only amount to modern regional medical crises, but are also deeply socio-political in nature as a tangible effect of historical institutionalised racism, exploitation, and the disregard for human dignity.[xxi] The Court in the *Nkala* case acknowledged this, stating that –

> "*With remarkable consistency their* (the miners') *evidence reveals that mining companies stripped them of their dignity, and concomitantly compromised their health and safety, with such intensity and ferocity that they were effectively dehumanised."*[xxii]

Despite the dawn of the South African constitutional democracy in 1994, founded on freedom, equality, and the primacy of the rule of law, the structural corporate conditions that facilitated the spread of occupational diseases amongst workers remained in place.[xxiii] This is evident by the fact that the class period in the *Nkala* case runs from 1965 to 2012, which is eighteen years into the democratic transition of 1994.[xxiv] The damages claimed by the class members do not differ despite the period spanning over the shift in the South African social, legal and political system. This begs the question whether, and to what extent, the South African legal system is capable of realising its transformative vision of curing the ills of apartheid in its establishment of an egalitarian constitutional order (in this context being the

legislative regulation of occupational health and safety). This question arises out of the consideration that the class action was instituted well beyond the enactment of the Constitution and the institution of a new legal framework that purports to protect the basic rights of people.[xxv] This question will be analysed in the light of the role that compensatory justice plays in a society that is riddled with inequality and poverty.

1.2 *Compensation as a form of justice*

In her discussions of forms of justice in the aftermath of violent conflict, or in instances of authoritarian rule such as the apartheid administration, Rama Mani presents three manifestations of justice: rectificatory justice, legal justice, and distributive justice.[xxvi] Rectificatory (or reparative) justice aims to address direct consequences of conflict, such as war crimes.[xxvii] Legal justice seeks to restore the rule of law, the breakdown of which often pre-dates the outbreak of conflict by enabling political manipulation, corruption and state violence.[xxviii] Distributive justice, in turn, seeks to address the structural and systemic injustices and distributive inequalities that are observable both as potential causes of conflict, and as the broader effect of conflict.[xxix] Such inequalities are evident in the socio-economic conditions under which those disenfranchised by the apartheid regime continue to live despite the democratic transition. These dimensions of justice are inter-dependent and mutually reinforcing, and therefore must be addressed in a holistic manner. Mani further presents the two dimensions of peace-building, that is, the cessation of direct violence as a 'negative' peace, and the removal of structural and cultural violence to aid national recovery as a 'positive' peace.[xxx] In the context of South Africa, the restoration of the rule of law was a principal goal of the democratic transition due to the apartheid-era political manipulation of the legal system to effect injustice.[xxxi] However, the enactment of the Constitution also provides for distributive justice in its entrenchment of socio-economic rights, thereby emphasising the need for such justice in the process of restoring the rule of law. As such, the intention of the Constitution is not only to restore order as a 'negative' peace, but also to act as a blue-print for the attainment of just and sustainable 'positive' peace.[xxxii] This 'positive' peace was to be brought about via the removal of structures that maintained inequality between races and perpetuated disadvantage in South African communities of colour.

The realisation of these different dimensions of justice as outlined in the stated objectives of the South African Constitution will be interrogated in the context of statutory and other compensatory mechanisms in the mining context. The reasons for the inadequacy of these legal instruments that drove the initiation of the class action will be analysed against how the judicial outcome may alleviate such inadequacies in its potential to more effectively carry out the initial vision of justice. Thus, the power of the legal system to facilitate the achievement of the constitutional transformative vision will be investigated in the context of the *Nkala* case. This is because the case acts an example of a post-apartheid

legal response to a colonial and apartheid era 'problem': the historical exploitation of Black migrant labour for white capital under conditions that facilitated the spread of silicosis and/or tuberculosis on such a level that they are known epidemics in the 'new' and 'just' South Africa.[xxxiii] How the Court's intervention in the *Nkala* case may have an important impact on increased access to justice going forward will also be explored.

An important question that arises out of these observations of the different dimensions of justice is whether compensation is a feasible means to address these harms, or whether it instead acts as a mechanism by which to 'buy' silence, distracting from the necessity of changing the structures that give rise to these harms in the first place. This implicates the function of compensation, yet gives rise to the risk of denying such relief for the sake of advancing the narrative that it does not amount to the 'correct' type of justice. While the precise meaning of justice cannot be established due to its subjective nature, the exploration of its manifestations is vital to the analysis of the capacity of compensation to effect transformation. It is important to note that, for the purposes of this thesis, it is the possibility of increased *access* to justice which is being explored, as opposed to whether the outcome of the *Nkala* case amounted to immediate and absolute justice. In other words, in the acknowledgment that transformation is a progression of change as opposed to an immediate paradigm shift, so too must the achievement of justice be perceived. This has been acknowledged by the Constitution, which directs the State to 'progressively realise' the enjoyment of socio-economic rights.[xxxiv]

Mani's conceptualisation of rectificatory justice encompasses reparations and similar measures, which includes compensation. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005 (The UN Basic Principles) defines compensation as a measure necessary –

> *"for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law."*[xxxv]

These Principles provide victims with the right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.[xxxvi] Such reparation measures must be proportional to the gravity of the violations and the harm suffered, and liability for reparations may extend to non-state actors.[xxxvii] The Principles note that, for measures to appropriately respond to the gravity of the violation in question, full and effective reparation must include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[xxxviii] In his analysis of reparative justice, Luke Moffett echoes these principles by emphasising that compensation forms but one of the above five types of reparations to

redress harms caused by human rights violations.[xxxix] Compensation therefore falls within the sphere of reparative justice, involving payment to cover the cost of moral harm suffered by victims.[xl] Reparations originate in private law corrective justice notions (which includes the law of delict) despite the recognition of their normative nature in the international community.[xli] This indicates a parallel to the cause of action in the *Nkala* case, that is, a delictual claim for damages. As such, the class action cannot be viewed simply as a matter rooted in private law, especially since all law today is informed by the Bill of Rights.

The intention of reparations is to publicly acknowledge the suffering and dignity of the victim, affirm the wrongful act of the perpetrator, and remedy the wrong suffered.[xlii] However, because compensation forms only one facet of a comprehensive reparative scheme, it does not leave room for affirming the dignity of the victims, nor does it actively acknowledge wrongfulness on the part of the perpetrator. Further, in this context (either by way of the legislative compensatory mechanisms in place or via the Tshiamiso Trust) one cannot observe any guarantee of non-repetition. This is because the Settlement Agreement has shown no indication on the part of the mining companies to change the conditions under which the miners were harmed in the first place.[xliii] Mention is merely made to the Parties recognising "the need to address issues associated with past, present and future compensation" for silicosis and tuberculosis in the South African gold mining industry, and settle the claims "fully and finally."[xliv]

Claire Moon expands on the implications of compensation in her analysis of reparations, arguing that it can function as a means of social control by placating victim demands for criminal justice and regulating the political and historical meanings with which the harms are endowed.[xlv] While it is imperative to repair the harms in question, since compensable wrongs cannot be ignored, such action must be accompanied with a determination of responsibility and the vindication of the victims.[xlvi] Moon further argues that, in certain contexts, monetary compensation may amount to an abuse of poverty for those victims who do not experience equal enjoyment of socio-economic rights.[xlvii] However, it is emphasised that the reception of such reparative measures by the victims must be attended to so as to place the narrative with the victims.[xlviii] This acts to avoid the coercive potential of such measures.[xlix] Moon's observations are in reference to Argentina's *Madres de Plaza de Mayo* ('mothers of the disappeared'), who refused to accept state financial and memorial reparations for the disappearances of family members during the mass atrocities committed by the military junta during 1976 and 1983.[l] Their refusal was premised on the fact that monetary compensation was predicated on a presumption of death, thereby relinquishing hopes for reappearance, but more importantly accepting that no proper investigation of the disappearances would take place.[li] As such, the group asserted their dignity in the refusal of such reparations without an investigation into what had happened to their loved ones.

However, in this context, the victim group actively pursued compensatory relief, which places them at the centre of the narrative, thereby asserting their dignity in their demand for reparative relief.

Compensation must, however, be complemented by the other facets of reparations for them to have a transformative impact. Payment on its own, with no commitments of non-repetition, nor acknowledgment of guilt, may lead to an instance whereby the provision of compensation will enable an environment in which miners continue to suffer the consequences of silica dust and tuberculosis exposure without the incentive to address such conditions. While the respondent mining companies saw their day in court, the out-of-court settlement avoided a judicial order that would point to their wrongfulness. Instead, their initiation of the Tshiamiso Trust in the absence of a court-ordered payment of damages may now be considered an act of generosity on their part. In this way, the mining companies cited in the *Nkala* case have failed to accept responsibility for their role in the broader structural injustices by restrictively defining, in monetary terms, what they are liable for in this context.

It is noteworthy that it is not only the South African mining industry that has shied away from accountability for their exploitative practices during apartheid. The political appetite for corporate accountability in general has not materialised during the South African transition, where official justice processes tended towards the civil and political crimes committed by individuals, against individuals.[lii] Corporate accountability for structural abuses during apartheid has therefore been marginalised.[liii] This is in spite of the Truth and Reconciliation Commission's (TRC) conclusion in its 1998 Report that many businesses were directly complicit in the policies of apartheid.[liv] While the Commission found that the mining industry had neglected its obligations regarding workers' health and safety, it ultimately failed to make recommendations with regards to how this corporate complicity could be addressed.[lv].

The lack of the mining industry's acknowledgment of complicity and responsibility falls within a post-conflict culture where business resources were promptly rehabilitated for national interests with limited guarantees of non-recurrence, suggesting that business decisions made during apartheid were simply in reasonable response to opportunities presented by the regime of the time.[lvi] The de-personalisation of corporate actors therefore created an image in which they could not perpetrate moral harms, and that structural violence was merely a by-product of a system which created the conditions for such abuses.[lvii] Thus, in today's climate, the maximisation of profit persists as a priority over the material well-being of workers.

1.3 *The constitutional dispensation and its transformative vision*

The *Nkala* class action finds itself within a context of a South Africa that is premised on transformative constitutionalism. The case reveals the tension between the constitutional vision of transformative justice and the reality of post-apartheid structural inequality. The concept of

transformative constitutionalism has informed South Africa's post-apartheid legal order through the enactment of the Constitution of the Republic of South Africa, which entrenches human rights in an extensive Bill of Rights.[lviii] In its preamble, the Constitution provides an impetus for change from the apartheid system preceding the 1994 democratic transition.[lix] Professor Karl Klare, who formulated the notion of transformative constitutionalism, notes that the democratic transition from a culture of political and racial oppression rests upon a negotiated political foundation, which includes the promulgation of a justiciable Bill of Rights.[lx] The justiciability of the Bill of Rights is grounded in the intention to act as a bridge from authoritarianism and political oppression to a new culture of justification of any act of power.[lxi] Professor Klare expands on the meaning of transformative constitutionalism as entailing –

> *"…a long term project of constitutional enactment, interpretation, and enforcement committed to…transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction."*[lxii]

The late former Constitutional Court Chief Justice Pius Langa, who served in the Constitutional Court of South Africa from 1994 until 2009, stated that the Constitution was to act as a –

> *"historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights."*[lxiii]

The Constitution therefore echoes the core vision of transformative constitutionalism in its express aims of promoting national unity, reconciliation and freedom to induce a paradigm shift in social relations.[lxiv]

Institutional oppression during apartheid informed the aim of the Constitution to privilege the law as a means to cure apartheid's injustice in its express vision of achieving justice through law.[lxv] Judge Dennis Davis (judge of the High Court of South Africa since 1998) referred to the Constitution as bringing about a new legal dispensation as a means by which "a repressive, racially and sexually divided society could be transformed into a non-racial, non-sexist and egalitarian community."[lxvi] This is reflected in Section 8 of the Constitution, which affirms that the Bill of Rights extends to all areas of South African law, and is applicable to both public and private entities.[lxvii] Apartheid's doctrine of parliamentary supremacy subordinated the Judiciary to a Legislature that only represented white interests, and courts were unable to review the validity of law enacted by Parliament.[lxviii] Chief Justice Langa noted that the apartheid dispensation operated under a culture of authority, whereby state action was justifiable simply due to the fact that it was state-sanctioned.[lxix] All public action today, in contrast, must be measured against the Bill of Rights to determine its validity. As such, while racial segregationist legislation under apartheid was permissible due to the unfettered authority of the Legislature, State action today must respect constitutional rights of equality, dignity, and fairness. Where law-making was once a site of oppression, the enactment of the Constitution came with a concerted effort to rehabilitate

the rule of law to establish the courts as final guardians of the Constitution to indicate a commitment to the new order based on human rights.[lxx]

While these transformative aims are formally entrenched, it is the issue of this aforementioned *access* to justice that raises concerns regarding the reach of the Constitution on those who were, and remain, profoundly affected by the policies of colonialism and apartheid. Chief Justice Langa argued that the biggest indication that South Africa still faces continuing disparities of wealth and power is the lack of access to justice.[lxxi] This is because legal representation is beyond the financial reach of the majority of the South African population, as well as the reality that better representation can be secured with more money.[lxxii] Indeed, according to the United Nations Special Rapporteur on extreme poverty and human rights,

> *"Access to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability, for several reasons. First, owing to their vulnerability, persons living in poverty are more likely to fall victim to … illegal acts, including sexual or economic exploitation, violence, torture, and murder. Second, access to justice is important because justice systems can be tools to overcome deprivation, for example, by developing jurisprudence on social and economic rights. Third, when vulnerable persons cannot access justice systems, they are sometimes forced to take justice into their own hands through illegal or violent means, or to accept unjust settlements. Fourth, the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights. In turn, their increased vulnerability and exclusion further hamper their ability to use justice systems. This vicious circle impairs the enjoyment of several human rights."* (2012)[lxxiii]

Further, former Minister of Justice of Niger, Marou Amadou, stated that –

> *"…you are poor not only because you don't have money, but also because you cannot read the civil procedure code, or the penal code, or you don't know what action to take in the face of injustice."*[lxxiv]

As such, there is an observable nexus between inequality and access to justice. While discrimination and inequality can undermine one's ability to seek redress for injustice, lack of access to justice worsens conditions of poverty and inequality.[lxxv] In 2016, the Organisation for Economic Cooperation and Development (OECD) noted that the inability to seek legal redress diminishes access to economic opportunity, thereby reinforcing the poverty trap and undermining inclusive growth.[lxxvi]

1.4 *Critiques of transformative constitutionalism*

It is against this background of transformative constitutionalism in South Africa that one has to question the extent to which the law has been able to deliver justice to those most vulnerable of society,

comprising mostly of Black persons who under apartheid were politically oppressed and relegated into economic subjugation. Those most vulnerable continue to live under conditions in which their rights to dignity, equality and socio-economic freedom remain to be realised. The promise of the Bill of Rights, which is infused with the concept of human dignity and equality, rings hollow in the face of pervasive inequality. One in five South Africans live under conditions of extreme poverty and lack of access to basic resources according to the 2020 United Nations Human Development Index and Human Development Report.[lxxvii] Where the central tenet of transformative constitutionalism is a commitment to substantive equality through the improvement of socio-economic conditions, why is it then that there is a continuing disparity of wealth and power pervading South Africa? With the vast majority of the 'previously disadvantaged' population existing in a perpetual cycle of poverty, beyond the reach of the Bill of Rights, what has come of the extensive academic and political musings of the meaning of transformation and what it ought to achieve? Where there has been such a massive paradigm shift in the South African legal system, the question arises whether it is actually within the law's capacity to effect transformative change in the face of pervasive racial and gender inequality that persists in post-apartheid South Africa. This is an important question considering the fact that the South African Constitution is seen as the mechanism by which to cure the ills of apartheid, and, by virtue of the fact that it is a legal instrument, assumes that it is within the law's capabilities to achieve such ends.

Boaventura de Sousa Santos introduces the concept of the 'abyssal line' to describe an invisible, yet radical line that divides society into two realms: 'this side' of the line (the side of 'being'), and 'the other side' of the line (the vanished, non-existent and excluded).[lxxviii] Those who fall on 'the other side' of the line are therefore excluded from reality. Tshepo Madlingozi expands on this concept to explain that those who exist under conditions of inequality and poverty in the new constitutional order have been banished to 'the other side' of the line to a "zone of non-beings," still suffering dehumanization and social invisibility despite the formal ending of apartheid.[lxxix] Madlingozi argues that white people and the Black middle class are governed by a system of liberal democracy, while the poor Black population have been relegated to the 'other side', beyond the culture of human rights and hegemonic discourse of social justice.[lxxx] He therefore argues that South Africa is functioning under a system of 'neo-apartheid', since the constitutional re-arrangements that seek transformation have not resulted in a fundamental rupture in social relations inherited by colonialism.[lxxxi] As such, within the discourse of social emancipation, the line emanating from colonialism and apartheid continues to survive the abovementioned idyllic transition from apartheid to post-apartheid.[lxxxii] In this transition, according to Madlingozi, impoverished Black people remain left behind from the proverbial bridge from a culture of oppression to a new South African democracy founded upon principles of human dignity and equality.[lxxxiii] The concept of the 'abyssal line' could be an explanation for the fact that a vast majority of the South African population, particularly impoverished Black South Africans, remain disenfranchised, poor, and unable to enjoy the rights that the Bill of Rights purports to promise to all. In

the same vein, it provides insight as to why migrant miners have mobilised to institute the class action due to their claims of consistent and unacknowledged human rights abuses against them by mining companies.

Another critique of transformative constitutionalism is provided by Isaac Shai, who questions whether it can address the crudity and inanity of colonialism where it assumes the potential of the law to resolve legacies of colonialism and apartheid.[lxxxiv] He argues that transformative constitutionalism can only bring about radical transformation in the disruption of coloniality. Coloniality is a term to define long-standing patterns of power that emerged as a result of colonialism, but define culture, labour, inter-subjective relations, and knowledge production which survive colonialism.[lxxxv] This requires a reckoning of the impact of colonialism and apartheid that is ultimately felt through racism, material penury, land dispossession and economic exploitation.[lxxxvi] Because transformative constitutionalism is embedded within a Eurocentric (colonial) liberal-democratic paradigm, Shai argues it is ill-suited for achieving major social, economic and political transformation as envisioned by the South African Constitution.[lxxxvii] An example of the Constitution's failure to disrupt coloniality is the South African gold mining industry, the foundation of which rests upon centuries of exploitation of Black migrant labourers since the discovery of gold in 1886, and of which such labour relations persist in the post-apartheid legal order despite constitutional protections and legislative interventions.

This thesis does not, however, assume that the Constitution's design continues to uphold inequality in the post-apartheid era, as Madlingozi and Shai suggest. While the existence of the abyssal line may ring true in modern South Africa, it will be argued that the development in the law with regards to class action suits may be a mechanism by which those who have seemingly been 'left behind' in the enactment of the Constitution may, to an extent, pierce the veil that prevents access to the Bill of Rights. While such a development in the law may increase access to justice, this thesis will analyse the extent to which this is applicable, noting the importance of working within the entrenched constitutional paradigm due to the unlikeliness of its amendment within the foreseeable future. An analysis of the degree to which South African law is capable of upholding the rights enshrined in the Constitution will be useful in determining where it falls short, and where public policy and legislative measures need to fill this gap, since the law cannot be expected to function in a vacuum of curing the ills of apartheid.

1.5 *Thesis outline*

Chapter Two will analyse the context out of which the *Nkala* case arose. The conditions under which the miners work and live, as well as the century-long migrant labour system upon which the industry depends will be discussed to garner an understanding for the intensifying crisis that is the silicosis and tuberculosis epidemics in the region. Silicosis and tuberculosis will therefore be explained to identify the cause of action, that is, the wrongful cause of these illnesses by the mining companies,

that the applicants are relying upon. It is also necessary to analyse their working conditions in the context of legislative occupational health and safety requirements to illustrate the liability of the mining companies in their treatment of their employees.

Chapter Three will analyse the constitutional entrenchment of socio-economic rights and the principle of horizontality to illustrate the transformative vision of the Constitution. It will also discuss the constitutional and legislative protection of fair labour practices and basic conditions of employment, as well as the history of collective action and labour rights. The history of labour relations and the nature of trade unionism in South Africa is important to understanding the reason for instituting the class action under the law of delict, as opposed to seeking representation from trade unions that purport to represent workers' interests.

Chapter Four will discuss the statutory and common law duties of care which the mining companies are alleged to have violated in the *Nkala* case. The statutory duty of care arises out of legislative instruments such as the Labour Relations Act of 1995 (LRA),[lxxxviii] the Basic Conditions of Employment Act of 1997 (BCEA),[lxxxix] the Mine Health and Safety Act of 1996 (MHSA),[xc] and the Mines and Works Act of 1956 (MWA).[xci] This Chapter will also introduce and analyse the interaction between, and the applicability of, the compensation Acts, namely the Compensation for Occupational Injuries and Diseases Act of 1993 (COIDA)[xcii] and the Occupational Diseases in Mines and Works Act of 1973 (ODIMWA).[xciii] The reasons for the applicants' difficulty in vindicating their rights to legislative compensation will be discussed to illustrate the reasons for their rooting their claim in delict. This Chapter is intended to emphasise the strong position in South African law with regards to the importance of occupational health and safety of miners, which stands in juxtaposition to the plight of the miners represented by the *Nkala* class action.

Chapter Five will discuss the judicial outcome of the *Nkala* case, that is, the development in the common law regarding the transmissibility of damages to dependents. It will explore how this development may amount to an increase in access to justice, but will also highlight the gendered issues that arise as a result. This Chapter will also analyse the evasion of corporate responsibility as a result of the out-of-court settlement. The Tshiamiso Trust, being the practical outcome of the *Nkala* case, will be analysed in depth with regards to how it could function differently from the legislative compensatory scheme. How the legal position has changed since the *Nkala* case is relevant to analysing the impact of the landmark case on occupational rights in the mining context. Finally, this Chapter will discuss the implications that the outcome of the *Nkala* case will have on corporate responsibility in the context of the broader evasion of accountability for apartheid-era abuses.

1.6 *Research methodology and limitations*

This thesis is predominantly based on research of primary sources legislation and South African common law and case law, on the one hand, and secondary sources such as scholarly writings on the other. Much of the analysis will be taken from the *Nkala* case documentation, comprising of several affidavits submitted by the applicants, and made available to the public. Information regarding the context out of which the *Nkala* case arose is sourced from published scholarly and medical journal articles. As such, this thesis is a qualitative descriptive analysis based on existing textual sources.

First-hand accounts forming the basis of the claims made by the applicants in the *Nkala* case, and the harm suffered by the class members, are limited to affidavits submitted to the Court, which were prepared by representative lawyers. It is therefore important to note that the insight gained in respect of the plight of the applicant miners extends only so far as the parameters of translated and legally framed affidavits would allow. Affidavits are formulaic: they must outline the cause of action, point to liability, and make a formal claim for a form of relief that the Court is able to grant. While information regarding the lived experience of the deponents would have been invaluable to issues relating to compensation, the only information included in the affidavits is that which was relevant to the cause of action and relief claimed. There is a possibility that the victim group may have wanted non-judicial forms of relief, but this would not have been included in such affidavits. However, due to the Covid-19 pandemic, interviews were not possible (reasons for which include travel bans, national lockdowns, and safety concerns).

This study is limited by the lack of input from representatives of any of the respondent mining companies. While attempts were made to interview representatives of Harmony Gold Mining Company Limited, with an e-mail confirmation on their part of a willingness to do so, I was unable to secure any communication beyond that. I approached them specifically due to their role in the establishment of Tshiamiso Trust, as well as for information on the functioning of the mining industry. The potential bias that may permeate this thesis is therefore acknowledged. As such, while I have conducted extensive research on the topic, much of the writings I have come across are informed by the history of colonialism, apartheid, exploitation, and the corrosive effects that ensued, which has naturally informed the lens through which this project has been approached.

1.7 *Conclusion*

The Constitution has been lauded as a transformative legal document with the capacity (and a resultant expectation) to cure the ills of apartheid by the likes of the Late Chief Justice Langa and Judge Dennis Davis. The existence of the Constitution and its extensive provision of human rights cannot be taken as proof of transformation and equality, viewing the country as it "should be," as opposed to the

reality. This thesis is an analysis of the legal mechanisms that intend on effecting justice for miners and former miners, as well as their dependents through the lens of critical analyses posed by theory regarding the potential for transformation in the judicial process. Specifically, the *legal* approach of the institution of a class action to tackle the inadequacy of the *legal* compensatory remedies provided by legislation and the common law will be analysed to interrogate whether the parameters of the law have the capacity to address such broad and systemic injustices.

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[i] Spoor, R. (2020) About the Silicosis Litigation. *Richard Spoor Inc. Attorneys.* Retrieved 26 September 2021, from http://goldminersilicosis.co.za/about-the-silicosis-litigation/respondents.

[ii] The mining companies cited are as follows:

1. African Rainbow Minerals (previously Anglovaal Mining Ltd);
2. Anglo American South Africa Ltd;
3. Anglogold. Ashanti Ltd (previously Vaal Reefs Exploration and Mining Company Ltd);
4. Armgold/Harmony Freegold Joint Venture (Pty) Ltd;
5. Avgold Ltd (previously Target Exploration Company Ltd);
6. Beatrix Mines Ltd;
7. Blyvooruitzicht Gold Mining Company Ltd;
8. Bracken Mines Ltd;
9. Buffelsfontein Gold Mines Ltd;
10. Doornfontein Gold Mining Company Ltd;
11. Drdgold Ltd;
12. Dierfontein Consolidated (Pty) Ltd;
13. East Rand (Pty) Ltd;
14. Evander Gold Mines Ltd (previously Kinross Mines Ltd);
15. Farworks/682 Ltd (previously Kloof Gold Mining Company Ltd);
16. Free State Consolidated Gold Mines (Operations) Ltd;
17. Gfi Mining South Africa (Pty) Ltd;
18. Gold Fields Ltd (previously East Driefontein Gold Mining Company Ltd & Driefontein Consolidated Ltd);
19. Gold Fields Operations Ltd (previously Western Areas Gold Mining Company Ltd);
20. Harmony Gold Mining Company Ltd;
21. Leslie Gold Mines Ltd;
22. Loraine Gold Mines Ltd;
23. Newshelf 899 (Pty) Ltd;
24. Randfontein Estates Ltd;
25. Randgold and Exploration Company Ltd;
26. Simmer and Jack Mines Ltd;
27. Unisel Gold Mines Ltd;
28. Village Main Reefs Ltd; and
29. Winkelhaak Mines Ltd.

[iii] *Nkala & Others v Harmony Gold Mining Company Limited & Others* 2016 (5) SA 240 (GJ) (*Nkala*); Spoor (2020).

[iv] *Ibid,* Notice of Motion, dated 21 December 2012.

[v] Act No. 78 of 1973.

[vi] Notice of Motion, dated 21 December 2012.

[vii] Gold Mineworkers' Class Action Settlement Agreement (The Settlement Agreement) entered into 3 May 2018. Retrieved 10 June 2021, from http://goldminersilicosis.co.za/wp-content/uploads/2019/08/Project-Phoenix-Settlement-Agreement-Executed-3-May-2018_9010893-with-addendum.pdf.

[viii] The Framework for the Harmonized Management of Tuberculosis in the Mining Sector, signed in Johannesburg, South Africa on 25 March 2014 (the Harmonization Report), 10.

[ix] The Compensation for Occupational Injuries and Diseases Act No. 130 of 1993 (COIDA); Occupational Diseases in Mines and Works Act No. 78 of 1973 (ODIMWA); The Mine Health and Safety Act No. 29 of 1996 (MHSA).

[x] Stuckler, D., Steele, S., Lurie, M., & Basu, S. (2013) Introduction: 'Dying for Gold': The Effects of Mineral Mining on HIV, Tuberculosis, Silicosis, and Occupational Diseases in Southern Africa. *International Journal of Health Services,* 43(4). 639-649, 641.

[xi] The Harmonization Report (2014), 10.

[xii] Smith, J. & Blom, P. (2019) Those who don't return: Improving efforts to address tuberculosis amongst former miners in southern Africa. *A Journal of Environmental and Occupational Health Policy,* 29(1). 76-104, 81.

[xiii] Bloch, K., Johnson, L. F., Nkosi, M., & Ehrlich, R. (2018) Precarious transition: a mortality study of South African ex-miners. *BMC Public Health,* 18:862, 1.

[xiv] *Ibid,* 4.

[xv] Since the slave trade that started in 1652 after the arrival of Jan van Riebeeck.

[xvi] *Nkala* (2016), 43.

[xvii] *Ibid,* 42.

[xviii] Lelyveld, J (1981) At South Africa's mines, race barriers are rigid. *The New York Times.* Retrieved 15 October 2021, from https://www.nytimes.com/1981/06/09/world/at-south-africa-s-mines-race-barriers-are-rigid.html.

[xix] *Nkala* (2016), 42.

[xx] van der Merwe, H. & Merafe, M (2021) Continuities of Conflict and Unresolved Transitions: Transitional Justice in the South African Mining Sector. *Centre for the Study of Violence and Reconciliation* (unpublished), 14,

[xxi] *Nkala* (2016), 50.

[xxii] *Ibid,* 66.
[xxiii] The Constitution of the Republic of South Africa (1996).
[xxiv] *Nkala* (2016).
[xxv] Kibet, E. & Fombad, C. (2017) Transformative constitutionalism and the adjudication of constitutional rights in Africa. *African Human Rights Journal,* 17, 340-366.
[xxvi] Mani, R. (2005) Balancing Peace with Justice in the Aftermath of Violent Conflict, *Development,* 48:3. 25-34, 25.
[xxvii] *Ibid,* 25.
[xxviii] *Ibid*.
[xxix] *Ibid,* 25-26.
[xxx] *Ibid*, 28; Rambsbotham, O. & Woodhouse, T. (1999) *Contemporary Conflict Resolution: The prevention, management and transformation of deadly conflicts.* Cambridge: Polity Press, 188.
[xxxi] Eg, The Immorality Act of 1950 banning inter-racial relationships; The Group Areas Act of 1950 providing for physical segregation of racial groups by reserving urban areas for white South Africans; The Bantu Education Act of 1953, which provided for racially separated educational facilities; the Separate Amenities Act of 1953 providing for the reservation of public premises or vehicles for the exclusive use of whites; etc.
[xxxii] Mani (2005), 29; Preamble of the Constitution (1996).
[xxxiii] Spoor (2020).
[xxxiv] Sections 26, 27 & 29 of the Constitution (1996).
[xxxv] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), A/RES/60/147.
[xxxvi] *Ibid,* VII.
[xxxvii] *Ibid* IX, 15.
[xxxviii] *Ibid* IX 18-23.
[xxxix] Moffett, L. (2017) Transitional Justice and Reparations: Remedying the Past? In C. Lawther, L. Moffett, & D. Jacobs (Eds.). *Research Handbook on Transitional Justice,* 4.
[xl] *Ibid,* 5.
[xli] *Ibid,* 4.
[xlii] *Ibid*.
[xliii] The Settlement Agreement (2018) provides for the establishment of the Trust, what amounts to full and final settlement, and undertakings by the parties, which extend only to issues such as confidentiality arrangements, non-disclosure agreements, and dispute resolution procedures.
[xliv] Moffett (2017), 4.
[xlv] Moon, C. (2012) 'Who'll Pay Reparations on My Soul?' Compensation, Social Control and Social Suffering. *Social & Legal Studies,* 21(2), 187.
[xlvi] *Ibid,* 190; Asmal, K. (1992) *Inaugral lecture:* Victims, Survivors and Citizens – Human Rights, Reparations and Reconciliation. University of the Western Cape [delivered on 25 July 1992], 25.
[xlvii] Moon (2012), 195.
[xlviii] *Ibid,* 196.
[xlix] *Ibid*.
[l] *Ibid,* 192.
[li] *Ibid*, 193.
[lii] van der Merwe & Merafe (2021) 2.
[liii] *Ibid.*
[liv] *Ibid,* 10; The Truth and Reconciliation Commission Final Report (1998) Volume 4, Chapter 2, 22.
[lv] *Ibid.*
[lvi] *Ibid.*
[lvii] *Ibid.*
[lviii] Section 2 of the Constitution (1996).
[lix] Preamble of the Constitution (1996); Rapatsa, M. (2014) Transformative Constitution in South Africa: 20 Years of Democracy. *Mediterranean Journal of Social Science*, Vol. 5 of 21, 887.
[lx] Klare, K. (1998) Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights*, 14, 146-188; Section 2 of the Constitution (1996); Rapatsa (2014), 888.
[lxi] Klare (1998), 147.
[lxii] *Ibid*, 150.
[lxiii] Liebenberg, S. (2006) Needs, Rights and Transformation: Adjudicating Social Rights. *STELL LR,* 1. 5-36. 6; Langa, P. (2006) Transformative Constitutionalism. *Stellenbosch Law Review,* 17:3. 351-360, 352.
[lxiv] Preamble of the Constitution (1996); Rapatsa (2014), 887.
[lxv] Friedman, N. (2014) The South African Common Law and the Constitution: Revising Horizontality. *South African Journal on Human Rights,* 301:1. 63-88, 66.
[lxvi] Davis, D. (2010) Transformation: The Constitutional Promise and Reality. *SAJHR,* 26. 85-101, 85.
[lxvii] Section 8 of the Constitution (1996).
[lxviii] Kibet & Fombad (2017), 346-347.
[lxix] Langa (2006), 353.
[lxx] Kibet & Fombad (2017), 348.
[lxxi] Langa (2006), 355.
[lxxii] *Ibid.*
[lxxiii] Durojaye, E., Mirugi-Mukundi, G., & Adeniyi, O. (2020) Legal empowerment as a tool for engendering access to justice in South Africa. International Journal of Discrimination and the Law, Vol. 20(4), 229.
[lxxiv] *Ibid*, 225.
[lxxv] *Ibid,* 229.
[lxxvi] *Ibid,* 225; Organisation for Economic Co-operation and Development (OECD) (2016) *Towards Inclusive Growth – Access to Justice: Supporting People-Focused Justice Services.* Paris: OECD.
[lxxvii] United Nations Development Index and Human Development Report (2020); Mlaba, K. (2020) 1 in 5 South Africans Are Living in Extreme Poverty: UN Report. *Global Citizen*. Retrieved 30 November 2021, from https://www.globalcitizen.org/en/content/1-in-5-south-africans-living-extreme-poverty-un/.

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[lxxix] Madlingozi, T.i (2017) Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribition. STELL LR, 1. 123-147, 124.
[lxxx] *Ibid,* 124-125.
[lxxxi] *Ibid.*
[lxxxii]*Ibid.*
[lxxxiii] *Ibid.*
[lxxxiv] Shai, I. (2019) The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections. *African Human Rights Journal,* 19. 494-509, 502.
[lxxxv] *Ibid*, 501.
[lxxxvi] *Ibid,* 496-497.
[lxxxvii] *Ibid,* 506.
[lxxxviii] Act No. 66 of 1995.
[lxxxix] Act No. 75 of 1997.
[xc] Act No. 29 of 1996.
[xci] Act No. 27 of 1956.
[xcii] Act No. 130 of 1993.
[xciii] Act No. 78 of 1973.

2. CHAPTER TWO: CONTEXTUAL ANALYSIS

> *"A mine is a prison. If you survive the mines you have survived prison. An underground man struggles because he doesn't see the sun. He starts work at five or half-past four. He knocks off around six. You can imagine how much time people spend underground…while inhaling that dangerous, ugly air."*. – Interviewee, *Dying for Gold* (2018)[i]

2.1 *Introduction*

The social and historical context enabling the emergence of silicosis and tuberculosis in the Southern African region must be analysed to provide the contextual basis out of which the *Nkala* class action arose. The crisis resulting from the mining economy is at its core a deeply racial and socio-political issue; it is important to acknowledge the centuries of slavery and indentured labour of the colonial period, and the subsequent period of coercive migrant labour conditions of apartheid that persist today. The mining conditions underground and how such conditions are attributable to the breach of duty of care of the mining companies are pertinent. This contextual analysis seeks to emphasise the historical persistence of the structural harms that continue to fester despite the coming into force of the Constitution and its comprehensively written Bill of Rights.

2.2 *The cause of action: silicosis and tuberculosis*

From as early as 1902 several commissions of inquiry were appointed by the South African government to investigate the causes of silicosis, such as the 1902 Weldon Miners' Phthisis Commission and the 1903 South African Native Affairs Commission.[ii] These commissions established early on that the disease is caused solely by the inhalation of excessive crystalline silica dust that is generated and released into the air during mining processes, which include blasting, drilling and handling the rock and soil containing such dust.[iii] Particles of such dust are deposited in miners' lungs upon inhalation, causing scarring and fibrosis thereof, and is painful, incurable, and latent.[iv] The disease is irreversible and often fatal.[v] The onset of the disease is progressive, and may take many years to exhibit symptoms, even though work on the mine has ceased.[vi] It is therefore often referred to as 'chronic silicosis' as it typically takes more than fifteen years to become symptomatic.[vii] Richard Spoor, one of the legal representatives of the class in the *Nkala* case, estimates that one in four gold miners in South Africa suffers from silicosis.[viii]

Tuberculosis, on the other hand, is a bacterial lung disease, which can be treated successfully upon early detection, but may be fatal otherwise.[ix] The infection in the lungs is caused by the mycobacterium tuberculosis complex (tubercule bacilli), and is spread from person to person via the inhalation of infected droplets.[x] The disease may be present with active symptoms or remain latent, and the only cure

for it is antibiotics.[xi] While silicosis does not necessarily cause tuberculosis, there is an association between the two, where the prolonged and excessive exposure to and inhalation of such dust poses a lifelong risk of developing tuberculosis even in the absence of active silicosis.[xii]

The Court in the *Nkala* case differentiated between tuberculosis and silicosis in separating the classes of applicants who were applying for the certification. This is because, while the sole cause of silicosis can easily be attributed to mining conditions underground, there is a range of causes of tuberculosis, and therefore there is a higher burden proof to show, on a balance of probabilities, that the cause of their contraction of tuberculosis was the underground mining conditions.

2.3 *A brief history of tuberculosis and silicosis in Southern Africa*

Tuberculosis was comparatively rare in the mid-1800s in the Southern African region when the disease reached its peak in Europe.[xiii] The disease was brought to the country in the late 18th and 19th centuries by European colonists, with its spread being correlated to their degree of contact with Indigenous communities.[xiv] Dr William Budd, an English epidemiologist known in this period for his studies on infectious diseases, wrote that Indigenous communities living in coastal African areas were particularly vulnerable to tuberculosis (referred to as 'phthisis' at the time).[xv] However, he further noted that there was no reason to believe that communities living to the interior of the region would be vulnerable, as their contact with European settlers was slight.[xvi] As such, non-colonised communities in the Southern African region remained relatively untouched by the disease for a longer period of time.[xvii]

The discovery of diamonds in 1867 and gold in 1886 in Southern Africa attracted more European settlers to the region, which resulted in more carriers spreading the disease to Indigenous groups. Gold mining has been directly correlated with illness and death since the discovery of gold in the region.[xviii] Silicosis and tuberculosis have been so closely associated during this time that the term 'miner's phthisis' was often used to conflate the two diseases.[xix] The silicosis crisis can therefore be traced back to the inception of the mining industry in Southern Africa with certainty, while tuberculosis has its roots in the colonisation of the region.

2.4 *The South African mining industry*

> *"They say the rock is money, but you can't see the value of it."* – Interviewee, *Dying for Gold* (2018)[xx]

South Africa was a leading producer in the global trade of gold since the discovery of the world's largest gold resource in the Witwatersrand Basin in 1886.[xxi] Over time, the region was brought to the forefront in global production, which peaked in 1970.[xxii] Gold exports therefore became a large

contributor to the growth in the gross domestic product of the region.[xxiii] South African currency has for decades been based largely on the value of highly demanded exports.[xxiv] The mines were, and remain, politically powerful and dominated by private corporations and are a major source of government revenue.[xxv] However, this growth of wealth left a trail of hundreds of thousands of current and former miners suffering from debilitating and often fatal silicosis and tuberculosis in its wake.[xxvi]

The mining industry remains one of South Africa's largest employers, having exploited the region's mineral resources for over a century. During this period, it is estimated that hundreds of thousands of miners from the region contracted and succumbed to silicosis and tuberculosis.[xxvii] Due to the exhaustion of mineral reserves in the region, with the prediction that the cost extracting gold would soon exceed its value the deeper mining activities go, the growth of mining industry in South Africa saw a decline after its peak in the 1970s.[xxviii] Nevertheless, the industry continues to operate and maintains a lead in the employment of Southern Africans today.[xxix] In 2020, Harmony Gold Mining Company Ltd[xxx] employed 33 090 miners, while AngloGold Ashanti Ltd employed 36 950 miners.[xxxi] In a survey dated July 2021, a total of 279 840 employees were recorded to work at the leading mining companies in South Africa.[xxxii]

2.5 *Conditions underground*

> *"They never told us that the dusty conditions underground are dangerous. This dust is very fine, much like flour by my understanding. Because by the time you're aware of it you already have silicosis. Only science can see this fine dust, not us. And people like us who did not go to school, went to work in the mines."* – Mr Bangumzi Balakisi, *Dying for Gold* (2018)[xxxiii]

Silicosis has long been recognised as a prevalent risk factor for tuberculosis, with studies revealing that miners with silicosis have a significantly higher risk of contracting tuberculosis than those without.[xxxiv] Miners therefore experience rates of tuberculosis approximately ten times higher than that of the general population in the Southern African region.[xxxv] Mine medical officers regard tuberculosis and silicosis as some of the most prevalent health problems facing miners with the illnesses being the biggest causes of mortality amongst them aside from trauma.[xxxvi] Silica dust exposure, often referred to as 'deadly dust', is associated with a lifelong risk of contracting silicosis and tuberculosis, even in cases where silicosis is not contracted.[xxxvii] It is therefore this 'deadly dust' that has been responsible for the erosion of the health of hundreds of thousands of miners, either by causing silicosis or increasing their risk of contracting tuberculosis and pneumonia.[xxxviii] In 1994, the Leon Commission into Health and Safety in the Mining Industry (the Leon Commission) confirmed that silica dust levels in the mines were extremely hazardous and that little had been done to decrease such levels in over fifty years.[xxxix] The Commission was set up to look into occupational health and safety in the mining industry over the previous thirty years.[xl]

Thirty affidavits were submitted by the applicants in support of the class action certification application in the *Nkala* case.[xli] The representative applicants acted for two classes: firstly, current and former miners who have silicosis and/or tuberculosis, and secondly the dependents of miners who had died as a result of the above diseases.[xlii] Each affidavit deposed by former miners states that, during their time of employment, they were "frequently and regularly exposed to silica dust released during day-to-day mining activities," regardless of which mine they worked at, or during which period they were employed.[xliii] Intense exposure was said to occur from working with and near activities such as drilling, blasting and crushing of ore and rock.[xliv] The explosions would create vast amounts of dust, and the miners reported that they could taste, see, and smell the dust, and that their uniforms and hair were white from it.[xlv] Silica dust exposure is therefore extremely high in the mines. This is despite the various legislative measures in place that seek to regulate the extent to which miners are exposed.

Companies are under a statutory duty to ensure that certain safety protocols are followed, and that their employees are provided with appropriate safety equipment.[xlvi] At all material times during the class period (that is, 1965 to the date of the institution of the class action), each of the cited companies were bound to comply either with the MWA, which was operative until 2002, or with the MHSA, which remains in force today.[xlvii] These Acts and their regulations require that the underground setting be properly ventilated and evacuated when necessary to maintain a safe and healthy working environment.[xlviii] It is emphasised that no miner may be in the vicinity of noxious substances, and that work may only resume once such an area is declared safe.[xlix] Blasting processes therefore have to be arranged in such a way to avoid exposing miners to harmful dust, smoke, gas or fumes.[l] Machinery and the surrounding working environment must be cleared of dust before miners are permitted to utilise the area.[li] However, despite these legislative mechanisms in place, miners were made to work in areas that were not properly ventilated to maintain safe and healthy environmental conditions, nor were they properly evacuated during blasting procedures.[lii] The affidavits all reported that there was inadequate ventilation to control the dust levels underground, and that the same dust would settle on the equipment which would seldom be cleaned between shifts.[liii] The majority of the affidavits further confirmed that miners were not evacuated during the blasting process, nor were they required to wait until dust levels had settled after the blast.[liv] One miner reported that they were not evacuated when the bombs were ignited in the blasting sites, but simply "moved away and covered their ears," after which they promptly returned to the site.[lv] Another reported that the miners were not taken to the surface during the blasting processes, and were therefore exposed to a tremendous amount of dust generated in the air after the blasting.[lvi] As far as safety equipment is concerned, an alarming number of the deponents stated that they were provided with inadequate respiratory equipment, if at all.[lvii] Some reported that they needed to pay for oxygen masks, which they could not afford to do, while others reported that their employer told them to simply "cover their faces" in dusty areas.[lviii]

While the Court received numerous affidavits regarding the working conditions under which the miners had to work, all of them made similar averments regarding the dangerous working conditions and labour relations. Indeed, the Court referred to them as "Victorian-era" like working conditions, regardless of which mine the deponents worked at, or during which time they were employed.[lix] The evidence provided by the applicants therefore reveal the consistency at which the mining companies stripped miners of their dignity and compromised their health and safety, despite the duty of care owed to them as employers.[lx] The Court, in fact, confirmed that the mining companies did so with "such intensity and ferocity that they (the miners) were effectively dehumanised."[lxi]

Each of the former miners reported that, while their entrance medical examination declared them fit for work, they were retrenched well before retirement age (by an average of ten to fifteen years) because they had subsequently fallen ill as a result of silica dust exposure, and were diagnosed with silicosis some years later.[lxii] This provides evidence that the conditions of working underground led to thousands of former miners falling ill and losing the ability to find gainful employment as a result.[lxiii]

2.6 *Living conditions in mining hostels and surrounding settlements*

The remote location of the mines coupled with the migrant labour system resulted in the need for miners to be housed at mining hostels provided by mining companies.[lxiv] The booming market in the industry meant that large numbers of miners required housing in a small geographic space, which fostered conditions which contributed to the high rate of tuberculosis transmission amongst miners.[lxv] Miners who live in the hostels live in multiple-occupancy, single-sex hostels that are made up of bunked dormitories, sleeping an average of sixteen men per room.[lxvi] This fosters conditions for the transmission of airborne lung diseases. In an interview for *Dying for Gold* (2019), Mr Balakisi reported that –

> "*we breathed the same air in there. We were all jammed into one room. Altogether, we'd be sixteen in the same room. I'd say it would've been easy to contract TB* (tuberculosis) *in that environment. In my case, I unfortunately contracted both TB and silicosis at the same time. It was terrible, sleeping in a place like a grave.*"[lxvii]

Further, an affidavit submitted to the Court in the *Nkala* case reported that –

> *"I was placed in a dormitory with fifteen other men. The dormitories were separated by tribe and I stayed with fifteen other Xhosa mine workers. It was fitted out with sixteen cement beds which had the appearance of tomb stones. I hated the mine hostels. The dormitory was dirty and smelly…the showers and toilets were in a different building next to our dormitory…they were shared by about twenty dormitories."*[lxviii]

The living conditions in the mining hostels are therefore reported by miners and former miners to be substandard and poorly ventilated, which facilitates the spread of airborne diseases.[lxix] This is a matter of concern considering the lack of options for miners who were barred from living around the mines during apartheid, and who now cannot afford to find better living conditions in the absence of legislative prohibition on Black settlement in urban areas. Evidence provided by the applicants in the *Nkala* case state that mining companies sacrifice the health and safety of miners in order to maximise profits by providing them with poor living conditions.[lxx] Indeed, the inspectors for the Leon Commission of 1994 reported that they were shocked by the conditions under which miners had to live, with facilities that were "so squalid as to shock the most hardened."[lxxi] The Commission also found that the ventilation systems in the buildings had been replaced with closed ceilings, which effectively eliminated ventilation from the rooms – conditions which are favourable for the transmission of tuberculosis in the hostels.[lxxii]

2.7 *The migrant labour system*

The development of the mining industry set the tone for labour relations in Southern Africa and the dependence of the mining sector on migrant labour. Recruiting cheap labour in large numbers was essential for profit.[lxxiii] The complex web of political and economic policies of apartheid allowed captains of the mining industry to avoid the costs of miners' community and family needs due to their subordination to a subservient status under a white capitalist state.[lxxiv] This was borne of an ideology informed by the demands of white capital for a cheap and malleable workforce in place since white settlement in the Southern African region.[lxxv] Thus, the extensive migration system throughout the region was carefully constructed over approximately a century to facilitate the movement of miners to and from the mines.[lxxvi] The industry has been build up and remains dependent on the cheap labour of people who have supplementary means of subsistence, employing millions of migrant workers who travel from rural communities in Southern Africa.[lxxvii] The circular pattern of migration that characterises the labour relations in the mining sector is conducive to the spread of tuberculosis both on the mines and to the rural areas from which the miners migrate and to which they return.[lxxviii] The system of migrancy in South Africa is unique due to its deeply political foundation and negative impact upon the labour-sending communities.[lxxix] It is indeed ironic that the region's abundance of mineral resources has generated massive wealth for the elite minority of South Africa, while also playing a leading role in the development of the silicosis and tuberculosis epidemics that burden the country's already over-stretched healthcare system today.[lxxx]

Migrant labour is a manifestation of a process occurring in the Southern Africa over the last century resulting from the capitalist relations of production under historical conditions of colonialism and slavery.[lxxxi] The Cape colony became the primary receiver of forced labourers under the slave trade from

neighbouring Southern African countries, which transitioned, with little interruption, to the importation of migrant labour.[lxxxii] Mining labour relations in South Africa is therefore fraught with a violent colonial history of slavery, indentured labour, and finally contracted labour migration that underpins the industry today.[lxxxiii] It is this colonial violence that established new forms of servitude after the formal end of slavery, and the exploitation of cheap labour today continues this coercive legacy.[lxxxiv]

With the anticipation of the emancipation of slavery came the introduction of a system of 'apprenticeships' into the colony, which was still dependent on the trade of human beings from neighbouring countries.[lxxxv] The Caledon Code of 1809 subjected Indigenous peoples to a pass system, which enabled the colonial administration to distribute labour in such a way that gave them a grip on the economy.[lxxxvi] The apprenticeship system introduced a degree of flexibility into the labour market, which further empowered the colony to retain its foothold in the economy.[lxxxvii] The industrialisation of the Southern African region from the 1820s interrupted cultivation and pastoralism that characterised Indigenous livelihoods.[lxxxviii] With the introduction of manufactured goods came the necessity for Indigenous people to become more integrated into the commercial networks to buy what they were previously able to produce themselves.[lxxxix] This meant that it was necessary for Indigenous men to migrate to economic hubs to earn the money required for the maintenance of a new kind of survival. Further, the abolition of slavery replaced the slave trade with a new form of state-controlled labour exportation characterised by migrancy.[xc]

During apartheid, Black workers were prohibited from settling permanently in whites-only areas, which created a pattern of circular migration.[xci] The targeted segregation of the Group Areas Act of 1950, as well as state-imposed mechanisms such as influx control and the homeland system of government, perpetuated the impermanence for Black labourers as migrant workers.[xcii] Black families were forced to live in regions that were geographically detached from mining sites, and the large distances between the mines and labour-sending communities created and perpetuated this system of migratory labour.[xciii] There exists a long historical process of creating 'rural reserves' in the Southern African region for the purpose of segregation between the white minority and the majority of the African population via their removal from arable land which the white population took, often by force.[xciv] Black populations therefore had to work for wages paid by the white capitalist economy to survive their subordinated position in society, which intensified with the establishment of the Union of South Africa in 1910 in which they were integrated without rights to navigate the structures of segregation.[xcv] The Natives Land Act of 1913 further restricted land available for Black populations, imposing strict limits on their access to, and stakes in, urban areas designated for the white population.[xcvi] As a result, such populations were forced into limited reserve areas which suffered under the burden of drought and famine, leading to the sharp decline of agricultural productivity.[xcvii] Dependence on wage labour therefore intensified as it became critical for survival.

The structure of the migrant labour system enabled the industry to pay labourers a subeconomic wage that was less than the market value of their labour, as well as less than what was required to sustain the reproduction of such labour.[xcviii] The impact of the establishment of rural reserves on creating a dual-dependency on the migrant labour pattern to drive the white economy was profound. These political mechanisms therefore exploited long-existing patterns of migration of Southern Africa's mining workforce, while apartheid legislation concretised such migration patterns in its further restrictions on land ownership for Black populations that were located far away from the mines.[xcix]

This migration pattern exposes people in low prevalence areas, such as labour-sending communities, to migrant workers with a higher prevalence of HIV and tuberculosis. It also prevents consistent access to healthcare and diagnostic support for these illnesses, which further facilitates the spread of these diseases.[c] This is because miners pose transmission risks to members of their communities as they travel home undetected or untreated, conditions under which tuberculosis is highly infectious.[ci] Migratory labour means that miners moving between their home communities and the mines are unlikely to have continuous and consistent access to treatment, which not only puts infected individuals at risk of death but increases the likelihood of subsequent transmission of drug-resistant strains of tuberculosis.[cii] The migration pattern therefore poses a great challenge in enforcing an effective health service and ensuring adherence to treatment, which in turn increases the risk of the transmission of drug-resistant strains of tuberculosis.[ciii] As a result, effective healthcare delivery is compromised.[civ]

Many miners and their families continue to opt to live in informal settlements surrounding the mines as an affordable alternative to the hostels to avoid family separation. These settlements create conditions that are similarly conducive to the spread of airborne diseases.[cv] Living conditions in both the housing provided on the mining sites and the informal settlements surrounding the mines therefore create conditions that provide an environment in which the risk of the transmission of tuberculosis is very high.[cvi] These environments therefore increase the risk of infection that extends beyond the working conditions. This is exacerbated by widespread alcohol and tobacco use which compromise immune responses.[cvii] Such conditions are ideal for the spread of airborne diseases, and studies from 2009 found that less than thirty percent of mining companies have actually improved such housing standards.[cviii] The affidavits submitted to the Court in the *Nkala* case confirm that such poor conditions persisted up until the time in which the class action was instituted.

2.8 *Conclusion*

The mining industry and its working conditions are arguably considered the engines of respiratory diseases in general, and the tuberculosis and silicosis diseases in particular.[cix] It is apparent that there is a knock-on effect resulting in consequences of national proportions due to the mining conditions

underground, the conditions under which miners live, and the migrant labour system upon which the industry depends, fuelling a nation-wide dual epidemic of silicosis and tuberculosis. The occupational lung diseases from which thousands of miners have suffered or succumbed to cannot be restricted to the mining locality, due to the circular migration pattern of these labourers. Further, the delayed onset of symptoms that characterises silicosis infection has enabled mining companies to detach themselves from responsibility for those infected with the illness and who experience symptoms long after their work on the mines has ceased.

Healthcare disruptions, lack of education around the treatment of tuberculosis, and the difficulty in monitoring patients who oscillate between Southern African regions result in poor treatment adherence. This leads to a rise in incidences of drug-resistant strains tuberculosis, adding further fuel to the fire that is the tuberculosis epidemic.[cx] The economic consequences are profound: those suffering from tuberculosis or silicosis are unable to participate further in the economy, and are therefore unable to escape the medical poverty trap.[cxi] Family members of those infected are not only at risk of contracting tuberculosis, many are also forced to abandon income-generating or educational opportunities in order to care for the ill family member, upon whom the family had previously depended for their sole means of household income.[cxii] The direct and indirect costs of treatment are high, and many patients therefore opt to abandon treatment to avoid losing their posts in the mines, should they be reasonably fit to continue working.[cxiii] This further drives the circular tuberculosis epidemic in South Africa and neighbouring regions.

The systemic problem arising out of the mining industry's hazardous working conditions and poor corporate responsibility in tackling this problem has had massive health and economic implications for miners who have contracted occupational lung disease as a result of their tenure on the mines. Further, the problem that arose in the mining locality has escalated to a national and regional health crisis as a result of migration. It is under these circumstances that the *Nkala* class action was instituted. However, while the respondent mining companies cannot possibly be held legally liable for the national tuberculosis and silicosis epidemics, the applicants *can* apply for the Court to hold them legally accountable for their working and living conditions that have led to the contraction of tuberculosis and silicosis by thousands of miners, and for which the class members are entitled to compensation. In this way, the *Nkala* class action is an attempted means by which to 'kill the snake (the national crisis emanating from occupational lung diseases) by hitting it on its head (the mining industry).'

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[xvii] van der Walt (2020), 1.
[xviii] Pakleppa & Meyburgh (2018).
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[xxv] McCulloch, J. Medicine, Politics and Disease on South Africa's Gold Mines (2013) *Journal of Southern African Studies,* 39(3), 544.
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[xxvii] *Ibid;* Field (2019), 213.
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[xxxvii] Kistnasamy *et al.* (2018), 2; Marks (2006), 573.
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[xxxix] McCulloch (2013), 554.
[xl] Unknown. *Klass Looch Associaties.* Retrieved on 17 September 2021, from http://www.klasslooch.com/leon_commission_of_inquiry.htm.
[xli] *Nkala* (2016): Founding and Supporting Affidavits deposed by:

1. Bonganie Nkala, dated 30 November 2012;
2. Siporono Phahlam, dated 29 November 2012;
3. Maphatsoe Kompi, dated 7 December 2012;
4. Thembekile Mnaheni, dated 22 November 2012;
5. Matona Mabea, dated 7 December 2012;
6. Mohjolofu Boxwell, dated 7 December 2012;
7. Alloys Mncedi Msuthu, dated 27 November 2012;
8. Liphapang Akime Lebina, dated 7 December 2012;
9. Zama Gangi, dated 28 November 2012;
10. Malungisa Thole, dated 29 November 2012;
11. Monokoa Thomas Lepota, dated 7 December 2012;
12. Mzawubalekwa Diya, dated 29 November 2012;
13. Msekeli Mbuzweni, dated 29 November 2012;
14. Zaneyeza Ntloni, dated 28 November 2012;
15. Myekelwa Mkenyane, dated 29 November 2012;
16. Masiko Somi, dated 29 November 2012;
17. Zwelendaba Mgidi, dated 28 November 2012
18. Mthobeli Gangatha, dated 28 November 2012;
19. Lanndile Quebula, dated 30 November 2012;
20. Phumeleleo Solitasi Slyocolo, dated 28 November 2012;
21. Tekeza Joseph Mdukisa, dated 29 November 2012;
22. Michael Litabe Litabe, dated 7 December 2012;
23. Joseph Lebone, dated 7 December 2012;
24. Tohlang Paulosi Mako, dated 10 December 2012;
25. Nanabezi Mgoduswa, dated 29 November 2012;
26. Thulenkho Kuswane, dated 29 November 2012;
27. Maleburu Regina Lebitsa, dated 7 December 2012;
28. Mataaso Mable Makone, dated 7 December 2012;

29. Matsekelo Cisilia Masupha, dated 7 December 2012; and
30. Matisetso Masiepati Jesenta Nong, dated 7 December 2012.

[xlii] *Nkala* (2016).
[xliii] Bongani Nkala (2012), and cited repeatedly in the 26 Supporting Affidavits.
[xliv] *Ibid.*
[xlv] Phahlam (2012); Kompi (2012); Mnaheni (2012); Mabea (2012); Boxwell (2012); Msuthu (2012); Mgidi (2012); Gangatha (2012); Qebula (2012); Siyocolo (2012); Mdukisa (2012); Litabe (2012); Lebone (2012); Lebina (2012); Gangi (2012); Thole (2012); Lepota (2012); Mbuziweni (2012); Ntloni (2012); Mako (2012); Mgoduswa (2012); & Kuswana (2012).
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[xlix] MWA 1965 Regulation 6.6(5); MWA 1970 Regulation 10.6.4
[l] MWA 1965 Regulation 6.10; MWA 1970 Regulations 10.6.5 & 10.10.3.
[li] MWA 1965 Regulation 6.10; MWA 1970 Regulations 10.10.5 & 10.20.1.
[lii] *Nkala* (2016): Particulars of Claim (2012).
[liii] Nkala (2012); Phahlam (2012); Mnaheni (2012); Msuthu (2012); Qebula (2012); Mdukisa (2012); Lebone (2012); Lebina (2012); Gangi (2012); Ntloni (2012); & Mako (2012), para 6.
[liii] Nkala (2012).
[liv] *Nkala* (2012): Founding Affidavit and Supporting Affidavits.
[lv] Diya (2012).
[lvi] Somi (2012).
[lvii] *Nkala* (2012): Founding and Supporting Affidavits.
[lviii] Boxwell (2012); Lebina (2012); Gangi (2012); Thole (2012); Lepota (2012); Ntloni (2012); Mgidi (2012); Qebula (2012); Mdukisa (2012); Litabe (2012); Lebone (2012).
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[lxx] *Nkala* (2016), 42.
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[lxxiii] *Ibid.*
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[xcv] *Ibid.*
[xcvi] *Ibid,* 165.
[xcvii] *Ibid.*
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[c] Basu *et al* (2009), 2.

[ci] *Ibid*, 3.
[cii] *Ibid,* 2.
[ciii] The Harmonisation Report (2014), 12.
[civ] Stuckler *et al* (2013), 641.
[cv] Dharmadhikari *et al* (2013), 657.
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3. CHAPTER THREE: THE CONSTITUTIONAL DISPENSATION, THE CLASS ACTION MECHANISM, AND THE LEGISLATIVE FRAMEWORK FOR LABOUR RIGHTS AND COLLECTIVE ACTION

3.1 *Introduction*

The constitutional and legislative framework is relevant to understanding the reason for the cause of action in the *Nkala* case being rooted in the law of delict. This is because, while the Constitution is considered to be a guardian for human rights, with implications of social improvement and better lives for all, miners still had to resort to legal creativity to vindicate rights to compensation under the common law. This was despite the existing constitutional and legislative framework that provides for compensatory mechanisms. The question then arises as to why such instruments were not considered accessible for the class of aggrieved miners and former miners to assert their rights to adequate compensation. The disparity between the constitutional entrenchment of socio-economic rights and the lived experience of the class members must be acknowledged. Similarly, the constitutional emphasis on horizontality versus the unequal bargaining power between mining companies and their employees should fall under scrutiny.

Despite the technical transformative nature of the Constitution, it must be considered in the context of pre-democratic negotiations, in which the economic effects of apartheid were neglected in favour of questions regarding institutional choice and political power.[i] Mahmood Mamdani, in his discussion regarding the post-apartheid transition in South Africa, reiterates that the violence of apartheid did not target the bodily integrity of a population group, but rather their means of livelihood, land and labour.[ii] However, the Constitution's attention to socio-economic rights rings hollow against the reality that the economy remains dependent on the system of migrant labour and exploitation. It seeks to prevent the recurrence of racialised violence (via the entrenchment of civil and political rights) that resulted as a *symptom* of the core aims of apartheid, which were racialised economic exploitation and segregation.[iii] However, the results of the structures set in place in pursuit of these core aims remain unaddressed, and as such the culture of liberal democracy allows for such social and economic inequalities to persist.[iv] It is in this context that one can observe the plight of miners who continue to face severe exploitation despite the constitutional and legislative entrenchment of their labour and occupational health rights.

The reasons that the applicants did not pursue the class action through their representative trade unions, considering the pivotal role such bodies played in the advancement of labour rights during apartheid, are also relevant. Their representative trade unions did not act on their behalf because occupational injury grievances do not amount to labour disputes, which trade unions are restricted to. This will provide insight as to why the aggrieved miners and former miners resorted to instituting a class

action claim. It is therefore necessary to understand the class action mechanism and its history in South African law.

3.2 *Understanding the class action mechanism*

The class action mechanism is a relatively new legal means by which to pursue justice in South Africa, being introduced by the constitutional right of access to justice.[v] In her discussion on exacting silicosis justice through the class action mechanism, Tracy-Lynn Field notes that it serves as a vehicle for individual justice, as well as a means to effect broader-scale social change.[vi] The mechanism allows for individuals to aggregate claims against powerful corporate bodies in a collective adjudication of relatively small claims, which would otherwise not have been feasible.[vii] Such claims would have been far too expensive for an individual to pursue against a large corporation in the context of social and economic obstacles. This therefore broadens access to justice by providing the potential to act as an equaliser in the context of an individualised system of litigation.[viii] The individualised system of litigation arises from the procedural pressure to personalise injuries to render them quantifiable and easily determinable.[ix] The class action mechanism, however, allows for the court to perceive the class as a class of individuals so that every person can be represented as a victim in their subjectivity, while also allowing for structural issues to be addressed without personalising them.[x] This avoids the singling out of individual injustices which would sever ties between different victims' sufferings of similar structural violence.[xi] Avoiding solely focusing on the individual leaves room for courts to consider consequences of structural violence.[xii]

While there is no specific legislation prescribing the ambit of class actions, the Constitution provides its basis in stating that anyone acting as a member or interest of a group or class of persons may pursue litigation.[xiii] The South African Law Commission (SALC) established Project 88 in which it investigated the recognition of class actions in South African law.[xiv] In its 1998 report, the SALC recognised the utility of the process for public interest litigation and found it in keeping with the Constitutional provision of the right of access to justice.[xv] Despite the SALC recommendation that the Legislature enact legislation to direct the courts' management of the process, such legislation is yet to be enacted.[xvi] Instead, the common law gave direction on the process in subsequent court cases. The first class action to be heard in South Africa was the case of *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* (2001), in which the Court confirmed that such litigation may be pursued in respect of the infringement of constitutional rights.[xvii] The Court in the case of *Children's Resource Centre v Pioneer Foods* (2012) defined the mechanism as one which enables claims of a number of persons (brought about by the 'representative plaintiff/s') against the same defendant/s for a remedy for the same or similar alleged wrongs with shared questions of law or fact ('common issues') to be determined in one suit.[xviii] The mechanism is two-fold: the court must first allow the class to litigate in

this manner (known as certification) to ensure that only viable claims are heard.[xix] After the certification the case proceeds as usual in assessing the substance of the claims, thereby facilitating the pursuit of justice by individuals who are otherwise unable to undertake legal proceedings to recover damages independently. [xx] This marked a shift in the legal paradigm, which, before 1994, only allowed for those who could show direct personal harm to have standing to sue.[xxi] The Constitutional Court in the case of *Fereirra v Levin* (1996) stated that this change came out of an intention to ensure that constitutional rights enjoy the full measure of protection.[xxii] This is because class actions typically represent large groups of the socio-economically disadvantaged who do not have the resources to pursue individual litigation to protect their rights.[xxiii]

3.3 *Justiciable socio-economic rights*

The Constitution is unique in having embedded socio-economic rights into the workings of the courts, along with civil and political rights, both of which are legally justiciable.[xxiv] Civil and political rights refer to the rights to life and equality, the right to participate in democracy by voting, the right of freedom and security of the person, the right of freedom from slavery and forced labour, and so on.[xxv] Socio-economic rights refer to the conditions and resources that are necessary for the material well-being of people, such as the right to food, water, housing, health care, social assistance, education, and a safe, clean and healthy environment.[xxvi] Former Constitutional Court Chief Justice Dikgang Mosoneke reiterated the importance of socio-economic rights to the restoration of social justice as a foundational value of the South African Constitutional democracy, interacting equally with human dignity, equality, freedom, accountability, responsiveness and openness.[xxvii] These rights mirror what has been recognised by the United Nations as universal in the Universal Declaration of Human Rights (1948), which sought to create an international standard of human rights after the atrocities of World War II.[xxviii] While the United Nations recognised that these rights are interconnected and interdependent, its General Assembly resolved that two instruments separating civil and political rights from socio-economic rights were necessary.[xxix] As such, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were passed in 1966 and were intended to operate in tandem.[xxx] However, while the ICCPR was ratified by South Africa in 1998, the ICESCR was only ratified in 2015. [xxxi]

While the ICCPR requires that member states respect civil and political rights absolutely, the ICESCR requires states to take steps to the maximum of their available resources to progressively realise such rights.[xxxii] This terminology suggests that civil and political rights require absolute and immediate implementation, while socio-economic rights require gradual realisation, depending on available state resources.[xxxiii] This segregation of rights has led to the privileging of civil and political rights over socio-economic rights.[xxxiv] While the Constitution does not make this distinction, its wording echoes that of

the two Covenants, qualifying the right to socio-economic resources to depend on the available resources of the State. In the case of *Mazibuko v City of Johannesburg* (2010), the Constitutional Court confirmed that the Constitution requires the State to take reasonable legislative and other measures to progressively achieve the enjoyment of socio-economic rights to ensure that all enjoy the basic necessities of life. [xxxv] The Court, however, stressed the institutional impropriety of its determination of what precisely these measures ought to be. This was due to the separation of powers doctrine, which determines that the Legislature and the Executive are the institutions best placed to investigate social conditions in the light of available budgets for the determination of achievable targets regarding these rights.[xxxvi] The courts are therefore limited in their ability to effect broad-scale transformation which would better be achieved by comprehensive policies to progressively realise socio-economic rights.

The constitutional entrenchment of socio-economic rights acknowledges their necessity to the attainment of substantive equality in South Africa. However, while the Constitution places a duty on all spheres of South African society to respect civil and political rights, the positive duties arising out of socio-economic rights are directed at the State.[xxxvii] Thus, the socio-economic conditions of miners foster an environment in which companies can exploit their labour in a dangerous working environment (as is claimed in the *Nkala* case), but these companies, as non-state actors, cannot be held liable to progressively realise the fulfilment of these rights. Mining companies therefore benefit from the poor socio-economic conditions of their employees. At the same time, they cannot be held legally responsible for these poor conditions unless they actively set out to infringe upon the enjoyment of existing socio-economic rights. However, it may be possible that the outcome of the *Nkala* case, along with the Settlement Agreement, could lead to an indirect means (via the class action mechanism) by which the class members may be able to realise these rights without State intervention (via the provision of compensation). Nevertheless, such judicial outcomes can only be directed at parties who can be held liable under legal requirements of fault and causation, instead of being able to address broader systemic issues that foster the conditions under which people are forced to work. Allowing for the latter will amount to arbitrary and legally unsound outcomes. Further, it cannot be said that compensation can act in lieu of the provision of essential resources by the State for socio-economic improvement. Compensation can only target the quantifiable damages suffered by claimants, and cannot possibly tackle the structural conditions that created an environment in which such damages could be effected by the mining companies on a persistent basis.

3.4 *Vertical and horizontal applicability of the Constitution*

What is unique about the South African Constitution is its horizontal applicability, that is, the fact that the Bill of Rights applies to non-state actors.[xxxviii] Section 8(1) of the Constitution states that the Bill of Rights applies to all law, binding the Legislature, the Executive, the Judiciary and all other organs of

State, such as the National Prosecution Authority and the Judicial Services Commission – this refers to its vertical applicability to the State, which is bound by the Constitution in its treatment of people.[xxxix] What is relevant to this thesis, however, is the horizontal applicability of the Bill of Rights, since the applicants in the *Nkala* are claiming legal relief from private entities and non-state bodies.

Section 8(2) of the Constitution states that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, depending on the nature of the right and the duty imposed thereby. This section explicitly contemplates direct horizontal application between private non-state bodies. "To the extent that it is applicable" refers to the fact that certain rights, such as the right to just administrative action, cannot bind private and juristic persons as it is only State bodies that can exercise administrative powers.[xl] Section 8(2) therefore becomes applicable when one private party alleges that another private party has violated a right in the Bill of Rights that binds that party due to the nature of the right. This is relevant in the context of mining labour relations, since the Bill of Rights imposes duties of care upon corporations in their treatment of employees derived from the rights to equality, human dignity, fair labour practices, an environment that is not harmful to health or wellbeing, and so on.[xli]

Horizontal applicability was definitively confirmed in the case of *Khumalo & others v Holomisa* (2002), stating that not only is the State under an obligation to uphold the provisions of the Bill of Rights, but that the duties stemming there from extend to the private sphere.[xlii] This case was regarding the horizontal applicability of the right of freedom of expression provided for in Section 16 of the Constitution, but the Court stressed that the Bill of Rights is applicable both publicly and privately.[xliii] The Constitution therefore not only attempts to confront South Africa's past of civil, political and economic oppression through placing duties upon the State to eliminate the legacy of injustice from public life, but also recognises that such injustices are rooted in the private sphere.[xliv] This acts as an acknowledgment that the classic liberal divide between the public and private spheres cannot hold, since the private sector was a key socio-economic power in, and benefactor of apartheid.[xlv] The private sector yielded much power for the beneficiaries of apartheid: urban areas were legislatively reserved for white populations, the education system was constructed in such a way as to maintain a white educated elite, and companies were able to exploit workers of colour for extreme profit.[xlvi] By 1994, the distribution of wealth in South Africa was grossly uneven, and thus the intention of horizontality was to breathe 'new hope' into the possibility of creating a more equal society envisioned by a shared future in which the human dignity of all South Africans are realised.[xlvii]

Horizontality, however, assumes that private parties have equal bargaining power in their contractual and other relations. This is incorrect in the context where large, multi-national corporations determine the wages and working conditions of employees who have limited choices in terms of

employment opportunities, or are unaware of their rights in the labour sphere. This is especially stark in mining labour relations in which migrant labourers enter into contracts with large companies who determine the working conditions that render miners vulnerable to the contraction of occupational lung diseases, but who are unable to demand for better working conditions for fear of losing employment. With limited options, and families at home who depend on their income as their sole means of subsistence, most of the miners are, in a sense, trapped in contracts in which their bargaining power is almost non-existent. As such, the horizontal applicability of the Bill of Rights, with its acknowledgment of the effects of apartheid in the private sphere, rings hollow in the face of labour relations between large corporations and vulnerable employees. While the private market therefore continues to benefit from the structures of apartheid, the socio-economic realities of migrant workers remain mostly unaddressed.[xlviii]

In the *Nkala* case, however, the Court emphasised the fact that the horizontal applicability of the Bill of Rights imposes duties of care between private parties, which extends into the common law of delict that is now informed by constitutional requirements.[xlix] This is an important acknowledgment and reinforcement of the principle that, despite the profoundly unequal bargaining power between contracting parties in the context of mining labour relations, mining companies are still under the duty to enforce working conditions that respect miners' human rights. This is an important acknowledgment in the case, since it is the existence to such duties of care that the applicants depended upon to certify their class action to form the basis of their claim to damages under the law of delict.

3.5 *The Judiciary's duty to develop the common law*

The courts are empowered to develop the common law in terms of Section 39(2) of the Constitution in order for it to reflect the popular moral sentiment of contemporary South African society and to bring it in line with the Constitution as the supreme law of the nation.[l] The purpose of Section 39(2) is to ensure that the courts take positive and gradual steps to fashion the law into a morally justified body of principles.[li] Adjudication is therefore, to an extent, the site of law-making. The question, however, arises as to how far the courts can go in achieving transformative change in the legal sphere where it cannot direct the democratically elected government to take specific action that it would deem appropriate for the progressive realisation of socio-economic rights.[lii]

In the *Nkala* case, the Court examined the delictual principle that general damages, which are personal damages resulting from pain and suffering, are not transmissible to dependents of the applicant, should the applicant pass away before the claim reaches the trial phase. As will be discussed further in Chapter Five, the Court took heed of the social realities of the dependents of miners who would be precluded from enjoying an award for damages because the sole breadwinner has passed away since the institution of the claim due to the lengthy judicial process.[liii] The Court therefore concluded that this

principle was unconstitutional in light of the need of the law to protect the most vulnerable members of society, and developed the common law of delict to allow for the transmissibility of damages.[liv] While this development in the law is welcomed due to its importance in protecting the rights of the vulnerable by increasing their access to justice in principle, the potential of this development to provide meaningful justice to miners and their dependents in this context must be questioned.

3.6 *Legislative instruments establishing standards for fair labour practices*

Section 23(1) of the Constitution provides for the right to fair labour practices, and was included in the Bill of Rights as a response to a history fraught with the exploitation of workers of colour.[lv] The right to fair labour practices interacts with the right to protest in Section 17 and of freedom of association in Section 18 of the Constitution.[lvi] These rights provide for the freedom of workers to form and join trade unions, participate in their activities, to strike, and to engage in collective bargaining.[lvii] In turn, they place a duty upon employers to enforce fair labour practices and respect these rights. Labour rights arose out of the negotiated political recognition at the close of apartheid, which acknowledged that democracy requires robust and continuous dialogue between the State and its citizens, as well as between corporations and their workers.[lviii] This negotiation process occurred at the 1991 Convention for a Democratic South Africa (CODESA), which resulted in the enactment of the Interim Constitution of 1993.[lix] The resultant Interim Constitution was consolidated into the Final Constitution of 1996, which now includes the right to freedom of association in the workplace.[lx] This is in stark contrast to legislation enacted at the inception of the South African Union (1910) and throughout apartheid, which shows a timeline of statutory suppression of labour rights, striking rights, and the institutional refusal to implement fair labour practices and basic conditions of employment.

However, while such rights were formally entrenched in the Interim and Final Constitutions as a result of these negotiations, the privileging of political and legal reform over social and economic justice at CODESA meant that the interests of the popular base were not taken into account.[lxi] With the focus of the African National Congress (ANC) being on the removal of apartheid legislation, many believed that they had left out the Black majority by negotiating away their economic and social rights which had been the core target of the apartheid regime.[lxii] Thus, while the law books formally reflected the removal of apartheid-era policies by entrenching labour rights and basic conditions of employment, the assumption that this would affect the economy in substance was unfounded and allowed for South Africa to emerge out of apartheid as a neo-colonial State.[lxiii] In this way, the economic and social conditions continues to force thousands into migrancy and poor working conditions in a cycle of poverty that persists beyond de Sousa Santos' abyssal line.

The Constitution and subsequent legislation regulating labour relations such as conditions of employment and procedures that respond to occupational hazards have established corporate

responsibility against which workers can measure their employers' conduct in the workplace. The history of institutionalised oppression of labour rights acted as an impetus for the Constitution to formally entrench these rights and require the Legislature to enact statutes that further regulated such rights. Such legislation has been important in setting a precedent for corporate responsibility and a duty of care, both which are necessary aspects for establishing delictual liability for damages under the common law.

3.6.1 The Labour Relations Act No. 66 of 1995

The LRA was enacted in response to the Constitutional duty of the Legislature to give effect to the right to fair labour practices provided for in Section 23(1) of the Constitution.[lxiv] It is the first piece of post-apartheid legislation that promotes workers' rights and interests in accordance with the new democratic vision of work and industrial relations.[lxv] Importantly, the Act regulates the procedures for the formation of trade unions, strike action, and collective bargaining, which were previously illegal under the apartheid dispensation. During apartheid, various pieces of legislation criminalised Black strike action completely, allowing the white economy to maintain a stronghold over cheap Black migrant labour, and prevent 'communist' influence from the ANC over any form of non-white organisation.[lxvi] It was only in 1974 that Black workers were granted limited access to trade unions and rights to strike by the Industrial Conciliation Amendment Act. This came about as a result of intensified Black strike action in 1973 despite lacking the protection of any formal workers organisations.[lxvii] South African industry was nearly brought to a standstill as a result, already struggling under the strain of the United Nations General Assembly's resolution of 1962 calling on member states to cease military and economic relations with South Africa.[lxviii]

The LRA was enacted to initiate a change in the law governing labour relations by regulating the organisational rights of trade unions, facilitate collective bargaining, regulate the right to strike, provide for procedures for the resolution of labour disputes (such as conciliation, mediation and arbitration), and to promote employee participation in decision-making in general.[lxix] Section 1 of the Act states that its purpose is to advance economic development, social justice, labour peace, and the democratisation of the workplace.[lxx] More specifically, its express purpose to provide a framework within which employees and their representative trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment, and other matters of mutual interest.[lxxi] The Act therefore relates to the dispute resolution process of collective work issues, and does not make mention of occupational diseases or injuries. The Act therefore does not govern such issues, nor does it provide for compensatory procedures that follow. As will be analysed further in this Chapter, this acts as an explanation for the reason that this Act's relevance in this context only extends so far as to indicate the constitutional and legislative emphasis on fair labour practices, which was

emphasised in the *Nkala* case.[lxxii] It also serves as an explanation as to why the National Union of Mineworkers (NUM) did not represent the class members in the *Nkala* case, as their role as a trade union is governed by the LRA and not referred to in COIDA or ODIMWA.

3.6.2 Trade unionism and collective action versus individual representation

NUM was founded in 1982 and currently operates in eleven regions in South Africa.[lxxiii] Its constitution states that anyone employed in the mining, energy, construction and allied industries is eligible to become a member.[lxxiv] The Union prides itself on its history of 'class struggle' and political solidarity, which begs the question as to why the class action was instituted by an independently formed class of miners and former miners instead of depending on the Union that purports to represent their interests.[lxxv] The reasons for which NUM was the incorrect forum for claiming compensation for occupational injuries and diseases must be noted as an explanation as to why for the class action was instituted in the *Nkala* case, instead.[lxxvi]

Instead of turning to an organisation that purports to represent miners and their labour rights as a whole, the mine worker applicants in the *Nkala* case mobilised independently (albeit with the help of legal representation) to form a class to represent their interests. This is because the function performed by trade unions is governed by the provisions of the LRA, which provides the procedure for labour disputes and collective bargaining between employers and the working force as a whole.[lxxvii] The LRA therefore does not extend to compensation for occupational injuries and diseases, as there are other legislative instruments, namely COIDA and ODIMWA, in place that provide for individual relief. The difference between the LRA, on the one hand, and COIDA and ODIMWA, on the other, is therefore representation of the *whole* to improve conditions of employment, versus compensation paid to the *individual* claimant for occupational injury or disease. This is because the nature of compensation and the calculation thereof is specific to the individual who actually suffered the harm, and is therefore not a matter of negotiation between employer bodies and employee unions. The class action mechanism in this context is therefore unique as it is a *collective group* that represents a class of miners, similar to the function of trade unions, while claiming compensation in the form of delictual damages for *individuals.* This serves to work around the near impossibility of each member of the class instituting a separate claim for compensation for the same cause of action. As such, while trade unionism is the incorrect forum for claims relating to occupational injuries and diseases, its historical foundation of collective action is argued here to have had an impact on the mobilisation of workers to institute the *Nkala* class action. The Constitutional recognition of the right to strike, freedom of association and access to justice played an important role in leading to the Constitutional Court's incorporation of the class action mechanism into South African law in the landmark *Mankayi Anglogold Ashanti Ltd* case (2011).[lxxviii]

However, whether the collective action was a result of independent mobilisation on the part of miners or whether an external intervention was the only means by which the action could be instituted is questionable. Mobilisation depended heavily on legal representation, which in this case was by Richard Spoor Attorneys Incorporated, Abrahams Kiewitz Attorneys and the Legal Resources Centre.[lxxix] Indeed, Richard Spoor Attorneys Incorporated confirms on their website that it was Richard Spoor who filed the motion and the Founding Affidavit to request class certification of the 15 000 prospective class members on 21 December 2012.[lxxx] Most of the prospective class members are from areas known for supplying migratory labour to the gold mines and for being isolated from legal resources (including the Eastern Cape, Lesotho, Botswana and Mozambique).[lxxxi] In this context, it therefore seems as though the pursuit individual justice for a class of persons must still go through a process in which a privileged person or group (in this case, lawyers) opt to initiate action and speak for that same group.

Options are seemingly limited where members of the class cannot turn to their representative trade union to vindicate their rights to damages on their behalf, and where individual claims are riddled with barriers that impede access to the courts (such as the costs of litigation) or legislative remedies (provided by COIDA or ODIMWA). The difficulties of claiming compensation provided for in the compensation Acts must be noted as some of the main reasons for which the action was instituted under common law. It therefore appears that the only avenue available for justice is that which is facilitated by the goodwill of the legally trained elite. On the other hand, however, one cannot underestimate or diminish the autonomy of the miners, who may have mobilised to reach out for such representation in the first place, despite there being no real record of their actions leading up to the filing of the motion to certify the class action. This is because the documents available to the public regarding the history of the *Nkala* case begins with the Notice of Motion and Founding Affidavit filed by Spoor in 2012.[lxxxii] Supplementary Affidavits presented to the Court by the representative class members do not make mention of anything relating to their initiation of proceedings, but rather to their commitment to the pursuit of litigation due to the harms described therein.[lxxxiii] To assume their lack of autonomy reinforces the notion that the miners, being the 'poor' and the 'needy', cannot act without volunteer intervention. That said, it is concerning to note that much of the efforts was the work of attorneys that allowed for and facilitated the class action certification and consequences emanating therefrom. While acknowledging this as a mere speculation, this thesis theorises that it was a combination of autonomous collective action on the part of miners, and the extensive assistance of legal representation and the vast resources at their disposal to investigate and obtain evidence to support their averments. Nevertheless, had there not been legal assistance in this context, it can be theorised that the *Nkala* case would not have reached Court, nor would it have led to the aforementioned extra-judicial settlement.[lxxxiv] This is because extensive legal knowledge and medical expertise were necessary for proving the liability of the mining companies cited in the case.

3.6.3 Remembering Marikana

The Marikana Massacre of 16th August 2012 saw the ANC-led South African police killing 44 unarmed miners who were striking against low wages and poor living and working conditions at Lonmin Plc.[lxxxv] The miners initiated the strike without the backing of NUM as their official representative due to their perception that the Union had been co-opted by mining management and was therefore unable to represent them effectively.[lxxxvi] Due to the unprotected nature of the strike, tensions escalated when Lonmin refused to negotiate outside of the official NUM channels, which eventually led to the utilisation of arms to repress the strike.[lxxxvii] This was a seminal moment in post-apartheid South African politics, rupturing the narrative that state violence of this nature belonged to the apartheid era.[lxxxviii] In a South Africa which prides itself on the collective action that contributed to the liberation of the people in 1994, the fact that those same 'liberators' (the ANC) were in power at the time calls into question the prioritisation of miners' rights. South Africa's current president, Cyril Ramaphosa, the founding leader of NUM in 1982, referred to the massacre as a 'tragedy' for which the nation should be held collectively responsible.[lxxxix] The government's official stance towards the miners and their families since the incident has been criticised as dismissive.[xc] The massacre serves as an example of the fact that, while the right to protest exists in the Constitution, such action must occur within the confines of what the State will allow, thereby defeating the purpose of protest as a tool for disruption. This event must be acknowledged as a watershed moment in South African post-apartheid history by bringing the grievances of miners (and the violent dismissal thereof) to the fore of workers' discourse, perhaps acting as a catalyst to the collective action that culminated in the *Nkala* class action.

3.7 *Conclusion*

The constitutional and legislative framework that establishes labour rights and conditions of employment in this context is relevant to the existence of the statutory and common law duties of care owed by employers that miners depend on to prove their liability. Further, it also depicts the importance of the interdependence of South African legislation and the common law to provide for a robust means of enforcing rights. However, while there exists a rich basis for labour rights and basic conditions of employment, with access to representative trade unions, this Chapter has illustrated how this was not accessible for the miners with regards to their particular grievances relating to occupational health and injury. Further, the Bill of Rights must be considered in the context of the pre-democratic negotiations, in which the economic consequences of apartheid were neglected, leading to a resultant formalistic lip-service paid to human rights without an acknowledgment of the ongoing and corrosive effect of apartheid economic policies. The applicants therefore had to rely on the legal duties of care owed by the mining companies to pursue a class action for damages under the common law despite the existence of such a comprehensive statutory framework.

[i] Mahmood, M. (2015) Beyond Nuremberg: The Historical Significance of Post-apartheid Transition in South Africa. *Politics & Society*, Vol. 43(1). 61-88, 63 & 69.
[ii] *Ibid,* 73.
[iii] *Ibid*.
[iv] wa Muiu, M. (2008) The Negotiations for a Democratic South Africa, 1990-1994. In M. wa Muiu, *The Pitfalls of Liberal Democracy and Late Nationalism in South Africa.* 131-150, 148.
[v] Section 38(c) of the Constitution (1996).
[vi] Field, T. (2019), 214.
[vii] *Ibid.*
[viii] *Ibid.*
[ix] Rita Kesselring (2016) An Injury to One is an Injury to All? Class Actions in South African Courts and Their Social Effects on Plaintiffs. *PoLAR*. Vol 39(S1). 74-84, 74.
[x] *Ibid,* 79.
[xi] *Ibid.*
[xii] *Ibid.*
[xiii] Section 38(c) of the Constitution (1996).
[xiv] South African Law Commission, *The recognition of Class Actions and Public Interest Actions in South Africa, Report 88*, August 1998 (SALC Report); *Nkala* (2016), 19.
[xv] *Ibid*; Section 34 of the Constitution (1996).
[xvi] *Ibid.*
[xvii] *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA); O'Connor, C. & Braude, N. (2019) *Class Actions in South Africa.* Retrieved 26 September 2021, from https://www.lexology.com/library/detail.aspx?g=546d018e-b68f-413a-81f6-249d3d3a65f5.
[xviii] *Children's Resource Centre Trust & Others v Pioneer Food (Pty) Ltd & Others* 2013 (2) SA 213 (SCA), 182.
[xix] Rooney, J. (2017) Class actions and public interest standing in South Africa: practical and participatory perspectives. *South African Journal on Human Rights,* 33:3, 406-428, 407 & 409.
[xx] *Ibid*, 409.
[xxi] *Ibid,* 407; *Patz v Greene* 1907, TS 427, 433.
[xxii] *Fereirra v Levin* 1996 (1) SA 984 (CC) 165.
[xxiii] Rooney (2017), 412.
[xxiv] Gibbs, T. (2019) Mandela, Human Rights and the Making of South Africa's Transformative Constitution. *Journal of Southern African Studies,* 45:6. 1131-1149, 1132.
[xxv] Sections 9, 11, 12, 13, & 19 of the Constitution (1996).
[xxvi] *Ibid,* sections 24, 26, 27 & 29.
[xxvii] Mosoneke, D. (2002) Transformative Adjudication. *South African Journal on Human Rights,* 18:3, 309-319, 314.
[xxviii] The.Universal Declaration of Human Rights of 1948; Tomuschat, C. (2008) International Covenant on Civil and Political Rights, *United Nations Audiovisual Library of International Law*, United Nations. Retrieved 29 July 2021, from https://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf, 1.
[xxix] United Nations General Assembly Resolution 421 (V) of 4 December 1950; Tomuschat (2008), 1.
[xxx] International Covenant on Civil and Political Rights of 1976 (ICCPR); International Covenant on Economic, Social and Cultural Rights of 1976 (ICESCR), United Nations General Assembly Resolution 2200 (XXI).
[xxxi] Article 2 of the ICESCR.
[xxxii] *Ibid.*
[xxxiii] Handayani, I. Justiciability of economic, social and cultural rights in international law and its future implementation in Indonesia. *Faculty of Law, University of Padjadjaran, Bandung,* Indonesia, 455.
[xxxiv] *Ibid*, 455; Craven, M. (1998) The International Covenant on Economic, Social and Cultural Rights: a Perspective on its Development*, Oxford University Press: Oxford*, 7.
[xxxv] *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).
[xxxvi] *Ibid,* para 61.
[xxxvii] The Constitution (1996).
[xxxviii] Bedi, S. (2014) The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in a Liberal Constitution. *Political Theory,* Vol. 42(6) 716-738, 723.
[xxxix] Section 8(1) of the Constitution (1996).
[xl] *Ibid,* section 33; Friedman (2014), 68.
[xli] Sections 9, 10, 23, & 24 of the Constitution (1996).
[xlii] *Khumalo & Others v Holomisa* (CCT53/01) [2002] ZACC 12, 28.
[xliii] *Ibid.*
[xliv] Friedman (2014), 67.
[xlv] Bhana, D. (2013) The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution. *South African Journal of Human Rights,* 29(2) 351 – 375, 353.
[xlvi] *Ibid;* The Group Areas Act of 1950; The Bantu Education Act of 1953; Bhana (2013).
[xlvii] Friedman (2014), 67
[xlviii] Bhana (2013), 353; *Nkala* (2016).
[xlix] *Ibid*.
[l] Section 39(2) of the Constitution (1996).
[li] Friedman (2014), 76.
[lii] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).
[liii] *Nkala* (2016).
[liv] *Ibid*.
[lv] Section 23(1) of the Constitution (1996).
[lvi] *Ibid,* sections 17, 18 & 23.
[lvii] *Ibid,* sections 23(2) & 23(5).
[lviii] *Ibid,* section 17.

[lix] Interim Constitution of 1993; Budeli, M (2012) Trade unionism and politics in Africa: the South African experience. *The Comparative and International law Journal of Southern Africa,* Vol. 45, No. 3, 475.
[lx] *Ibid.*
[lxi] Muiu (2008), 136.
[lxii] *Ibid,* 148.
[lxiii] *Ibid.*
[lxiv] LRA (1995); Section 23(1) of the Constitution (1996).
[lxv] Budeli (2012), 475.
[lxvi] Acts include the Mines and Works Act of 1911, the Native Labour Relations Act of 1911, the Natives (Urban Areas) Act of 1923, The Suppression of Communism Act of 1950, the Natives Labour (Settlement of Disputes) Act of 1953, the Riorous Assemblies Act of 1956, and the Industrial Conciliation Further Amendment Act of 1966.
[lxvii] Budeli, M (2007) Freedom of association and trade unionism in South Africa: from apartheid to the democratic constitutional order. *University of Cape Town.* 130.
[lxviii] *Ibid.*
[lxix] Preamble of the LRA (1995).
[lxx] Section 1 of the LRA (1995).
[lxxi] *Ibid,* section 1(c)(i).
[lxxii] *Nkala* (2016).
[lxxiii] Namely, Carleton, Eastern Cape, Free State, Highveld, Kwazulu-Natal, Kimberly, Matlosana, North East, PWV, Rustenberg, and the Western Cape. Unknown (2021) *National Union of Mineworkers,* Retrieved 27 September 2021, from https://num.org.za/About-Us/History.
[lxxiv] National Union of Mineworkers Constitution (2020) Retrieved 27 September 2021, from https://num.org.za/Portals/0/2021%20NUM%20CONSTITUTION%20for%20web_1.pdf.
[lxxv] Unkown (2021) *National Union of Mineworkers.* Retrieved 27 September 2021, from https://num.org.za/About-Us/History.
[lxxvi] *Nkala* (2016).
[lxxvii] Act No. 66 of 1999.
[lxxviii] Sections 16, 18 & 34 of the Constitution (1996); *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC).
[lxxix] Spoor (2020); *Nkala* (2016).
[lxxx] *Ibid.*
[lxxxi] *Ibid*
[lxxxii] *Nkala* (2012): Notice of Motion and Founding Affidavit.
[lxxxiii] *Ibid.*
[lxxxiv] The Settlement Agreement (2018).
[lxxxv] van der Merwe & Merafe (2012), 14; Lester, C (2016) Truth in the Time of Tumult. *University of Cape Town.* 4.
[lxxxvi] *Ibid.*
[lxxxvii] *Ibid,* 15.
[lxxxviii] *Ibid.*
[lxxxix] Cyril Ramaphosa. The Marikana Commission of Inquiry. Transcript. Day 272.
[xc] Lester (2016). 4.

4. CHAPTER FOUR: LEGISLATIVE AND COMMON LAW FRAMEWORK FOR THE DUTY OF CARE AND COMPENSATION FOR OCCUPATIONAL DISEASES AND INJURIES

4.1 *Introduction*

It is against the backdrop of the Bill of Rights that one must scrutinise any South African legislation, and specifically legislation dealing with working conditions in the mines and rights to compensation. South African legislation provides miners with the ability to claim compensation for silicosis and tuberculosis. The legislative measures were argued in the *Nkala* case to be inadequate in providing meaningful redress for the harms caused, which is the reason for the action being rooted in the common law of delict. These measures include the COIDA, promulgated to provide for compensation for death or disablement caused by occupational injuries or diseases sustained in the course of employment, and ODIMWA, promulgated to provide for similar compensation in respect of death or disablement caused by occupational injuries or diseases sustained in the course of employment on the mines.[i] More specifically, the interaction between COIDA and ODIMWA will be explored, since it was a source of confusion for many applicants seeking compensation for occupational diseases and injuries associated with mining. This is because the diseases that are listed as compensable under ODIMWA overlap with the diseases that qualify as occupational diseases under COIDA.[ii] While the latter excludes the claimant from enjoying any other form of statutory or common law relief for occupational injury or disease, the former excludes the applicant from claiming relief under COIDA.[iii]

While such legislation is progressive in addressing occupational health and safety in the workplace, especially in its recognition of tuberculosis and silicosis as compensable occupational diseases, this thesis will analyse the fact that rights to compensation to date have been extremely difficult for affected miners or their families to vindicate.[iv] Barriers to claiming compensation include lawyer fees, testing demands to prove an association between the injury and the mining company's neglect, and an unawareness of miners' rights.[v] Despite the progressive legislation in place to reflect the principles of the Bill of Rights, the enjoyment thereof is evidently inaccessible to affected miners and their dependants. This is important for the purposes of analysing the *Nkala* case, since the reason for the applicants lodging their claim in the common law of delict was precisely because the legislation in place did not provide them with, or enable sufficient access to, meaningful compensation to address their disablement or death resulting from occupational lung diseases contracted on the mines.

This Chapter will analyse the legislative instruments that establish the statutory duty of care that employers owe their employees, as well as the common law duty of care that existed before the enactment of such legislation. It will also analyse the compensatory legislative instruments and the

barriers that prevented the affected miners and former miners from claiming and receiving adequate compensation, leading to the institution of the class action in the *Nkala* case.

4.2 *The statutory duty of care*

Mining companies are under a statutory duty to ensure that certain safety protocols are followed, and that their employees are provided with appropriate safety equipment.[vi] At all material times during the class period (that is, 1965 to the date of the institution of the class action), each of the cited companies were bound to comply either with MWA (operative until 2002), or with MHSA, which remains in force today. These Acts and their regulations require that the underground setting be properly ventilated and evacuated when necessary to maintain a safe and healthy working environment.[vii] It is emphasized that no miner may be in the vicinity of noxious substances, and that work may only resume once such an area is declared safe.[viii] As such, blasting processes must be arranged in such a way to avoid exposing miners to harmful dust, smoke, gas or fumes.[ix] Machinery and the surrounding working environment must be cleared of dust before miners are permitted to utilize the area.[x]

4.2.1 The Mines and Works Act No. 27 of 1956

The MWA was amended with Regulations promulgated in 1965 (the '1965 MWA Regulations'), and then amended again in 1970 (the '1970 MWA Regulations'), which remained in force up until 2 July 2002. [xi] These regulations were repealed when the MHSA Regulations came into force on 2 July 2002.[xii] While MWA and its Regulations are no longer operative in South African law, many of the former miners forming part of the class in the *Nkala* case worked during its period of operation. The statutory duties provided for by these regulations were therefore relevant to the claimants in establishing that such statutory duties of care existed before the constitutional dispensation, and that such duties were breached by the cited mining companies.

The 1965 MWA Regulations required that every part of the mine where persons worked was to be properly ventilated to maintain safe and healthy environmental conditions, and provided that workers were not permitted to enter into areas containing harmful gas or dust without effective safety equipment.[xiii] Should such harmful substances be detected, the supervisor was required to order that workers be withdrawn from the area, that the issue be reported, and that an inspection be conducted to confirm that the working area is safe to resume work.[xiv] It was also explicitly stated in the 1965 MWA Regulations that the blasting machinery ought to be fitted with suitable mechanisms, including dust extraction systems, to prevent as far as possible the contamination of the air by such substances.[xv] The 1970 MWA Regulations were materially similar to the 1965 MWA Regulations, emphasising the necessity of the above measures.[xvi]

4.2.2 The Mine Health and Safety Act No. 29 of 1996

The Act and its Regulations seek to regulate employers' and employees' duties to identify, eliminate, control and minimise risks to health and safety and entrench the right to refuse to work in dangerous conditions.[xvii] It is explicitly stated in Chapter 2 of the MHSA Regulations that it is the responsibility of the employer to ensure, as far as reasonably practicable, that mining conditions are safe and foster a healthy working environment.[xviii] It is therefore for the employer to ensure that the mine be operated in such a way that does not endanger the health and safety of the employees.[xix] This duty reiterates that every employer *must,* as far as reasonably practicable, provide a working environment that is safe and without risk to the health of employees.[xx] This includes the duty to identify relevant hazards and the related risks to which employers may be exposed, and to supply all the necessary health and safety equipment and health facilities to *each* employee, who must be instructed on the proper use thereof.[xxi] Chapter 10 requires that employers provide employees with any information, instruction, training or supervision that is necessary to allow them to work without risk to their health.[xxii]

The MHSA and its Regulations therefore provide a comprehensive list of statutory duties of care that the mining employers must abide by. While the term "reasonably practicable" is open for interpretation, it was averred that the measures taken by the cited mining companies did not meet this statutory standard.[xxiii] They were accused of breaching Regulation 22 in particular, claiming that they did not ensure that the occupational exposure to health hazards were maintained below the limits set out in the schedule to the MHSA Regulations (stipulated as the 'Occupational Exposure Limit' for silica dust).[xxiv] The Court's response to these averments indicated its agreement to the breach of these duties.

While the Constitution enshrines fair labour practices, it is the lack of corporate responsibility in the mining sector that has made it evident that such principles are not at the fore of companies' priorities. The attitude of mining employers to their employees have been clearly shown by the averments made by the applicants in the *Nkala* case regarding their negligence. This indicates the disconnect between constitutional provisions and practice. However, it is the same existence of these duties that empowered the applicants in the *Nkala* case to point to their employers' negligence and institute a claim for damages based thereon.

4.3 *The common law duty of care*

The South African common law of delict can be likened to a 'law of obligations' under which a duty of care is owed between private parties not to intentionally or negligently cause harm to one another. This necessarily extends to the duty that employers owe their employees a safe and healthy work environment that is not injurious to their health.[xxv] Simply put, the law of delict places a legal duty

upon persons to act in such a way as to prevent harm or injury to others caused by their wrongdoing or negligence.[xxvi] There are many instances in which the enforcement of constitutional rights and such a duty of care overlap, such as the right to claim delictual damages arising out of personal suffering and injury wrongfully caused by another, and the violation of the right to bodily integrity and safety and security of person.[xxvii] In the case of *Lee v Minister of Correctional Services* (2014), the plaintiff sought damages from the Department of Correctional Services on the basis that, while in prison, the authorities failed to take adequate precautions to protect him against contracting tuberculosis, and that he had contracted the illness in consequence of this omission. [xxviii] The Constitutional Court was of the opinion that the authorities of the prison owed the inmates a common law duty of care to take reasonable measures to reduce the risk of contagion of tuberculosis.[xxix] Similarly, it is this common law duty of care owed by mining employers to their employees to take reasonable steps to prevent silicosis contraction and tuberculosis contagion during work on the mines.[xxx]

4.4 *The compensatory framework*

4.4.1 The Occupational Diseases in Mines and Works Act No. 78 of 1993

South African legislation provides for miners being able to claim compensation for silicosis and other occupational lung diseases, setting a model for compensation based on funds which are contributed to by mining companies, Parliament, and statutory boards.[xxxi] South African legislation on compensation has been developed along two parallel lines for two different categories of workers, those being ODIMWA and COIDA.[xxxii] ODIMWA is concerned primarily with the interests of miners and associated workers, and its purpose is to consolidate the law relating to the payment of compensation in respect of certain diseases contracted by those working in mines and works.[xxxiii] COIDA, on the other hand, relates to all other workers in industry, including commerce and services.[xxxiv]

While both Acts provide for compensation for occupational injuries and diseases, ODIMWA bars miners from claiming benefits under COIDA.[xxxv] This is to prevent the act of 'double-dipping'.[xxxvi] However, this raised confusion amongst claimants with regards to whether common law damages could be instituted against mining employers, since COIDA specifically precludes applicants from claiming compensation under the common law, while ODIMWA says nothing to that effect.[xxxvii] In the *Mankayi* case, the Court ruled that, since ODIMWA extinguishes the right for persons to claim compensation under COIDA, the provisions of COIDA, including the exclusion of any rights under the common law, cannot apply to miners.[xxxviii] Those claiming for compensation under ODIMWA may therefore also claim for delictual remedies as a result of employer negligence.[xxxix] The Court reasoned that this is in the interests of justice, since awards granted under ODIMWA are "seemingly paltry and inadequate" in comparison to those granted under COIDA.[xl] It was therefore considered appropriate that delictual remedies protecting constitutional rights be allowed in this context.

The Court in the *Mankayi* case considered the award granted under ODIMWA to be inadequate because the applicant received an award of R 16 000 as compensation, while the total damages he claimed to have suffered as a result of being rendered unable to work after contracting silicosis was approximately R 2,6 million. Invoking the constitutional right of freedom and security of person, the Court believed it in the interests of justice to allow for a delictual claim for damages for the breach of the duties of care by the employer. [xli] It is the decision of the Court in this case that opened up the possibility for the class action to be pursued under the law of delict in the *Nkala* case.

An important issue arises from the Court's reasoning in the *Mankayi* case. The Court itself acknowledged that ODIMWA provided inadequate compensation, using this as the main factor for opening up for common law delictual claims for damages. These delictual claims for damages were taken as appropriate constitutional remedies for the protection of fundamental rights, which therefore points to the Constitutional Court's opinion that the Legislature has failed to provide effective protection for miners under ODIMWA. Because COIDA was considered more effective in providing compensation than ODIMWA was, it was therefore ruled fair for COIDA to preclude common law remedies, but unfair for ODIMWA to do the same. The Court was constrained in its decision, since the constitutionality of the Act went unchallenged by the applicant, and therefore it was unable to make any pronouncement on this. The Court could not direct the Legislature to amend the Act accordingly, due to the Separation of Powers doctrine and the importance of judicial deference. As the guardian of the Constitution and its Bill of Rights, the Constitutional Court was limited in simply allowing that persons can lodge claims under an elusive and unwritten set of laws, despite its explicit acknowledgment that ODIMWA is not enough to vindicate the rights of reasonable compensation. Where the major concern of procedure lies with remaining mindful and considerate of the powers of the other arms of government (the Legislature and Executive), the interests of justice are subordinated and bureaucracy prevails for the sake of political compliance.

4.4.2 Barriers to compensation

The obligation to pay compensation theoretically should incentivise the improvement of conditions in the mines, but practice has shown that this has been ineffective.[xlii] Compensation for occupational disease remains extremely difficult for miners or their families to obtain, since claims must often be accompanied by evidence of second degree tuberculosis or permanent lung damage.[xliii] While thousands of former miners in the Southern African region are suffering from compensable lung diseases, there are numerous practical barriers preventing people from accessing benefits to which they are entitled.[xliv] Proving an association between injury or disease and the mining company's neglect is often difficult for families of the deceased as they would have to ship organs to do so, which is either culturally inappropriate, or too expensive.[xlv] Compensation claims often demand families to provide organ

samples to a government bureau for investigation, which is a very difficult requirement for families to fulfil.[xlvi]

The process for compensation is extremely slow around occupationally acquired tuberculosis and silicosis, and many former miners die before receiving the compensation for which they have applied several years before.[xlvii] Families therefore often report no compensation, or a delay in payment thereof, which contributes to poverty after the loss of their main source of income upon the death of the breadwinner.[xlviii] This means that there is a low incentive for former miners to invest in filing compensation claims, leaving the entire process inaccessible for many labourers who have fallen ill as a result of these diseases.[xlix] Further, the process of obtaining benefits for widows of former miners who have a claim but have since died remains an administrative barrier. In some rural areas, before the widow obtains documentation necessary to process her claim, the family of the deceased must provide a letter to confirm that she is indeed the wife, which must then be sent to the area chief to confirm.[l] The chief, in turn, must refer her as the beneficiary to the district administrator.[li] The district administrator will then refer her to the Master of the courts who must provide her with the necessary documentation to process the claim.[lii] Not only is this process extremely cumbersome, it has the potential to leave second wives without compensation if they are barred from the same process.[liii]

In 2014, the Chamber of Mines funded a project to collate data of approximately 200 000 Compensation Commissioner for Occupational Diseases (CCOD) files, and the CCOD launched Project Ku-Riha the following year to retrieve missing information relating to 100 000 unpaid claims in an attempt to pay as many as possible.[liv] This project, in collaboration with another project funded by mining companies, collated data from approximately 400 000 files to create a consolidated electronic database, which showed that there were 107 714 compensable claims that remained unpaid.[lv] Many files had otherwise either been deferred due to missing documentation or are still awaiting certification.[lvi] It is likely that most of these claimants have died - from the list of compensable claims that were unpaid, 24.8 percent of the former miners were known to be deceased.[lvii] This high ratio of unpaid claims highlights the injustice stemming from the inaccessibility of the compensation scheme offered to miners, former miners and their dependents for occupational lung diseases contracted on the mines.

However, during 2016 mobile services were deployed in several districts in the Eastern Cape, working with community health workers to work with traditional leaders and local municipal structures to track former miners or their heirs to prepare them in claiming for compensation.[lviii] This initiative, along with the launching of high-profile outreach and awareness campaigns for former miners, as well as the cooperation and involvement of the Deputy Minister of Mineral Resources, the Minister of Health, and the Deputy President of South Africa, led to some progress in educating mining and labour-sending communities on the process of claims for compensation.[lix] Slight improvement in payments resulted – while only 1575 claims were paid in 2010, 8727 claims were paid out in 2017, with

approximately half of the paid claims relating to tuberculosis and the other half relating to permanent lung impairment.[lx] Although these initiatives signify an improvement to the accessibility of the compensation process, there are administrative barriers that persist nonetheless: manual verification of fingerprints is still required for the processing of payments, which for many require travelling costs to the police station to obtain.[lxi] Further, miners from neighbouring Southern African countries may have more than one passport on file, which disrupts the administrative process. In addition, the CCOD requires a letter of authority from the Court for the nomination of beneficiaries and an open bank account, but it is common for former miners to have their bank accounts close after three months of inactivity.[lxii]

Nevertheless, there has been an abject failure of South African legislation in providing adequate compensation to former miners or their families due to the arduous process to submit claims, leading to only a fraction of those miners or their families receiving compensation, often years later with little impact on the ability to seek treatment.[lxiii]

4.5 *Conclusion*

South African legislation regarding basic conditions of employment and employer duties of care is comprehensive in setting out how workers ought to be treated in the mining context. The working environment must be safe and have due regard for the occupational health of employees, and yet workers are expected to work under conditions from which they return home extremely ill and no longer able to take up gainful employment. The effectiveness of the legislative and common law provision of such duties of care is therefore questionable, while the compensatory mechanism in place has proven to be inadequate and inaccessible. Where the South African post-apartheid law has been privileged as a means to protect fundamental human rights in the new democratic era, the fact that these mechanisms have been shown to ring hollow in this context is a cause for concern. These duties of care are important in establishing legal liability on the part of the mining companies. Yet, the very fact that the applicants in the *Nkala* case had to move beyond the protective statutory mechanisms in place to claim common law damages is indicative of a problem that the *status quo* is that of poor working conditions, up until such a time as thousands are able to mobilise and institute court action.

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[i] Act No. 130 of 1993; Act No. 78 of 1973.
[ii] *Mankayi* (2011).
[iii] Section 100(2) of ODIMWA (1973) & Section 35(1) of COIDA (1993).
[iv] Basu, S., Stuckler, D., Consalves, G. and Lurie, M. (2009) The production of consumption: addressing the impact of mineral mining on tuberculosis in southern Africa. *Globalisation and Health,* 5(1): 11, 5.
[v] Stuckler *et al.* (2013), 643.
[vi] MWA (1956) & MHSA (1996).
[vii] MWA 1965 Regulation 6.6(2) and 6.6(4); MWA 1970 Regulation 10.62; MHSA Regulation 22.9.2(1).
[viii] MWA 1965 Regulation 6.6(5); MWA 1970 Regulation 10.6.4
[ix] MWA 1965 Regulation 6.10; MWA 1970 Regulations 10.6.5 & 10.10.3.
[x] MWA 1965 Regulation 6.10; MWA 1970 Regulations 10.10.5 & 10.20.1.
[xi] *Nkala* (2012): Founding affidavit, 75.1; MWA, Govt Notice R334, 12 March 1965; MWA, Govt Notice R992, 26 June 1970.
[xii] MHSA (1996) Regulations.

[xiii] Regulation 6.6(2) & 6.6(4) of the MHSA (1996).
[xiv] *Ibid,* Regulation 6.6(5).
[xv] *Ibid*, Regulation 6.19.
[xvi] MWA (1956) Regulations of 1970.
[xvii] *Ibid.*
[xviii] *Ibid,* Chapter 2 (1)(a).
[xix] *Ibid,* Chapter 2 (1)(b).
[xx] *Ibid,* Chapter 5(1).
[xxi] *Ibid,* Chapter 6(1) and (3).
[xxii] *Ibid,* Chapter 10(1).
[xxiii] *Nkala* (2012): Founding affidavit.
[xxiv] *Ibid;* Regulation 22 of the MHSA (1996).
[xxv] *Ibid.*
[xxvi] Steel, S. (2015) Justifying Exceptions to Proof of Causation in Tort Law. *The Modern Law Review,* 78:5, 731; De Waal, L (2017) Unearthing the relationship between disease and causation in South African gold mines. *University of Cape Town,* 51.
[xxvii] Section 12 of the Constitution (1996).
[xxviii] *Lee v the Minister of Correctional Services* (CCT 20/12) [2012] ZACC; De Waal (2017), 26.
[xxix] *Ibid,* para 58; De Waal (2017), 52.
[xxx] *Ibid*; *Nkala* (2012): Founding Affidavit, 75.2.
[xxxi] Field (2019), 215.
[xxxii] *Mankayi*, 14
[xxxiii] Preamble of ODIMWA (1973).
[xxxiv] ODIMWA (1973) & COIDA (1993).
[xxxv] Section 100(2) of ODIMWA (1973).
[xxxvi] *Mankayi* (2011).
[xxxvii] Section 35(1) of COIDA (1993).
[xxxviii] *Mankayi* (2011), 11.
[xxxix] *Ibid.*
[xl] *Ibid.*
[xli] *Ibid;* Section 12 of the Constitution (1996).
[xlii] Stuckler *et al.* (2013), 643.
[xliii] Basu *et al.*(2009), 5.
[xliv] Stuckler *et al.* (2013), 643.
[xlv] *Ibid.*
[xlvi] Basu *et al.* (2009), 5.
[xlvii] The Harmonization Report (2014), 11.
[xlviii] Basu *et al.* (2009), 5.
[xlix] The Harmonization Report (2014), 11.
[l] Kistnasamy *et al.* (2018), 11.
[li] *Ibid,* 8.
[lii] *Ibid.*
[liii] *Ibid.*
[liv] *Ibid,* 4.
[lv] *Ibid,* 4-5.
[lvi] *Ibid*
[lvii] *Ibid.*
[lviii] *Ibid.*
[lix] *Ibid,* 6.
[lx] *Ibid,* 7.
[lxi] *Ibid.*
[lxii] *Ibid.*
[lxiii] Smith & Blom (2019), 89.

5. CHAPTER FIVE: THE OUTCOME OF THE *NKALA* CASE AND THE IMPLICATIONS FOR CORPORATE RESPONSIBILITY

5.1 *Introduction*

While the Court in the *Nkala* case noted the wrongful conduct of the mining companies in their treatment of their employees, they were unable to make a formal pronouncement on their liability, since the issue before them was limited to allowing the class action to proceed. The Court, however, observed their constitutional duty to develop the common law relating to the transmissibility of damages to bring it in line with the principles of the Constitution. This may amount to increased access to justice for dependents of deceased miners in the future. While the Court acknowledged the gendered issues that arise out of unpaid caring work provided by wives and daughters of ill miners, they failed to recognise that they incur damages in their personal capacity as a result of the wrongful conduct of the mining companies. As such, despite the judicial outcome of the case, there remains minimal visibility regarding the broader impact of occupational lung diseases on women.

The establishment of the Tshiamiso Trust, being the practical outcome of the *Nkala* case, raises questions regarding how it would function differently from the legislative compensatory scheme, since the practical barriers to compensation remain in place. Further, the functioning of the Trust cannot be considered to have the capacity to provide for reparative measures that will adequately address the legacy of the violence enacted by the mining companies. Indeed, the proposed initiative falls short of what is required by the norms of international law with regards to reparations.

The out-of-court settlement, which led to the formation of the Trust, interrupted the Court's consideration of the delictual principles of liability. This effectively allowed the respondent mining companies to evade legal liability, which is unsurprising in the broader context of the general refusal of corporate entities to accept accountability for apartheid-era abuses in the South African transitional framework. The Settlement Agreement makes vague reference to having to acknowledge the issues of the past, which means little when one considers the extensive role that mining companies played in sustaining apartheid structures.

5.2 *Judicial outcome of the* Nkala *case*

5.2.1 Delictual liability

The claim instituted by the applicants in the *Nkala* case was for general damages, which is refers to harm caused by wrongful injury to a person's body, causing pain and suffering, loss of amenities of life, or disfigurement.[i] Such damages are not readily calculable, but can be given a monetary value by the courts in the interests of justice.[ii] General damages may only be claimed by the person who has suffered

the harms in question, and such a claim extinguishes upon their death as they are personal in nature.[iii] Due to the two-part procedure of the class action mechanism, the issues before the Court in the *Nkala* case was whether firstly to allow for the institution of the class action, and secondly to allow for the transmissibility of damages. The principles of delict and the pronouncement of liability of the mining companies were therefore not considered by the Court, as these issues could only be analysed in the second phase of the process. The process was interrupted, however, by the out-of-court settlement reached shortly after the conclusion of the first phase. The settlement was based on principles of no-fault, whereby none of the parties to the agreement admitted to liability except for in respect of the obligations set out in the Settlement Agreement.[iv] The Court therefore never got the opportunity to make a formal pronouncement on whether the respondent mining companies were actually liable for the damages as claimed, and in this way corporate responsibility for these harms have effectively been avoided.

5.2.2 Common law development: the transmissibility of damages

An issue before the Court in the *Nkala* case was the constitutionality of the common law rule of non-transmissibility of damages. Courts have previously refused to allow a claim for general damages to be transmissible to a person's estate, should the claimant pass away before the close of pleadings.[v] The close of pleadings, also known as *litis contestatio,* occurs when all the parties have filed the final pleadings dealing with the allegations relating to the dispute, the claim, and the defence.[vi] As such, should the claimant succumb to silicosis or tuberculosis before the close of pleadings, dependents and heirs cannot continue the claim.[vii] The only event in which such a claim could be continued would be if the claimant passed away after the close of pleadings, in which case the executor of the deceased estate replaces the claimant.[viii] This is because *litis contestatio* serves to freeze the claim.[ix] It is only then that heirs and dependents of the claimant could benefit from an award for general damages. This common law rule therefore effectively precludes heirs and dependents from benefiting from claims for general damages.

Litis contestatio is, however, very uncertain in modern South African law, since pleadings may be re-opened at any time by either party, providing the defendant with the opportunity to prolong the case in an attempt to extinguish the claim.[x] The applicants in the *Nkala* case therefore called for the law to be developed so as to allow for the transmissibility of damages despite the death of the claimant before *litis contestatio.* The Court ruled that the common law had to be developed to allow for the claim for general damages to be transmissible upon the death of the claimant, even if pleadings had not yet closed.[xi] Not allowing for transmissibility was considered to violate a number of rights, including the right to equality, dignity, life, access to court, and freedom and security of the person.[xii] The Court also believed that the division of pre- and post-*litis contestatio* amounted to an unfair distinction between claimants who survived and those who did not.[xiii] Moreover, not allowing for the transmissibility would

amount to massive injustice that would benefit the mining companies for the harm that they had caused, at the same time profoundly impacting widows and children.[xiv] The majority opinion was therefore that the rule failed to reflect the popular moral sentiment of a society based on gender equality and fairness, noting the Court's constitutional obligation to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights.[xv]

The Court also noted the gender bias of this rule, since a large percentage of former miners return home to remote rural areas where their illnesses create a dependence upon home-based care that is ordinarily provided by wives and daughters.[xvi] Such care is extremely demanding, including efforts such as carrying, lifting, bathing, monitoring treatment, and generally attending to their needs.[xvii] This creates a burden which often compels many women to forego gainful employment, and many girls to leave educational opportunities.[xviii] Heirs and dependents should be able to benefit from a claim for general damages resulting from the contraction of silicosis and/or tuberculosis despite the death of the claimant as this would also compensate them for their care work and the foregoing of financial and educational opportunities.[xix] Many miners and former miners who may claim such damages under delict are already ill, and risk dying before the close of pleadings.[xx] Because of the high probability of death in this instance, the rule of non-transmissibility has the potential to cause massive prejudice and injustice for heirs and dependents, thereby infringing on their rights.[xxi] The acknowledgment of the gender bias was significant because it gave attention to the to the varied impacts of caring work on family members of miners who have fallen ill.[xxii] The decision to develop the law in this way amounts to an increase in access to justice, since the right to common law compensation has now been extended to an extremely vulnerable sector of South African society.

5.3 *The gendered implications of occupational lung disease*

In terms of legislative compensation, COIDA provides for a carer's allowance, but because miners are not covered by this Act, those caring for them cannot claim this money.[xxiii] There is no such a provision in ODIMWA, which is amounts to arbitrary discrimination against miners and their carers.[xxiv] There is no formal justification for the fact that miners are not entitled to the same benefits as other industrial workers, but Spoor argues that it may be due to the fact that the government and mining companies are unable to agree on who should be held liable for such benefits.[xxv] The gendered bias when it comes to the transmissibility of damages is therefore more pronounced, since the only available means of compensation for dependents are via an award for general damages to the claimant. If miners are unable to receive compensation through ODIMWA, so too are women who care for them when they are too ill to work.[xxvi] It is therefore an important development in South African law to allow for the transmissibility of damages until such a time that the constitutionality of ODIMWA is directly challenged and amended to provide for a carer's allowance.

While the development in the common law regarding the transmissibility of damages is welcomed in its capacity to increase access to justice, the extended applicability of general damages amounts only to indirect compensation for carers. The acknowledgment of the gender bias of the common law is significant, but making claims transmissible upon death of the claimant allows for a legal 'backdoor' claim to compensation, and not for carers to be compensated for damages incurred in their own right.[xxvii] South African law does not otherwise allow for carers to bring a claim for damages for unpaid care work, which is perceived as gratuitous: women are expected to take on the role of caretaker in the household and such work is therefore not compensable.[xxviii] The impact of occupational lung diseases on women in the home is significant, however, and they therefore suffer damages beyond that of the pain and suffering experienced by the miner as a result of silicosis and/or tuberculosis. While the Court recognised the contribution women make to the caring for miners, it did not acknowledge the value of domestic labour as labour with value.[xxix] Domestic labour finds itself outside of the production boundary, and therefore is not perceived as contributing to the national economy.[xxx] The Women's Legal Centre argues that unpaid care work should be recognised in the context of damages claims in the recognition that women contribute to the economy by working for free.[xxxi]

It is not only the miners who suffer as a result of the mining companies' breaches of their duties of care. Their partners and daughters incur damages independently as a result of their wrongful conduct, and they should therefore be able to institute a separate claim for damages that acknowledges this. This means that the Court will have to take into account the fact that disallowing this will create a situation in which the entity causing the harm also benefits from women's unpaid care work.[xxxii] Neglecting to acknowledge the damages incurred by unpaid carers of miners contributes to the feminisation of poverty.[xxxiii] Women are becoming increasingly poor and are unable to improve their circumstances as a result. In the same way that the mining population can be considered to fall beyond the abyssal line due to the structural violence enacted by the mining industry, so, too, do the women who care for them, having been rendered mostly invisible.[xxxiv]

5.4 *The Tshiamiso Trust*

Shortly after the Court certified the *Nkala* class action, a number of the respondent mining companies appealed the decision to the Supreme Court of Appeal.[xxxv] Some of the companies, however, announced on 3 May 2018 a settlement whereby they would provide an amount of R 5 billion to be set aside for the formation of the Tshiamiso Trust.[xxxvi] The Court approved the Settlement Agreement on 26 July 2019. It has been confirmed that the Trust does not provide for a finite amount and that it may increase depending on the number of claims received.[xxxvii] The Settlement Agreement provides that current and former miners will be given the opportunity to receive medical examination and compensation in the event that they have been diagnosed with silicosis and/or tuberculosis.[xxxviii] It also renders dependents eligible to claim where the miner has succumbed to such illnesses contracted on

mining sites after the date of 12 March 1965.[xxxix] A streamlined website and a call centre with a toll-free number was established in collaboration with the Compensation Commissioner for Occupational Diseases, which was also to reply to 'please call me' messages, to seek out affected miners and dependents, and calls for applications were published in newspapers and various radio stations across South Africa, Swaziland, Malawi and Mozambique.[xl] Further, the Trust now has sixty-one lodgement centres across Southern Africa.[xli] Claims are to be paid in a once-off lump sum, and it is foreseen that it the Trust will operate for twelve years to ensure that adequate time is allocated to trace and identify eligible claimants.[xlii] This period will also allow for a long enough incubation period for miners who have been exposed to silica dust but have yet to display symptoms.[xliii] Eligible claimants may receive between R 10 000 and R 500 000, depending on the nature and severity of their illness.[xliv] Claimants must show that they spent time doing risk work at the mines that are party to the Settlement Agreement.[xlv] Miners have been able to lodge their claims since 20 January 2021, and the process includes document verification, undergoing the benefit medical examination, reviews by the medical certification panel, and the trust certification process committee.[xlvi]

Critical challenges remain in this regard. The process may take up to eight months, and Daniel Kotton, the chief executive officer of the Trust, reports that there are very few medical state facilities that have the capacity to carry out the medical examinations.[xlvii] Indeed, the Trust announced on 2 August 2021 that the first batch of compensation had been paid to over one hundred claimants.[xlviii] This is two years since the establishment of the Trust, and over nine years since the institution of the *Nkala* class action. It is likely that many claimants in the *Nkala* case have since died. Further, the payments made are only a handful in the face of the approximate 40 000 claims lodged by the end of July 2021.[xlix] The number of miners who have been compensated to date is significantly lower than the number of hopeful applicants. There has been a receipt of awards by one in ten and one in twelve claimants for tuberculosis and silicosis respectively.[l] This results in the potential for disappointment for large numbers of destitute miners and their families who have been mobilised.[li]

This process is still reactive (as opposed to preventative), and former miners must first present with a certified diagnosis before the process may be initiated.[lii] Due to the slow onset of silicosis and the possibility of asymptomatic tuberculosis, compensation is likely to be too slow to have any impact on miners who have active tuberculosis.[liii] Further, the allocated time period of twelve years may not be enough time to accurately track and identify all eligible claimants.[liv] Because payments will be made in a lump sum, former miners and their families may not be able to support themselves off of this amount for more than a few years.[lv] There are gaps and inconsistencies in miners' employment and health data, since such information was of little concern during apartheid.[lvi] Autopsy data and death certificates are often not available for many miners who have passed away.[lvii] This presents significant hurdles to their eligibility to lodge a claim. There may be further barriers in place in accessing these funds, and questions arise whether compensation will address the entrenched legacy of the poor working and living

conditions that led to the public health crisis in the first place. Further, given the socio-economic circumstances of most current and former mine workers, radio broadcasts and newspaper adverts may be inaccessible to those that are living in remote rural communities. The mining companies who are party to the Settlement Agreement, however, have aggregated their available data, which has proven helpful for establishing whether claimants are eligible for compensation.[lviii] Nevertheless, the fact that the criteria for assigning awards are based on accurate and complete data raises concerns considering that such data in many instances is not available.[lix]

While these are positive steps towards creating a system of compensation that is more comprehensive and meaningful, it has the potential to be unsustainable in the face of thousands of new patients contracting silicosis and/or tuberculosis on the mines annually. The Trust is unlikely to reduce tuberculosis transmission, morbidity and mortality among former miners and their families, and cannot be viewed as a replacement for legislative reform.[lx] It therefore cannot be considered a long-term solution to the systemic problem of this public health crisis.[lxi] The compensation to be made available are a mismatch to the impact of the violence enacted by the mining industry. The violations of the mining industry are embedded in a history of exploitative relations, and financial payment to individual victims or their surviving family members is unlikely to provide sufficient relief that would satisfy the international norms regarding reparations.[lxii]

5.5 *Corporate responsibility in the post-apartheid mining context*

The mining companies' evasion of delictual liability via the out-of-court settlement finds itself within a context a general neglect of corporate accountability for apartheid abuses in the democratic era. Official transitional justice processes in South Africa have marginalised this aspect of accountability, since public outrage was directed more at those perpetrating abuses for malicious reasons rather than at those seeking to maximise profit.[lxiii] The corporate sphere during apartheid, however, was responsible for the introduction of the migrant labour system, workplace segregation, racial division of labour, and racially discriminatory salaries.[lxiv] Further, many businesses were responsible for providing services, technologies and weapons directly used for State oppression during apartheid.[lxv] During the democratic transition, the TRC, as part of its mandate to examine and make recommendations on gross human rights violations committed during apartheid, held a special hearing on the business sector.[lxvi] At the hearing, the ANC argued that a number of the core discriminatory laws were both sought and tolerated by businesses, and that they must therefore accept a degree of co-responsibility for their role in sustaining the apartheid system.[lxvii] The TRC agreed, and concluded that many businesses, especially mining companies, played a central role in aiding the design and implementation of apartheid policies, and for this they must be held accountable.[lxviii] It went on to state:

> *"The evidence shows that, rather than relying simply on the forces of supply and demand, the mining industry harnessed the services of the State to shape labour supply conditions to their advantage. Thus, the mining industry bears a great deal of moral responsibility for the migrant labour system and its associated hardships."*[lxix]

The TRC therefore made an unequivocal finding that the mining industry had neglected its obligations regarding the health and safety of their workers, and that profitability appeared to rank higher than people's lives.[lxx] However, no specific recommendations were made to address these findings, and progress for securing reparations for victims of corporate abuses during apartheid has been limited.[lxxi] State responses were muted, and the exploitative practices highlighted by the TRC have continued largely unchanged.[lxxii] Businesses therefore escaped serious retribution in the hearings of the TRC, despite the evidence that large corporations made profits on the back of human rights violations.[lxxiii] As a result, the ideology of reconciliation embraced the business community and absolved it of any culpability.[lxxiv]

An explanation for this may be the conventional conception of transitional justice as a transition to a new political system that addresses the legacy of civil and political abuses, which frames approaches narrowly and marginalises the need for economic reforms and corporate accountability.[lxxv] While the TRC flagged the abuses, there has been an abject failure to institute initiatives that adequately address these violations. Business and human rights are inextricably linked, however, and the focus on civil and political abuses during apartheid renders the transitional process incomplete.[lxxvi] As such, socio-economic oppression persists today, despite the formal ending of apartheid.

Today, corporations are increasingly perceived as an important part of social, economic, and environmental development on a global level.[lxxvii] While this is the perception, neither the common law nor South African legislation provide for corporate social responsibility.[lxxviii] Instead, the best interests are the company are of paramount importance, and legal duties do not extend to requiring companies to behave in a socially responsible manner.[lxxix] However, companies have expressed their concern with 'corporate social investment' or 'corporate citizenship' to project ideas of good practice and reputation.[lxxx] These terms are preferred over 'social responsibility', as the latter assigns both moral and ethical responsibility for historical abuses, and businesses are loathed to acknowledge their legacy of social and environmental injustice perpetrated under apartheid.[lxxxi]

The extent of liability acknowledged by the mining companies in the Settlement Agreement is simply a statement that they "recognise the need to address the issues associated with the past, present and future compensation for silicosis and tuberculosis in the South African gold mining industry."[lxxxii] Such a vague recognition is far more favourable for the mining companies than a formal judicial ruling that considers their conduct wrongful and for which they must be held liable. The mining industry has publicised its benevolent concern for the health of their miners, its sophisticated healthcare system of

tertiary care facilities and its awareness of the crisis facing their workers.[lxxxiii] The industry has, however, been slow in recompensing for "its ravages on the bodies of hundreds and thousands of Southern Africans, mostly Black."[lxxxiv] While the industry claims full compliance with the World Health Organisation's recommendations for tuberculosis treatment and silicosis prevention, it is under no obligation to submit public reports on its data on disease incidence and patient outcomes.[lxxxv] Such aims and claimed efforts are therefore yet to address the continued increase in tuberculosis and silicosis rates in the industry.

5.6 *Conclusion*

While the outcome of the *Nkala* case amounted to a positive development in South African law, which may result in an increase of access to justice, such a development cannot be said to cure the issues relating to the invisibility of an extremely vulnerable group in South Africa. Further, the fact that the Court accepted the settlement proposal by the respondent mining companies amounted to an indirect concession by the Court that legal justice can be avoided via the payment of money. While the Tshiamiso Trust cannot be said to be an explicit attempt to evade responsibility for the harms caused by the mining companies, this has been the outcome in effect. There exists a legacy of avoiding corporate responsibility for apartheid abuses during the South African democratic transition. The acceptance of the Settlement Agreement by the Court caused them to miss an important opportunity to make a legal pronouncement and take judicial notice of the wrongful conduct of the mining industry. As guardians of the Constitution, this amounts to a failure of the Court to protect those most vulnerable and most in need of having their rights vindicated. Further, the functioning of the Trust will continue to face challenges, and persons entitled to compensation will still struggle with accessing such payments. This begs the question whether the Trust will cause the same issues with regards to claiming compensation as ODIMWA has caused.

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6. CHAPTER SIX: CONCLUSION

6.1 *Introduction*

The South African mining industry rests upon a foundation of centuries of exploitation of cheap sources of Black labour. The industry is responsible for creating working conditions under which hundreds and thousands of miners have contracted and succumbed to silicosis and/or tuberculosis. As the exploitation of mineral resources accrued massive profit for South Africa, this growth was at the expense of the health and lives of masses of Black miners. Even with the democratic transition in 1994, miners continued to be exploited by mining companies to the point of being rendered too ill to work, and essentially being sent home to their rural homes to die. The plight of miners has resulted in a continual human rights crisis in the Southern African region, despite the recent developments in South African case law. Working and living conditions on the mines remain extremely hazardous, and companies have shown no real intention of improving such conditions beyond the establishment of the Tshiamiso Trust. Instead, the Trust is expected to serve as a non-legislative compensatory mechanism, which, at best, will act to partially alleviate the financial consequences of the pain and suffering caused by the working conditions that stand firm. The reparative effect of the Trust is expected here to be minimal, as its compensatory function is incomplete in the evident guarantee of repetition and an absence of acknowledgment of liability on the part of the mining industry.

6.2 *The human rights crisis affecting miners and their families*

Gross violations of human rights are commonly discussed in contexts of authoritarian regimes or civil conflicts.[i] While the discourse around such violations usually refer to extreme violence and physical harm, extreme structural and economic violence must similarly be considered as gross violations of human rights. In this context, while such violations were committed against the Black mining community during the colonial era and throughout apartheid, they persist with impunity in South Africa's post-conflict setting. Apartheid's explicit goal of disenfranchisement and economic oppression directly affected Black miners in their ability survive in the economy in a way that could maintain their health and dignity.

The complex web of political and economic policies of apartheid enabled mining companies to avoid the costs of miners' personal, community and family needs due to their subordination under the white capitalist state.[ii] However, the lack of recommendations to address such structural corporate harms during the transitional period after 1994 meant that companies could continue with business as usual. With the passing of seemingly progressive legislation to address occupational safety in the workplace, the State was able to leave the functioning of the mining industry in the private sphere, thereby providing no real incentive for companies to impose better working or living conditions. The

State was both directly and indirectly involved in the perpetration of these violations, and to date there has been an inability or unwillingness to hold mining companies responsible.[iii] This is concerning considering that it is the State that carries the principal responsibility for providing redress for gross violations of human rights during periods of conflict.[iv] The legislative development of occupational health codes may have been an attempt by the State to do its part in improving working conditions of miners. However, it is clear from the affidavits submitted to the Court in the *Nkala* case that occupational health codes are rarely enforced, to which the Court agreed.

The physical, psychological and economic consequences of the structural violence committed by the apartheid government and mining companies are immeasurable. From the inception of the mining industry, the bodies of Black miners were treated as disposable: healthy workers entered the mines, and irreversibly sick men were sent back to their communities well before retirement age. Unable to work or be self-sufficient, they depend on the care of their families, who in turn have to forego gainful employment to fill this role. With many miners being sole breadwinners, affected families are pushed further into poverty. The costs of care for silicosis and/or tuberculosis far exceed the average income of these families, leading to excessive out-of-pocket costs in the face of unemployment.[v] This perpetuates the poverty trap that thousands of South Africans find themselves in, operating beyond the scope of economic participation and upliftment. Where people are unable to participate in society, so too are they unable to enjoy the benefits of law applicable to that society (including access to legislative instruments for compensation).

6.3 *Judicial intervention and the Tshiamiso Trust*

The class action instituted in the *Nkala* case came about because miners found the compensation scheme provided for by ODIMWA inadequate to remedy the damages caused by occupational lung disease. Due to the dissatisfaction with the legislative compensatory mechanism in place, the miners turned to the common law of delict to claim for general damages for bodily harm and for pain and suffering. The Court in the *Nkala* case agreed that ODIMWA was not adequate in redressing the harms caused by the respondent mining companies, and therefore allowed for the class action to proceed on this common law basis. The *Nkala* case, as opposed to the Marikana Massacre, depicts an example of collective action that 'acceptably' takes place within the confines of legal parameters of propriety. It is an indication that protest action must occur within the language of the law for it to be acceptable, and that any action outside this language may be met with violent repression that also operates beyond the realm of the Bill of Rights. The Constitutional right of peaceful assembly and picket is therefore conditional on rules of procedure, which paradoxically limits this right.[vi]

The fact that the applicant miners had to resort to the common law must be questioned within the constitutional framework. Where the Constitution was enacted as a paradigm shift from the apartheid

regime to uphold and protect fundamental human rights, the fact that legislation enacted in pursuit of these goals was found to be inadequate by the guardians of the Constitution is cause for concern. The class action was instituted eighteen years into the democratic transition of 1994, calling into question the efficacy of the Constitution and subsequent legislation to address the structural violence of apartheid that persists beyond the democratic line. The *Nkala* case therefore reveals a tension between the constitutional vision of transformative justice and the reality of pervasive structural inequality that endures today. The transitional context failed to recognise the economic oppression that was integral to the apartheid regime, rather focusing on political and racial oppression of individuals. This led to the need for economic reform being neglected in the post-apartheid order. In this way, those most profoundly affected by apartheid, such as the mining population, have been left behind from the proverbial bridge from apartheid to a culture of equality and democracy. The failure of post-apartheid transitional mechanisms to address the economic harms caused by apartheid has rendered the constitutional transformation process incomplete.

The Court in the *Nkala* case took heed of their constitutional mandate to develop the common law to reflect the vision, purport, and objects of the Bill of Rights. They did so by overturning the common law rule of non-transmissibility of general damages, thereby allowing for such a claim to vest in the deceased estate before *litis contestatio.* This came out of a recognition that the rule had the potential to amount to great gendered injustice by precluding widows and children from benefiting from an award for damages in the likely event that the miner passes away before the close of pleadings. This rule was noted to amount to an unjust situation in which mining companies would benefit from their wrongdoing due to the uncertain nature of pleadings procedure. While this development acts as an important acknowledgment of the role women play in caring for ill miners, it still failed to take notice of the personal damages that they incur from occupational lung disease. While allowing for a claim to be transmissible to the deceased estate enables dependents to benefit from an award made to a miner for damages suffered by him, dependents cannot institute a claim against mining companies for any harms caused beyond the body of the deceased miner (except for loss of support of a breadwinner). As such, any claims instituted by women personally extend only so far as it relates to their miner spouse and cannot account for the unpaid caring labour that causes them to forego personal educational and employment opportunities. The impact of occupational diseases on women and children is profound, and the common law should be developed to allow for them to institute claims for damages against mining companies for the losses they incurred personally.

The Tshiamiso Trust was established because of the out-of-court settlement between several respondent mining companies and the applicants shortly after the Court approved the class action. The Court's approval of the Settlement Agreement meant that the case did not have a chance to proceed to the hearing of issues regarding the wrongful conduct of the mining companies. In this way, the mining companies managed to interrupt the legal process and evade liability for the harms that they caused.

The Court missed an important opportunity to take judicial notice of corporate wrongdoing and assign responsibility for apartheid-era structural violence that permeates mining labour relations today. Mining companies, along with many other South African corporations, continue to benefit from their role in maintaining the structures of apartheid, and the *Nkala* case presented an important occasion for the Court to acknowledge this in the post-apartheid context. This case is but one example of the continued invisibility of corporate accountability for apartheid harms.

6.4 *Compensation as a component of reparations*

The UN Basic Principles act as a comprehensive and authoritative instrument that delineates the forms that reparations may take to bring relief to victims of gross violations of human rights.[vii] Importantly, it highlights the function of reparation as promoting justice and as means to prevent further crimes.[viii] Other functions include promoting peace and reconciliation between the victims and perpetrators.[ix] However, reparations face several challenges in providing relief for violations that have caused mass-scale suffering to groups of people, such as the Black miner population and their families. These challenges include the irreparable nature of the violation, the large number of victims, the limited resources available, and difficulties involved in identifying and locating victims.[x] For reparations to be comprehensive, they must not only address individual suffering but also the structural problems that may have caused the suffering to prevent recurrence.[xi] This will serve as a *de facto* guarantee of non-repetition.

While compensation is an important component of reparation, reparation is not just a matter of transferring monetary resources from the injurer to the victim.[xii] For reparation to be comprehensive, the person responsible for the harms caused must acknowledge the wrongfulness of their act – payment in the absence of this factor otherwise implies that their conduct was not unjust.[xiii] The denial of liability, or of the wrongfulness of their conduct, continues to affront the dignity of the victims, which in turn affects the peacebuilding potential between the parties concerned. A lack of acknowledgment of such wrongfulness also implies that the conduct, being fair, will continue without being addressed as the root cause of the harm. In this context, because the mining companies avoided liability by settling out of court, there has been no tangible acknowledgment of their role in the setting up of the structures that have caused the suffering of thousands of miners. Because they have escaped official judicial notice of their wrongful behaviour, there is still no real intention to change the structures in such a way that the harms do not recur.

The functioning of the Tshiamiso Trust raises questions regarding how it may act differently to ODIMWA. Claimants would face the same administrative barriers in claiming compensation, and the fact that the first set of payment was made over nine years since the institution of the *Nkala* class action is concerning. The Trust does not act to prevent the occupational diseases for which it seeks to pay

compensation, and the Settlement Agreement does not acknowledge any form of liability for causing these harms. The reparative potential of this Trust is therefore incomplete without any acknowledgment of liability or promises of non-repetition. Indeed, where so few hopeful claimants have received payment at all shows that compensation has not been properly made for the level of harm caused by the mining industry. It is likely that the structural violence enacted by the mining industry will persist without accountability until such a time that they are legally forced to reckon with their harms caused.

6.5 *Conclusion*

The *Nkala* case is an example of a legal reaction by a community of persons who have been profoundly impacted by apartheid policies and the lack of structural equality that was promised by the Constitution. The laws relating to occupational health and safety, as well as compensation, failed miners in such a way that they had to institute a class action under the common law to hold mining companies liable for the damages they caused. However, the outcome of the case has shown a worrying potential to move the inadequate compensation scheme from the legislative realm to the hands of the mining companies in the private realm, who have to date refused to accept accountability for their role in the deaths of thousands of miners from tuberculosis and/or silicosis. The Tshiamiso Trust is by no means an adequate attempt at reparation. While monetary compensation is desperately required for the affected miners and their families, provision of such funds cannot operate in isolation. Without guarantees of non-repetition or any intention to change the structures in place, mining companies will continue to profit off the exploitation of Black workers with little regard to their health or dignity.

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[vi] Section 17 of The Constitution (1996).
[vii] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), A/RES/60/147; Odier Contreras-Garduno (2018), 4.
[viii] *Ibid.*
[ix] *Ibid,* 6.
[x] *Ibid,* 6.
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3. Maphatsoe Kompi, dated 7 December 2012;
4. Thembekile Mnaheni, dated 22 November 2012;
5. Matona Mabea, dated 7 December 2012;
6. Mohjolofu Boxwell, dated 7 December 2012;
7. Alloys Mncedi Msuthu, dated 27 November 2012;
8. Liphapang Akime Lebina, dated 7 December 2012;
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