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CASE NOTE

Inappropriately assessing appropriateness of class proceedings: *Nkala v Harmony Gold Mining Company Ltd*

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Nkala v Harmony Gold Mining Company Ltd (Treatment Action Campaign NPC and another as amici curiae)[1] is the first South African mass personal injury class action. The latter is worth noting because a mass personal injury class action presents unique challenges compared to other types of class actions, such as consumer class proceedings. In a personal injury class action, the extent of the injuries and the quantum of damages suffered by each member are individual issues. One of the challenges present in mass personal injury class actions is that, if the class consists of a large number of victims and each victim is required to present oral evidence to prove his or her damages individually, the trial may take years to conclude, and some claimants could possibly pass away by the time the court delivers judgment. It would overburden proceedings and cause undue delay.[2] These are some of the issues which, as will appear from this note, were influential in the court's questionable approach to assessing appropriateness of class proceedings in *Nkala*.

In *Nkala*, Bongani Nkala and 55 other individuals sought certification of a dispersed incident mass personal injury class action[3] on behalf of mineworkers for damages arising from silicosis contracted by mineworkers through their employment on the mines.[4] The South Gauteng High Court granted certification of the class action. This note considers the approach of the Court in *Nkala* in dealing with the issue of the appropriateness of class

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[1] *Nkala v Harmony Gold Mining Company Ltd* 2016 (3) All SA 233 (GJ) (*Nkala*).
[2] See T Broodryk 'Individual issues and the class action mechanism: Determining damages in mass personal injury class actions' (2017) 4 *South African Law Journal* 821–846. The article evaluates certain alternative methods to determine damages in mass personal injury class actions in view of the existing procedural framework developed by our courts, with specific regard to the approaches followed by select foreign jurisdictions.
[3] Ibid 823: a distinction is drawn between a mass personal injury class action based on a single accident and a mass personal injury class action based on a dispersed incident.
[4] *Nkala* (note 1 above) paras 2–4. It is worth noting that, on 26 July 2019, a full bench of the Johannesburg High Court approved settlement of the class action.

actions as a certification factor.[5] It is argued that, contrary to the finding of Mojapelo DJP in *Nkala*, sufficient commonality does not necessarily render class proceedings appropriate. Although admittedly there is an overlap between the certification factors, to determine whether a class action is appropriate a court would need to consider other issues and not just whether a determination of commonality would advance the class action. It may be that there is sufficient commonality, but that class proceedings would nevertheless be otherwise inappropriate. The note concludes by finding that, notwithstanding the court's erroneous approach to this issue, it nevertheless reached the correct conclusion in deciding the certify the class action.

1. The certification factors

In *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*,[6] the Supreme Court of Appeal dealt with the circumstances when a class action may be instituted and the procedural requirements that must be satisfied before such proceedings may be instituted. Wallis JA held that the first procedural step prior to the issuing of summons is to apply to court to certify the process as a class action.[7] Until a potential action is certified, it is not a class action. Wallis JA laid down the following factors, previously referred to as the certification requirements, which should guide a court in making its decision regarding the certification of a class action:

- There must be a class, identifiable by objective criteria.
- There must be a cause of action raising a triable issue.
- There must be issues of fact and/or law common to all the members of the class.
- The relief sought or damages claimed must flow from the cause of action and must be ascertainable and capable of determination.
- If the claim is for damages, there must be an appropriate procedure for allocating damages to the class members.
- The proposed representative must be suitable to be permitted to conduct the action and to represent the class.
- It must be shown that a class action is the most appropriate means of adjudicating the claims of the class members.[8]

According to Wallis JA, the above requirements overlap to some extent; for instance, it is not possible to determine class composition without considering the nature of the claim. Wallis JA added that a class action may be appropriate where the class members share common issues, but that it is not necessarily the case. He further held that it is conceivable that a class action could be certified in respect of some issues, such as

[5] See T Broodryk 'The South African class action vs group action as an appropriate procedural device' (2019) 1 *Stellenbosch Law Review* 6–32, in which the author considers various factors that should inform a court's approach to determining whether class proceedings are appropriate in a particular case.
[6] *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (1) All SA 648 (SCA) (*Children's Resource Centre Trust*).
[7] Ibid paras 23–25.
[8] Ibid para 26.

negligence in a mass personal injury claim, with the result that other issues, such as damages, would need to be resolved separately.[9]

In *Mukaddam v Pioneer Foods (Pty) Ltd*,[10] Jafta J held that the interests of justice should be our courts' guiding consideration when considering class action certification applications.[11] Regarding the certification 'requirements' mentioned in *Children's Resource Centre Trust*, Jafta J stated as follows:

> In Children's Resource Centre [...] the Supreme Court of Appeal laid down requirements for certification. These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.[12]

2. Conflating the issues

In the *Nkala* certification judgment, handed down by Mojapelo DJP, the court held as follows regarding the relevance of the appropriateness inquiry and its contingency upon a determination of commonality:

> [W]e hold that once it has been established that there are sufficient common issues whose determination would advance the cases of all individual mineworkers, then there is no need for the court to engage in the exercise of examining whether these common issues outweigh the non-common ones. In such a case it has to be in the interests of justice that a class action be certified. Articulated differently, once the determination on whether there are sufficient common issues to warrant a class action is made, *the question of the most appropriate way to proceed would almost certainly fall away*.[13]

In certifying the class action, Mojapelo DJP held that although class members' damages would need to be individually determined 'there are sufficient common issues of fact and law that allow for, at least at the first stage, a single proceeding to be held where evidence and argument common to all the mines is entertained'.[14]

Mojapelo DJP appears to have largely based the certification decision on the likelihood that determining the common issues would advance the individual mineworkers' cases.[15] He found that, following upon receipt of the common evidence, the determination of the common issues would move the litigation forward.[16] If there are sufficient common issues to warrant certification, then it would be in the interests of justice that the court certifies a class action.[17]

He further stated that Wallis JA in *Children's Resource Centre Trust* did not find that the requirement that a class action must be the appropriate means of determining

[9] Ibid para 26.
[10] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (10) BCLR 1135 (CC) (*Mukaddam*).
[11] Ibid paras 33–34.
[12] Ibid para 35.
[13] *Nkala* (note 1 above) para 110, emphasis added.
[14] Ibid paras 79, 84.
[15] Ibid para 110.
[16] Ibid para 99.
[17] Ibid paras 99, 110, 121.

the claims of class members is one that must be satisfied before certification succeeds. To reach this conclusion, Mojapelo DJP referred to the comment of Wallis JA that there is an overlap between the certification requirements and that '[t]he fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case'.[18] Mojapelo DJP held that the Supreme Court of Appeal 'left it at that' and that a court therefore does not need to inquire into the appropriateness of class proceedings before deciding whether to certify the class action.[19]

The above conclusion reached by Mojapelo DJP is, with respect, incorrect. Wallis JA clearly listed as a separate certification requirement 'whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members'.[20] He held that '[w]ithout excluding the possibility of there being other issues that require consideration, it suffices for our purposes to say that a court faced with an application for certification of a class action must consider the [certification] factors […] and be satisfied that they are present before granting certification'.[21] Accordingly, the Supreme Court of Appeal did not suggest that a court would only need to consider *some* of the factors; rather, the court expressly found that a class action could not be certified unless each of these factors is present. Further, in *Mukaddam*, the court found that the requirements listed by Wallis JA 'must serve as factors to be taken into account in determining where the interests of justice lie in a particular case […] The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise'.[22] It is submitted that the finding by the Constitutional Court should not be construed to mean that a court does not need to consider all the certification factors listed by Wallis JA before deciding whether to certify a class action. Rather, it should be interpreted to mean that, after having inquired into the presence of each of the factors listed by the Supreme Court of Appeal in *Children's Resource Centre Trust*, a court may decide to certify a class action even if one of the factors is absent or has not been complied with. In other words, a court should at least inquire into the appropriateness of class proceedings in the circumstances.

Such an approach is reinforced by the finding of Makgoba J in *Pretorius v Transnet Second Defined Benefit Fund*[23] that 'the Constitutional Court endorsed the approach set out by the Supreme Court of Appeal and in addition thereto the Constitutional Court laid down the principle applicable for certification, to wit, the interests-of-justice principle'.[24]

In *National Union of Metalworkers of South Africa v Oosthuizen*[25] the court also held that 'the seven factors identified in *Children's Resource Centre* form the building blocks of the founding affidavit in this matter. Provided the overarching "interests of

[18] Ibid para 111, referring to *Children's Resource Centre Trust* (note 6 above) para 26.
[19] *Nkala* (note 1 above) para 111.
[20] *Children's Resource Centre Trust* (note 6 above) para 26.
[21] Ibid para 28.
[22] *Mukaddam* (note 10 above) para 35.
[23] *Pretorius v Transnet Second Defined Benefit Fund* 2014 (6) SA 77 (GP).
[24] Ibid 23.
[25] *National Union of Metalworkers of South Africa v Oosthuizen* 2017 (6) SA 272 (GJ).

justice" lodestar remains the vade mecum, these seven factors are justifiably traversed, and they must be applied to the facts of the present case'.[26] Recently, in *Vlok v Georgiou*,[27] the court confirmed with reference to the factors listed in *Children's Resource Centre Trust* that '[i]n order to establish whether this application should be granted and the class action be certified, it is appropriate to consider the factors set out above, the interests of justice and any factor that may be relevant to this specific application'.[28] The point of departure for class proceedings is accordingly to consider whether certification would be in the interests of justice, which would clearly entail considering the factors identified by Wallis JA in *Children's Resource Centre Trust*.[29]

In *De Bruyn v Steinhoff International Holdings NV*,[30] the court held that 'the factors are considerations that must be weighed together so as to make a final judgment, against the overarching standard of the interests of justice, as to whether certification should be granted, and if so, on what terms'.[31] Unterhalter J stated that '[c]ertain factors may weigh with the certification court to incline the decision one way or another. Other factors may be so weighty that the scales tip decisively. Every factor is to be weighed, and none displaces the ultimate exercise of weighing all in the balance to determine where the interests of justice lie. But that does not mean that a factor in a particular case may weigh so heavily that it points clearly to what the interests of justice require'.[32]

Therefore, the legal position as it currently stands is that the court should consider *all* the certification-factors listed by Wallis JA in *Children's Resource Centre Trust* and, in so doing, a court should consider whether it would be in the interests of justice to certify the class action. Regrettably, in *Nkala*, the court failed to do so.

By not considering the appropriateness of class proceedings, a court may fail to take into account factors that may operate against the certification of a class action, notwithstanding the existence of common issues that, if determined, would advance class members' claims. In this regard, it is unclear what, according to Mojapelo DJP, the court's approach would be in circumstances where there are common issues the determination of which would advance class members' claims, but certification of the class action would give rise to manageability concerns that may render a class action inappropriate. The dismissive approach of the court in Nkala to the appropriateness-consideration during certification, renders it uncertain when the court will focus on the advantages of a class action compared to alternative forms of dispute resolution which may be available to the claimants, such as litigation through joinder. When and how will the court determine whether there is a better method of handling the controversy other than through the class action mechanism? In other words, what about the practical difficulties that may result in class proceedings being inappropriate for

[26] Ibid para 23.
[27] *Vlok v Georgiou* 2020 1 All SA 884 (GP).
[28] Ibid para 44.
[29] T Broodryk 'Class action certification and constitutional claims: the South African case' (2020) 27 *Maastricht Journal of European and Comparative Law* 17–18
[30] *De Bruyn v Steinhoff International Holdings NV* (29290/2018) [2020] ZAGPJHC 145.
[31] Ibid para 23
[32] Ibid para 25.

a particular suit?[33] The requirement that a class action must be appropriate is, according to Erasmus and Van Loggerenberg, aimed at ensuring that only claims that cannot feasibly be instituted as ordinary actions with multiple plaintiffs are brought as class actions.[34] It cannot be that such considerations should be discarded solely because there are common issues and the determination of these issues would advance class members' claims. With respect, it would be untenable for our courts to overlook the (in)appropriateness of class proceedings in such circumstances.

For example, it is arguable that a court may decline certification where it is of the view that it would be problematic to notify a significant proportion of the class, or because class members would have to prove causation *and* damages on an individualised basis. Consider also, for example, the collapse of a bridge where five individuals, all of whom reside in the same area, are injured. These individuals would have common issues that, if determined, would advance their claims. According to Mojapelo DJP, a class action would be certified and no further questions would need to be asked as to the appropriateness of class proceedings. However, it is likely that, in such circumstances, joinder would be possible and would not needlessly complicate the litigation of the case. The class is small, the individual claimants are likely to litigate individually if a class action is not certified and the class members are not geographically dispersed. Essentially, joinder of parties in terms of the court rules would be practical and appropriate. Conversely, class proceedings would be inappropriate. However, the consequence of the above-mentioned approach of Mojapelo DJP is effectively to render superfluous the joinder provisions and to require certification of the class action in such circumstances. It does not take account of alternative, feasible, methods of adjudication, compared to class proceedings, even though such alternatives may also be in the interests of justice. Mojapelo DJP's approach is also at odds with the approaches of those foreign jurisdictions upon which the development of our mechanism is modelled, especially Ontario and the United States. Both jurisdictions require some degree of investigation into the suitability of class proceedings in addition to the existence of common issues of fact or law.[35]

In view of the above it is, with respect, difficult to comprehend how the court in *Nkala* could conclude that the appropriateness of class proceedings did not have to be considered before granting certification. It is also difficult to conceive of circumstances where a class action should be utilised notwithstanding the existence of more appropriate alternatives. In other words, if there is another device available that is more appropriate than a class action in the circumstances, why would such a device not be utilised at the expense of class proceedings? The question is relevant even where determination

[33] *Eisen v Carlisle & Jacquelin* 417 US 156, 164 (1974).
[34] HJ Erasmus & DE van Loggerenberg *Erasmus: Superior Court Practice* (RS 41 2013) A2–A25.
[35] The threshold requirements for certification of a class action in the United States are contained in rule 23(a) of the American Federal Rules of Civil Procedure. These certification requirements are generally referred to as numerosity, commonality, typicality, and adequacy of representation. In addition to having to satisfy the requirements for certification, each class action must satisfy the requirements of either rules 23(b)(1), 23(b)(2), or 23(b)(3). Rule 23(b)(3) pertains to the opt-out damages class action and specifically requires that a court should assess whether class action proceedings is 'superior to other available methods for fair and efficient adjudication of the controversy'. Section 5(1)(d) of Ontario's Class Proceedings of 1992 provides that a class action should be certified where 'a class proceeding would be the preferable procedure for the resolution of the common issues'. See also Broodryk (note 5 above) 9–11, 15–18.

of the common issues may advance class members' claims. It is, with respect, not possible to agree with the finding by Mojapelo DJP that the existence of common issues that, if determined, would advance class members' claims, means that a court would not have to consider the appropriateness of class proceedings, including alternatives thereto.

During his judgment, Mojapelo DJP considers 'what the most appropriate way to receive the common evidence and to resolve the common issues'[36] is, and whether there are viable alternatives to class proceedings in the circumstances.[37] He states that the respondents failed to provide an alternative to class proceedings that 'would be best suited for the receipt of a substantial amount of very focussed evidence of a common nature and the determination of common legal issues'.[38] Further, the respondents 'do not disown the possibility that they would bring evidence common to all the claims of the mineworkers whether in a class action or in numerous individual actions'.[39] Mojapelo DJP further states that:

> [T]he institution of hundreds of thousands of separate individual hearings is not more appropriate than the proposed class action to resolve the disputes between the mineworkers and the mining companies. This is so even if the proposed class action only resolves some of the disputes between them. Accordingly, we conclude that the proposed class action is the most appropriate way for this matter to proceed.[40]

Mojapelo DJP appears to conflate the certification requirement that there must be common issues of fact or law and that a class action should be found to be the appropriate method to adjudicate class members' claims. Wallis JA, in *Children's Resource Centre Trust*, held that for the purpose of certification, it would not have to be shown that the class action would dispose of every aspect of the claim. According to Wallis JA, the question is whether 'there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or subclass'.[41] This appears to be the criteria that Mojapelo DJP utilised in *Nkala* to decide on the appropriateness of class proceedings. However, as discussed above, the appropriateness inquiry constitutes a separate certification requirement that entails taking into account other relevant factors, such as the existence of appropriate alternative methods of adjudication and the objectives and manageability of class proceedings. It may therefore be that, despite the existence of common issues, class proceedings may be otherwise inappropriate. Hence the suggestion by Wallis JA that '[t]he fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case'.[42]

The above-mentioned conflation by Mojapelo DJP of the certification requirements set by Wallis JA may also explain why, rather unconnectedly, a majority of the factors that are relevant to determining the appropriateness of class proceedings compared to

[36] *Nkala* (note 1 above) para 112.
[37] Ibid paras 101–115.
[38] Ibid para 113.
[39] Ibid para 114.
[40] Ibid para 115.
[41] Ibid para 45.
[42] *Children's Resource Centre Trust* (note 6 above) para 26.

other methods of adjudication are scattered throughout his judgment. In other words, Mojapelo DJP does appear to consider the appropriateness factor. For example, he does consider the class action objectives of access to justice[43] and judicial economy[44] and he does refer to the manageability of class proceedings.[45] Ultimately, Mojapelo DJP may have reached the correct conclusion by certifying the class action. However, the approach that he used to reach this conclusion is, for the above reasons, questionable to say the least. His approach does not lend itself to creating legal certainty and judicial uniformity insofar as the above issues are concerned. Unterhalter SC and Andreas Coutsoudis agree that the appropriateness criterion is important to consider during certification and, referring to *Nkala*, they question the 'somewhat dismissive approach taken by the court to the appropriateness criterion'.[46] It is worthwhile to set out their views on this issue below:

> In particular, one of the separate reasons that the court held that certification should be granted was that it found that "in the context of this case class action is the only realistic option through which most mineworkers can assert their claims effectively against the mining companies. This is the only avenue to realise the right of access to the courts which is guaranteed for them by the Constitution." Given this determination, we would have thought that (a) this factor should have been considered under the appropriateness criterion; and (b) the fact that the court found that one of the reasons for granting certification was effectively (if rightly characterised) a finding that a class action was the most appropriate means for determining the class members' claims demonstrates the independent importance of the "appropriateness" criterion, even when the court "has found that there are common issues whose determination will advance the case of all individual class members".

3. Conclusion

This author has previously argued that access to justice serves as the foundation for the incorporation of the class action into South African law and that it is essentially against this background that a court should decide on the appropriateness of class proceedings as a means of adjudicating the claims of class members.[47] Our courts' assessment should be aimed at establishing whether certification of a class action is necessary to achieve access to justice. Consideration should also be given to whether a class action is necessary to achieve judicial economy and behaviour modification. Finally, the court should consider any other relevant factor(s) that may assist it in determining whether class proceedings are otherwise appropriate, including the manageability of the class action, the importance of the common issues in relation to the claims as a whole, and whether the class members' claims are large enough to warrant being pursued separately. The manageability consideration entails taking into account *inter alia* the identifiability of class members, the size of the class and the extent of the non-common

[43] *Nkala* (note 1 above) paras 104–108.
[44] Ibid paras 34, 98, 141.
[45] Ibid paras 33, 52, 86-87, 224.
[46] D Unterhalter & A Coutsoudis 'The certification of class actions' in M du Plessis et al. (eds) *Class Action Litigation in South Africa* (2017) 21, 32. See also T Broodryk *Developing a Structure for the Adjudication of Class Actions in South Africa* LLD dissertation Stellenbosch (2017) 72–77 where the court's approach in *Nkala* was first criticised by this author.
[47] Broodryk (note 5 above) 30.

issues that would require individualised adjudication. The manageability of the class action should not be the only or even dominant consideration taken into account in assessing the appropriateness of class proceedings, as opposed to other mechanisms such as joinder, as a means of adjudicating the claims of class members. A holistic, common sense and pragmatic approach needs to be adopted where the assessment is made, having regard to all the circumstances of the case.[48]

When applying the above test to the facts in *Nkala*, it appears that the court was ultimately correct to certify the class action. The size of the class ranged from 17,000 to approximately 500,000 members. Further, '[t]he scope and magnitude of the proposed silicosis and TB claims is unprecedented in South Africa. The action, if it proceeds, will entail and traverse novel and complex issues of fact and law'.[49] The class members are 'poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are continually battling the effects of two extremely debilitating diseases'.[50] 'It was not disputed that the majority of mineworkers have little to no access to the South African justice system as they are all impoverished or indigent and are living in the rural areas of South Africa, Mozambique, Malawi, Lesotho and Swaziland, and are in poor health'.[51] These individuals are unlikely to litigate independently in the absence of certification of the class action.[52] Accordingly, applying the criteria of the appropriateness-inquiry detailed above, it would appear that a class action is the appropriate method to adjudicate class members' claims. This is the case even though there may be manageability concerns that may arise during the second phase of the bifurcated proceeding. These concerns are overshadowed by the need for class members to be provided with access to justice. Such an approach, it is suggested, would be in the interests of justice.

Importantly, the above conclusion is premised upon considerations other than commonality, the latter having constituted the primary basis for the finding by Mojapelo DJP that the appropriateness enquiry would not need to be engaged with. Although, as Wallis JA pointed out in *Children's Resource Centre Trust*, the certification factors overlap to a certain degree, our courts should caution against regarding these factors as peripheral, dispensable considerations. Rather, they constitute important individual elements, each of which serves to assist the court in determining where the interests of justice lie in a particular case. Ultimately, by not considering the appropriateness of class proceedings, a court may fail to take into account factors that may operate against the certification of a class action, notwithstanding the existence of common issues that, if determined, would advance class members' claims.

Disclosure statement

No potential conflict of interest was reported by the author.

[48] Ibid 30–31.
[49] *Nkala* (note 1 above) para 7.
[50] Ibid para 100.
[51] Ibid para 103.
[52] Ibid paras 106–107.

Notes on contributor

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