ABSTRACT
Silicosis is an incurable lung disease caused by the inhalation of silica dust. Gold is usually found alongside silica, so goldminers are especially at risk of silicosis. Studies show that up to a quarter of career mineworkers in South Africa have contracted it. As one expert witness in the litigation put it, a ‘river of disease’ was flowing through the mines. The river metaphor also captures the meandering course of the silicosis litigation, which spanned more than a decade, its course unpredictable, joined by new tributaries and splitting into new streams of litigation along the way. It included test cases, arbitration, massed claims and eventually, a class action. The silicosis class action in South Africa not only provided the first real test for the new court-made rules governing class actions, but is one of the largest and most complex multi-class, multi-defendant, dispersed incident class actions the world has seen. The class action succeeded, culminating in a R5 billion settlement. It also provides a strong basis to consider how best class action law should develop in South Africa. This article engages with the test for certification, representation in class actions, settlements and legal fees and costs. It argues that the constitutional commitment to access to justice undergirds class actions and must inform the development of these rules. The profit incentive presented by class actions presents risks of abuse that must be addressed. The Constitution, and not the market, should determine which poor litigants get legal representation to bring class actions, and how class actions work.
called massive fibrosis. I also contracted TB because of this. I developed this disease because of breathing too much dust from the mine.¹

1. Introduction

This article charts the course taken by the silicosis litigation over almost two decades, culminating in South Africa’s largest and most significant class action to date and a R5 billion settlement to compensate an upper-end estimate of 500,000 mineworkers, in addition to two other major settlements. The litigation took many forms – from test cases and arbitration to class actions and massed individual claims. It ran during the early stages of the evolution of South Africa’s class action regime. Class actions in South Africa are rooted in the constitutional commitment to access to justice, which must remain central to the rules governing class actions. The silicosis litigation provides an excellent basis for a comparison with other forms of litigation and offers an entry point into the development of a constitutional class actions law.

Silicosis is an incurable lung disease caused by the inhalation of silica dust. Gold is usually found alongside silica, so goldminers are especially at risk. Silicosis itself is generally not fatal, but contracting the disease significantly increases the risk of tuberculosis (TB), which can be fatal. The extent of the historic silicosis epidemic among black goldminers in South Africa became increasingly apparent in the post-apartheid era. Some studies showed that up to a quarter of career mineworkers had contracted the disease, revealing that the industry knew (or ought to have known) about it at the time but treated black labour as expendable.² As one expert in the litigation put it, a ‘river of disease [was] flowing out of South African mines’.³

The river metaphor aptly captures the meandering course of the silicosis litigation. It ran long, over a decade, its course unpredictable, joined by new tributaries and splitting into streams of litigation along the way. Different actors entered the water at different times, after the Legal Resources Centre (LRC), a South African public interest law firm, and UK-based firm Leigh Day & Co (Leigh Day) jointly launched the initial actions, later supported by local firm Garratt Mbuyisa Neale (GMN). In the second half of the story, private attorneys Richard Spoor Inc (Spoor Attorneys) and Abrahams Kiewitz Attorneys (Abrahams Kiewitz), partnering with US class action firms Motley Rice and Hausfeld respectively became involved, initially launching separate class action certification proceedings.⁴ Ultimately all these players except Leigh Day and GMN agreed to act jointly for the class, and the tributaries were joined, culminating in a single, massive class action.

¹ Alpheos Zonisile Blom, first plaintiff in litigation against Anglo American South Africa Ltd, speaking from the floor at annual general meeting of Anglo plc, London, United Kingdom, 22 April 2010.
² AS Trapido, NP Mqoqi, BG Williams, Neil White, A Solomon, RH Goode, CM Macheke, AJ Davies & C Panter ‘Prevalence of occupational lung disease in a random sample of former mineworkers, Libode District, Eastern Cape Province, South Africa’ (1998) 34 American Journal of Industrial Medicine 305–313; BV Girdler-Brown, NW White, RI Ehrlich, GJ Churchyard ‘The burden of silicosis, pulmonary tuberculosis and COPD among former Basotho goldminers’ (2008) 51 American Journal of Industrial Medicine 640.
³ This expression is attributed to Tony Davies, a medical expert for the plaintiffs in the Blom litigation and the class action instituted by the LRC. See, for example, D Smith ‘Diseased workers take on gold giant’ (19 November 2009) Sydney Morning Herald.
⁴ See C Abrahams Class Action: In Pursuit of a Larger Life (2019). Abrahams’ autobiography recounts his role in the silicosis class action litigation.
The litigation ran in parallel to the judicial development of new rules governing class actions. When it began, these rules were largely non-existent. After a decade of pursuing other litigation strategies, however, the ‘bread litigation’ concerning alleged anti-competitive price-fixing in Children’s Resource Centre Trust v Pioneer Foods\(^5\) and Mukaddam v Pioneer Foods\(^6\) established court-made rules governing class actions. These decisions established procedural and substantive requirements for the certification of class actions, charting a powerful new path for the silicosis litigation. Certification is the process by which a court approves that a case be conducted as a class action. In the silicosis litigation, public interest lawyers and local and foreign firms combined forces to seek certification of a class action against effectively the entire goldmining industry. Despite firm resistance, a full court of the South Gauteng High Court certified the class action, laying the groundwork for a multi-billion-rand settlement.\(^7\)

The silicosis class action not only provided the first major test for the new court-made rules governing class actions, but also emerged as one of the largest and most complex multi-class, multi-defendant class actions in the world. Because each mine-worker contracted silicosis and/or TB in different circumstances at almost 100 mines, the class action was a ‘dispersed incident mass personal injury class action’, the first such class action to be certified in South Africa.\(^8\)

The litigation resulted in a trilogy of judgments, beginning with an initial judgment in an application to join Motley Rice, the foreign firm working with one set of plaintiff attorneys, as a party to the certification proceedings (Silicosis Joinder).\(^9\) The second judgment was the certification decision itself (Silicosis Certification)\(^10\) and the last was the judgment approving the settlement (Silicosis Settlement).\(^11\) This article maps the shift to a class action strategy from the available alternatives, and critically evaluates choices made along the way.

The silicosis litigation highlights key legal, logistical and ethical dilemmas that class actions present in South Africa. How is the ‘interests of justice’ test to be applied in certification proceedings? Is certification required in Bill of Rights class actions? If class actions are meant to promote access to justice, how well placed is the South African legal aid, public interest and private legal profession to run these proceedings? How should foreign firms be treated and regulated? Lastly, what ethical concerns arise when for-profit class action litigation is conducted on behalf of poor communities?

The article engages these questions. I draw on the silicosis litigation – considered in the context of the academic literature, comparative experience and early class action

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\(^5\) Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA).

\(^6\) Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC).

\(^7\) Nkala v Harmony Gold Mining Company Limited 2016 (5) SA 240 (GJ) (Silicosis Certification).

\(^8\) T Broodryk ‘Individual issues and the class action mechanism: Determining damages in single-accident mass personal injury class actions’ (2017) 134 South African Law Journal 821, 832.

\(^9\) Gold Fields Limited v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited 2015 (4) SA 299 (GJ).

\(^10\) Silicosis Certification (note 7 above).

\(^11\) Ex Parte Nkala [2019] ZGPJHC 260 (majority); Ex Parte Nkala [2019] ZAGPJHC 262 (Vally J concurrence). Unless indicated otherwise, all references to Silicosis Settlement below are to the majority judgment by Windell J. An earlier judgment by Mojapelo J prescribed the process to be followed to approve the settlement: Ex Parte Nkala [2018] ZAGPJHC 657.
litigation in South Africa – to argue that key interventions are required to ensure that class actions actually promote access to justice for marginalised litigants and communities. First, I focus on the events, choices and outcomes in the silicosis litigation itself: part 2 describes the initial phase of test case litigation before class action proceedings were instituted, while part 3 covers the class action consolidation, certification and settlement.

Second, I turn to key unresolved questions about class actions generally. I consider three important questions in part 4, namely whether certification is required in all class actions, what role access to justice plays in the test for certification and whether the considerations in the inquiry are ‘factors’ or ‘requirements’. In part 5, I turn to issues regarding legal representation in class actions, including questions of representivity and civil legal aid. Part 6 focuses on settlement, in particular potential abuse of settlements and problematic clauses. Finally, part 7 discusses fees, costs and profit-making in class actions.

2. The beginning: silicosis test case litigation

In this part, I describe the first phase of silicosis litigation, test cases launched by the LRC and Leigh Day. These test cases were instituted in court but subsequently referred to arbitration. Prior to the arbitration commencing before former Chief Justice Sandile Ngcobo as arbitrator, the claims were settled. Also during this phase, the Mankayi case was litigated by Spoor Attorneys and Abrahams Kiewitz, clearing an important legal hurdle to delictual claims against employers. I explore how each of these events presented particular choices, and their legal and ethical implications.

2.1 The Blom test cases

The test case litigation was instituted by the LRC and Leigh Day in 2004, almost a decade before the class actions began. The litigation took the form of 23 individual actions instituted in the South Gauteng High Court against Anglo American South Africa Ltd (Anglo) on behalf of the plaintiffs, most of whom had worked in the President Steyn Gold Mine and had contracted silicosis. The plaintiffs included fifteen ex-mineworkers and eight widows of deceased mineworkers. The litigation was instituted against Anglo. The principal cause of action was that Anglo, which had concluded service agreements with several gold mines, had negligently advised those mines resulting in the plaintiffs contracting silicosis during the course of their employment.

The first named plaintiff was Alpheos Zonisile Blom, and this litigation came to be known as ‘the Blom litigation’. Mr Blom often acted as a spokesperson for the plaintiffs, at one stage attending an annual general meeting of Anglo American Plc in London in 2010, where he drew attention to his own situation and the demands of other ex-mineworkers. Part of his statement is quoted at the beginning of this article. Mr Blom explained that he had a very serious form of silicosis called massive fibrosis. He drew

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12 Mankayi v AngloGold Ashanti Ltd 2011 (3) SA 237 (CC) (Mankayi CC).
attention to the unsafe working conditions in gold mines and high rates of silicosis and TB, and ended his statement:

I am part of a group of former miners who are suing Anglo American South Africa for failing to advise its gold mines on how to protect miners against excessive dust exposure. If our claim is successful it could lead to thousands more people coming forward. This case could help my quality of life however I worry that I may die before it is over. I would like to see a compensation scheme put into place now for silicosis victims, I would also like to see your company put into place a system for monitoring silicosis and TB and treating it promptly. Will you help us?

It was reported that, ‘while shareholders had made no response to Alpheos Blom’s harrowing account of suffering as a worker, there was applause at the suggestion that shareholders should receive better drinks after company AGMs.’ By then, the test cases had been running for six years. The ill health of many plaintiffs and the urgency of their claims prompted a change of strategy, from court to arbitration.

### 2.2 The choice of arbitration

The Blom actions were instituted in the High Court. However, the LRC and Leigh Day ultimately reached agreement with Anglo that the actions be arbitrated. This was not easily decided. The choice of arbitration is a vexed issue in South Africa and other common law jurisdictions.

There are weighty considerations on both sides of the debate about arbitration. Against it, there are concerns that arbitration is a form of ‘privatisation’ of civil justice and threatens human rights. A particular concern is that, although arbitrators are ordinarily bound to apply South African law, diverting disputes away from the courts may in practice promote decision-making insulated from the reach of the Constitution of the Republic of South Africa, 1996. The Constitutional Court encountered a clash between arbitration and human rights in a dispute about the suspension of a church minister for entering into a same-sex relationship. The Court refuted the notion that arbitration operates as a Constitution-free zone, supported arbitration as an institution and directed the parties to return to it. The concern remains that arbitration may not actually advance human rights. Most commercial arbitrators are retired judges or senior advocates, many with limited human rights experience (notwithstanding notable exceptions), and arbitrations typically happen in the rarefied corporate setting of advocates’ chambers. Worryingly, arbitral awards are technically not binding precedent. An award will bind the parties, but not subsequent arbitrators or courts.

The trend of diverting civil litigation towards arbitration warrants deeper reflection. In the Blom test cases, there were good reasons for the plaintiffs to opt for arbitration. The plaintiffs and the broader group of silicotic ex-mineworkers were old, sick and in desperate need of financial relief. Waiting for a High Court trial to happen, along with

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13 Richard ‘Anglo American challenged at AGM: Full report’ (29 April 2010) London Mining Network <https://londonminingnetwork.org/2010/04/anglo-american-challenged-at-agm-full-report/>.

14 See, for example, LL Maltby & AE Smith ‘Private justice: Employment arbitration and civil rights’ (1998) 30 Columbia Human Rights Law Review 29.

15 De Lange v Presiding Bishop of the Methodist Church of Southern Africa 2016 (2) SA 1 (CC).
the possibility of three further appeals to a Full Bench, the Supreme Court of Appeal (SCA) and Constitutional Court would delay justice considerably. By the time the cases were ready to go to trial, pleadings, the massive volume of discovery of documents from Anglo American and pre-trial preparation had already taken almost a decade. Arbitration offered the opportunity to shorten the trial and appeal period by having a dedicated arbitrator and limiting appeals to just one. The parties also understood that the arbitrated disputes were ‘test cases’ that would, in principle, be determinative of similar claims in future.

A similar use of arbitration to resolve issues of major public importance emerged in a claim arising from the decision of health authorities to move a number of mental health patients out of Life Esidimeni facilities in Gauteng. As a result of this decision, 144 mental health care users died and 1,418 suffered rights violations but survived. The dispute was referred to arbitration before former Deputy Chief Justice Dikgang Moseneke, who rendered an award on 19 March 2018.16 Esidimeni is an example of a damages claim arising from human rights violations being successfully concluded by arbitration. Despite not being technically binding, the Esidimeni award is publicly available and has been influential in developing the law on constitutional damages,17 which have been rarely awarded. Given the arbitrator and the public nature of the award, this is likely to be persuasive before courts. Although Blom and Esidimeni are isolated examples of public interest litigation (PIL) going to arbitration, they illustrate the possibilities. However, the choice is a difficult one.

2.3 The Blom settlement

In 2013, as class action proceedings were beginning (discussed in part 3 below), and shortly before the arbitration hearing, Anglo settled the Blom claims. The settlement agreement is confidential, but it is public information that the settlement included the payment of sums of money to each of the plaintiffs and the payment of their legal costs.

The settlement provided relief to the individual plaintiffs. However, at that point, the Blom litigation had been running since 2004 and the parties always understood it to be ‘test case’ litigation to determine the principled issues of liability of Anglo to silicotic mineworkers. The eleventh-hour settlement, the main terms of which were confidential and which netted no determination or admission of liability, meant that even the limited determinative status of an arbitral award was lost.

I return to some of the difficulties associated with settlements below. For now, I note that one of the potential advantages of a class action is that it is not possible simply to settle the representative plaintiffs’ cases because class representatives litigate in the interests of all class members. However, representative plaintiffs must be fully advised that a settlement of their claims alone cannot be accepted since they are acting in the interests of the class as a whole and not merely their own interests.18

16 Life Esidimeni arbitral award 19 March 2018 <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf>.
17 Ibid 212–219. Moseneke J (as he is designated in the award) awarded R1 million in constitutional damages to each of the claimant families.
18 Children’s Resource Centre Trust (note 5 above) paras 47–48.
plaintiff legal representatives in the silicosis class action litigation were careful to do so in the mandate agreements for clients in the class action.

2.4 Mankayi clears the COIDA hurdle

Chronologically, Mankayi is the next tributary that joined the main flow of the silicosis litigation. At that time, the Blom test cases being litigated by the LRC and Leigh Day had not yet settled.

Thembekile Mankayi brought an action for delictual damages against his former employer, Anglogold Ashanti, on the basis that it had failed to apply appropriate and effective control measures to create a safe and healthy working environment, resulting in him contracting TB and chronic obstructed airways disease. Anglogold Ashanti took an exception on the basis that s 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) precluded such a common law claim against an employer. Mankayi culminated in a decision of the Constitutional Court in 2011 in favour of Mankayi. It also marked the entry of Spoor Attorneys and Abrahams Kiewitz into the silicosis litigation. The effect of Mankayi was to remove a hurdle presented by s 35 of COIDA, which provides:

No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

The High Court and SCA held that s 35 operated as a statutory bar to claims by mineworkers against mine owners employing them. In the Constitutional Court, Khampepe J for a unanimous court read s 35 differently. She concluded that ‘employee’ in s 35 is limited to employees who are able to claim statutory compensation in terms of COIDA. Mineworkers are excluded from COIDA and instead covered by the Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA). Accordingly, s 35 does not bar a mineworker from making a claim against their employer.

Mr Mankayi passed away before the delictual claim could be litigated. The mortality of silicotic class members remained a major fear and challenge throughout the litigation. As I discuss in part 3, during the certification proceedings the LRC persuaded the High Court to develop the common law so that general damages are now transmissible to the estate of a claimant who dies after the institution of legal proceedings.

However, Mankayi itself was a significant legal development. The Blom test cases were framed as claims based on the negligent advice of Anglo to mines in terms of service agreements between Anglo and the mines. Mankayi opened up a new cause of

19 Mankayi CC (note 12 above) paras 2–3.
20 Mankayi v AngloGold Ashanti Limited (unreported case number 06/22312), South Gauteng High Court, Johannesburg (26 June 2008).
21 Mankayi v AngloGold Ashanti Ltd 2010 (5) SA 137 (SCA).
22 Mankayi CC (note 12 above) para 76.
23 L Smit ‘Human rights litigation against companies in South African courts: A response to Mankayi v Anglogold Ashanti 2011 (3) SA 237 (CC)’ (2011) 27 South African Journal on Human Rights 354, 357.
24 See generally ibid.
action – that Anglo controlled the mines and was liable directly on this basis. Ultimately, both causes of action were advanced in the consolidated class action.

Mankayi highlights the deficiencies of the statutory scheme for compensation for occupational injuries and diseases. Khampepe J described the compensation under ODIMWA as ‘paltry and inadequate’, holding that unless employees can also bring delictual claims against their employers, they would be deprived of an effective remedy as guaranteed under s 38 of the Constitution.25

3. From test cases to class actions

The silicosis litigation underwent a crucial shift from test cases to class action proceedings in 2012 to 2013, just as the Blom arbitration hearing approached. In this part, I begin by noting how class action law developed in parallel to the silicosis litigation, presenting a powerful new option. I then explore how the silicosis class action unfolded, beginning as separate applications by Abrahams Kiewitz, Spoor Attorneys and the LRC, which were later consolidated in Nkala. I discuss the attempt to join Motley Rice, which was funding and supporting Spoor, as a party. Finally, I deal with the certification hearing and judgment, and the court’s approval of the subsequent settlement. I tease out certain unresolved questions about class actions generally, explored in parts 4 to 7 below.

3.1 Class actions emerge as a powerful new option

Class actions had been in a nascent state in South Africa throughout the constitutional dispensation, despite s 38(c) of the Constitution expressly conferring standing in Bill of Rights cases on ‘anyone acting as a member of, or in the interest of, a class of persons’.26 The South African Law Commission (SALC) had recommended that rules be made to govern class actions, but this had not happened.27 In the first two decades of democracy, only one class action was litigated. Ngxuza, litigated by the LRC and finalised in 2001, invoked class action standing to seek monetary relief for all persons in the Eastern Cape Province whose disability grants had been unlawfully terminated.28 The High Court and the SCA approved the matter proceeding by way of class action, but did not develop detailed rules for class actions.

The real turning point came with the institution of the ‘bread litigation’, culminating in two SCA decisions in Children’s Resource Centre Trust and Mukaddam in 2013 and the Constitutional Court’s decision in Mukaddam later that year.29 In these cases, courts adopted the following definition of a class action:

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25 Mankayi CC paras (note 12 above) paras 17–18.
26 Section 7(4)(b)(iv) of the Interim Constitution, Act 200 of 1993 contained an equivalent provision. The Interim Constitution has been repealed.
27 South African Law Commission Project 88 (August 1998) ‘The recognition of class actions and public interest actions in South African law’ <https://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf>
28 Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza [2001] ZASCA 85.
29 See generally G Jephson ‘A false start in the development of class action law’ (2015) VII Constitutional Court Review 286.
A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (‘representative plaintiff’) may sue on his or her own behalf and on behalf of a number of other persons (‘the class’) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (‘common issues’). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.30

Children’s Resource Centre Trust confirmed that certification is required and developed procedural rules and a substantive test. The judgment provided a ‘how-to’ guide to litigating class actions. The SCA identified seven ‘requirements’ to be met to secure certification, namely: (i) an objectively identifiable class; (ii) a triable cause of action; (iii) common issues of law or fact; (iv) that the relief sought, or damages claimed, be ascertainable and capable of determination; (v) if damages are claimed, an appropriate procedure for allocating damages to class members; (vi) that the proposed class representatives are suitable; and (vii) whether a class action is the most appropriate means of determining the claims.31

The bread litigation unfolded during 2012 and 2013, around the same time that the silicosis class action litigation was launched. In Mukaddam, the Constitutional Court broadly confirmed the approach of the SCA to certification in Children’s Resource Centre Trust, but held that the ‘requirements’ Wallis JA identified should rather be understood as ‘factors’ informing an overarching ‘interests of justice’ test.32 As Georgina Jephson has observed, however, Mukaddam did ‘not address many aspects of class action litigation, placing the burden on the lower courts to engage with and develop class action law’.33 As I describe below, the initial silicosis class action litigation consisted of separate applications, ultimately consolidated later.

In 2014, the first class action under the rules developed by the SCA and refined by the Constitutional Court was successfully certified and succeeded on the merits. This was Linkside, an opt-in class action brought by the LRC on behalf of public schools in the Eastern Cape to claim the payment of unpaid teacher salaries and compel government to fill teacher vacancies.34 In light of these developments, class actions appeared a realistic possibility for the silicosis litigation.

### 3.2 Consolidation into a single class action

Although the class action litigation culminated in a single torrent – taking the name of Bongani Nkala, the first applicant – it began in separate streams. While the LRC was preparing to commence the Blom arbitration and concluding the Blom settlement,
Abrahams Kiewitz and Spoor Attorneys launched separate class action certification applications. Abrahams Kiewitz launched applications against three mining companies, while Spoor launched a single application against multiple respondents. The LRC (working with Leigh Day) then launched its own certification application, limited to Anglo, the defendant in Blom and the largest industry player.

At this stage, there was a threat of splintering and competition, to the detriment of the claimants. The LRC’s view was that the interests of all potential class members would best be served by a single application, a single class and ultimately a single settlement scheme. Accordingly, the LRC approached Spoor Attorneys and Abrahams Kiewitz and proposed collaboration. The proposal was negotiated by representatives of the LRC and Spoor Attorneys teams. A co-operation agreement was ultimately signed by Janet Love (national director of the LRC), Richard Spoor and Charles Abrahams, in terms of which the LRC, Spoor Attorneys and Abrahams Kiewitz became joint legal representatives of the envisaged class.

At this time, Leigh Day parted ways with the LRC, considering that a consolidated, whole-industry class action of such scale and complexity had limited prospects of success, especially given South Africa’s still nascent class actions jurisprudence. Leigh Day and GMN instead instituted a large but targeted massed claim, made up of 4,365 individual plaintiff actions, against two of the major defendants, Anglo and Anglo Gold Ltd. This separate stream ran in parallel, culminating in a settlement in March 2016 and the establishment of a trust to pay out R500 million to silicotic ex-mineworkers. The settlement established the Q(h)ubeka Trust, which took its name from the lead litigant, Mr Qubeka, and the isiXhosa word ‘Qhubeka’, which means ‘go forward’.

Following the decision of the LRC, Spoor Attorneys and Abrahams Kiewitz to work together, a complex system of collaboration developed, also involving foreign partners and funders of Spoor Attorneys and Abrahams Kiewitz – Motley Rice and Hausfeld. The LRC’s work was funded by Legal Aid South Africa (LASA). The LRC’s team was composed of salaried, in-house LRC lawyers, with one senior advocate briefed to appear in the certification hearing at reduced LASA rates. In August 2013, an application to consolidate the separate class actions was brought, ultimately decided as part of Silicosis Certification.

The High Court in Silicosis Certification observed that the ‘magnitude and the range of legal representatives involved [in the consolidated application was] unprecedented’. The potential class numbers ranged from 17,000 to 500,000. There were 69

35 Leigh Day’s lead lawyer was Richard Meeran, supported in particular by Zanele Mbuyisa.
36 Georgina Jephson, an attorney at Spoor, operated as the fulcrum attorney, acting as attorney of record and managing the papers. Sayi Nindi was the LRC’s attorney of record during the certification proceedings. The two of them played key litigation attorney roles during the certification proceedings.
37 LRC personnel changed during the silicosis litigation. Durkje Gilfillan was attorney of record when the Blom claims were first launched. Richard Moultrie, then in-house counsel at the LRC, played the role of ‘instructing attorney’ from 2014 to 2016. I was attorney of record from 2008 to 2010, switching to the role of counsel from 2010 to 2016. Sayi Nindi took over the attorney of record role from 2010 to 2016. Finally, Carina du Toit joined the LRC and played the role of attorney of record after certification and through the settlement process until the end of 2019. Many other LRC lawyers and staff worked on the silicosis litigation during its various phases.
38 Silicosis Certification (note 7 above) para 9.
39 Ibid.
40 Ibid para 7.
applicants (individual class representatives), 32 respondent mining companies and two *amicus curiae*, the Treatment Action Campaign (TAC) and Sonke Gender Justice.

The 69 applicants were legally represented in roughly equal groups by the LRC, Spoor Attorneys and Abrahams Kiewitz.\(^{41}\) In the certification hearing, the applicants were represented by nine counsel, a composite team made up of two LRC counsel,\(^{42}\) two counsel briefed by Abrahams Kiewitz and five counsel briefed by Spoor Attorneys. During the hearing, six of the nine applicants’ counsel made oral submissions, having allocated issues for argument among the team. The High Court agreed that this was a reasonable counsel team given the scale and complexity of the case, making an unprecedented award of the costs of four senior counsel and five junior counsel.\(^{43}\)

In total, the 32 respondent mining companies responsible for over 80 mines were represented by eight firms, who briefed 26 counsel. Several of the respondents formed clusters of joint legal representation, often following operational relationships. Three counsel appeared for the *amicus curiae*, Sonke and TAC, represented by SECTION27, a public interest law centre.

Accordingly, 38 counsel appeared in the case. Out of the 38 counsel listed as appearing, only two were black and only eight were women. This triggered public outrage and ultimately contributed to reform in the advocates’ profession, to which I return below. A similar number of attorneys were involved and present in court for the hearing. The hearing lasted for a lengthy two weeks, from 12 to 23 October 2015. In contrast, most applications are heard in a single day in the High Court, or at most a couple of days. I return to *Silicosis Certification* below, but first deal with an interlude concerning the attempt to join Motley Rice as a party.

### 3.3 The attempted joinder of Motley Rice

In 2015, after the consolidation application was launched but before the main certification hearing, one of the respondent mining companies, Gold Fields Ltd, applied to join Motley Rice as a party. Motley Rice was providing both professional support and funding to Spoor. Its joinder was sought on the basis that it was a litigation funder and potentially jointly liable for an adverse costs order. Mojapelo DJP, who subsequently sat in the certification hearing, allocated the matter to himself.

In South Africa, an agreement in terms of which a third party funds litigation in return for consideration in the event of success is called a ‘champertous agreement’. The court began by reaffirming that champertous agreements are *not* contrary to public policy, although Mojapelo DJP acknowledged that there may be ‘exceptional circumstances’ in which such agreements constitute an abuse of process and should not be permitted.\(^{44}\) In tracing the historical development of the law, Mojapelo DJP observed that such agreements, even where previously proscribed, had been permitted in cases where:

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41 Counsel are listed at the end of *Silicosis Certification* (Ibid).
42 In-house junior counsel (myself) and external senior counsel.
43 *Silicosis Certification* (note 7 above) para 228.
44 *Silicosis joinder* (note 9 above) paras 27–28.
injustice would be done if a poor litigant were not given financial assistance to conduct his case. In such circumstances champertous agreements were not against public policy and were protected and enforced.45

Mojapelo DJP identified two considerations central to the question whether Motley Rice should be joined – financial benefit and control. The court concluded that Motley Rice had no financial benefit at the certification stage of proceedings. It was premature to seek its joinder before the damages stage.46 Regarding control, Mojapelo DJP held that the mineworkers remained in control of the litigation and that Motley Rice could not be characterised as a party to the litigation.47 Rather, Motley Rice ‘ha[d] the essential attributes of a “pure funder”’.48

Accordingly, the court dismissed the application. Motley Rice and Hausfeld continued to support Spoor Attorneys and Abrahams Kiewitz respectively, advancing just under R100 million during the litigation and providing professional services. Motley Rice and Hausfeld were ultimately paid their fees at US rates as ‘disbursements’ under the settlement. I discuss some issues relating to costs and fees in class actions in part 4 below.

3.4 Certification judgment

Silicosis Certification was handed down on 13 May 2016. I discuss the court’s reasons and the implications for the future development of the law in part 4 below. The court unanimously certified the class action, creating a silicosis class and a separate TB class. Save for exclusions relating to other litigation, the classes included all current and former mineworkers who contracted the relevant diseases and had worked on any listed goldmine after 12 March 1965, effectively a 50-year period. The LRC, Spoor Attorneys and Abrahams Kiewitz were approved as joint class representatives of the silicosis class with Abrahams Kiewitz appointed for the TB class. The court directed these representatives to take extensive steps to publish the notice of the class action, including in newspapers, on radio, on notice boards at particular offices and on their own websites. The court approved a two-stage process: first, to decide issues common to the class and cover all class members who did not opt out, and second, an opt-in process to decide individual issues and liability. The court held that any settlement would require approval by the certifying court. It also awarded costs to the applicants, including an unprecedented award of the costs of nine counsel.

In addition to certifying the class action, the High Court developed the common law on transmissibility of damages. The LRC had raised this issue during the Blom test cases. At common law, a claim for general damages only became transmissible after litis contestatio (close of pleadings). If a plaintiff died after a case was launched, the claim for general damages would not transmit to the estate. This was a major problem in relation to silicosis, since general damages would normally make up the bulk of a mineworker’s claim. This was further exacerbated by the long period required to

45 Silicosis joinder (note 9 above) para 25.
46 Ibid para 111.
47 Ibid paras 112–113.
48 Ibid para 114.
reach close of pleadings (in the litigation preceding this stage) and high levels of claimant mortality.

The High Court in *Silicosis Certification* held that in future such claims are transmissible from the date of institution of proceedings.49 This was the only issue that divided the court, with the majority holding that this development should apply to all cases, while Windell J in dissent limited the development to class actions.

### 3.5 Settlement proceedings and judgment

Following certification, settlement discussions began. The majority of the mining companies appointed leading South African mediator John Brand to represent them in engaging with the plaintiffs’ legal representatives.50 The discussions culminated in the establishment of the Tshiamiso Trust to pay damages to potentially tens of thousands of former mineworkers with silicosis and TB. The founders’ liability was to be secured by guarantees to the Trust, collectively amounting to R5 billion, with provision made for top-up if this amount was exhausted.51 An amount of R845 million was allocated to administer the trust.

The applicants52 and respondents (excluding certain non-settling mining companies) jointly approached the court to approve the settlement agreement, which *Silicosis Certification* had mandated. The court in *Silicosis Settlement* produced two judgments – a main judgment by Windell J (Mojapelo DJP concurring) and a separate concurring judgment by Vally J.

The majority reaffirmed that the standard for approving a settlement is ‘fair, reasonable, adequate and that it protects the interests of the class’.53 Claimants will be paid once-off benefits depending on degree of silicosis: R70,000 for mild lung function impairment, R150,000 for moderate impairment, R250 000 for serious impairment, and R500,000 with serious silicosis plus another lung condition.54 For TB, the Trust will pay R50,000 for ‘first degree’, R100,000 for ‘second degree’ or R10,000 if the degree was unknown. It will also pay claims to dependents of deceased mineworkers. The majority approved the quantum of damages, observing that the amounts were comparable to settlements in asbestosis and silicosis litigation, including the Leigh Day settlement resulting in the Q(h)ubeka Trust, discussed below.55

The settlement amounts exceeded statutory compensation under ODIMWA. As discussed above, the Constitutional Court in *Mankayi* had anticipated, with approval, that claimants will also receive ODIMWA compensation. Though higher than statutory compensation, the settlement amounts are less than the damages generally awarded in delict claims. The High Court noted this but highlighted the uncertain prospects of success if the claims went to trial, the mortality rate of claimants in the face of lengthy

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49 *Silicosis Certification* (note 7 above) para 220.
50 *Silicosis Settlement* (note 11 above) para 57.
51 Ibid para 23.
52 At this stage, there were 48 individual applicants, being three groups of mineworkers represented by the LRC, Spoor Attorneys and Abrahams Kiewitz.
53 *Silicosis Settlement* (note 11 above) para 17.
54 Ibid para 65.
55 Ibid para 73.
litigation, the costs of ongoing litigation and the benefits of receiving prompt payments. Ultimately, the court held that the settlement ‘caters for the best interests of the applicants and is fair, adequate and reasonable’.56

The majority dealt separately with the applicants’ legal fees. The LRC, which sought neither an uplift nor a contingency fee, was allocated R15 million in the settlement agreement. After the LRC had calculated its costs and disbursements, it claimed only R12,234,469.57, being the fees that it considered it could account for in its statement of costs. The agreement provided for R163.3 million to go to Abrahams Kiewitz and Hausfeld between them, and R191.7 million to go to Spoor and Motley Rice.57 Spoor Attorneys and Abrahams Kiewitz claimed 200 per cent ‘uplifts’ on professional fees.58 Motley Rice had provided R49 million in funding to Spoor during the litigation, and Hausfeld had advanced approximately R50 million to Abrahams Kiewitz.59 The court ultimately approved all the fees.60 I return to this in part 6 below.

Having traced the litigation above, I now delve into the implications of *Silicosis Certification* for the development of class action law in South Africa.

4. Unresolved questions on certification

In this part, drawing on *Silicosis Certification*, I explore three unresolved questions relating to certification: first, whether certification is required in *all* class actions; second, how best to understand the overall test for certification; and finally, whether the considerations that form part of the test are best understood as requirements or factors.

4.1 Is certification required in ‘Bill of Rights class actions’?

The first question that I consider is whether certification is required for all class actions, including so-called ‘Bill of Rights class actions’. The High Court in *Silicosis Certification* held that it is. This is the correct position and should be maintained.

The *amici curiae*, TAC and Sonke Gender Justice, argued that certification should not be required in Bill of Rights class actions because s 38 of the Constitution confers standing *as of right* in relation to threatened or actual violations of constitutional rights. Accordingly, courts should not impose an additional procedural barrier to litigation of having to prove that the litigants fall within the category of ‘anyone acting as a member of, or in the interest of, a class of persons’.61 These arguments were grounded in a commitment to access to justice. This is in line with the histories of all three organisations involved (TAC, Sonke and SECTION27), of working to promote access to justice for poor and marginalised people.

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56 Ibid paras 85–90.
57 Ibid para 108.
58 Ibid paras 120–121.
59 Ibid para 118.
60 Ibid paras 116, 124.
61 Constitution, s 38(c).
The High Court in *Silicosis Certification* disagreed with the *amici*, holding that certification is a requirement in all class actions because dispensing with it: i) can lead to an abuse of court process, and (ii) that it can, as has occurred in Australia, cause numerous costly and time-consuming interlocutory skirmishes around the very issues that the certification court ought to resolve. The need for the court to protect its own process does not disappear in a matter where a right in the Bill of Rights has been invoked. Section 173 of the Constitution makes it plain that the court has inherent power to protect its own processes.62

There is a logic to the *amici curiae*’s argument that adding a layer of proceedings to class actions hinders access to justice. This is often true as requiring additional, longer or more complex proceedings impedes access to courts. Pro-poor arguments have been advanced to allow similar loosening of other procedural rules relating to instituting litigation, such as arguments in support of allowing greater direct access to the Constitutional Court by bypassing the High Court.63 However, lessons on class action litigation and forms of PIL from other jurisdictions demonstrate that, counterintuitively, processes like certification promote access to justice for poor litigants.

As has been widely recognised, in the 1980s, the Indian Supreme Court introduced major departures from rules of civil procedure in PIL, including broadened standing, allowing epistolary jurisdiction (cases commenced by letter to court); allowing senior advocates to directly institute cases on behalf of poor litigants; allowing courts to commence cases, for instance in response to media reports, and conduct fact-finding; dispensing with evidentiary rules; and exercising supervisory jurisdiction.64 These developments were initially met with acclaim, and continue to be valorised in international academic literature.

However, as more recent Indian studies indicate, diluting procedural rules in PIL may prejudice the interests of poor people who are affected by litigation.65 In the last two decades, Indian PIL has seen trends towards excluding disadvantaged voices, centreing middle-class interests, and even being used to curtail human rights.66 Some associate this with the ‘neoliberal turn’ of the Indian Supreme Court.67 Anuj Bhuwania’s compelling study argues that relaxation of certain procedural rules contributed to this trend and that, in fact, rules relating to access, representation and evidence may often safeguard the interests of the vulnerable.68

James Fowkes, noting recent criticisms of Indian PIL, calls for a ‘modest’ model of Indian PIL to be adopted in South Africa, in particular because a modest model is more likely to find support from the judiciary and political branches.69 He proposes

62 *Silicosis Certification* (note 7 above) para 38.
63 J Dugard ‘Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court’ (2006) 22 South African Journal on Human Rights 261.
64 U Baxi ‘Taking suffering seriously: Social action litigation in the Supreme Court of India’ (1985) 4 Third World Studies 107.
65 A Bhuwania ‘Courting the people: The rise of public interest litigation in post-Emergency India’ (2014) 34 Comparative Studies of South Asia, Africa and the Middle East 314.
66 G Bhatia ‘Natural justice at the bar of the Supreme Court’ Indian Constitutional Law and Philosophy 5 November 2019 <www.indconlawphil.wordpress.com/tag/public-interest-litigation>.
67 M Suresh & S Narrain *The Shifting Scales of Justice: The Supreme Court of India and neo-Liberal India* (2014).
68 Bhuwania (note 64 above).
69 J Fowkes ‘How to open the doors of the court: Lessons on access to justice from Indian PIL’ (2011) 27 South African Journal on Human Rights 434.
allowing more informal approaches to court (such as epistolary jurisdiction), greater direct access to the Constitutional Court, more court-led fact-finding and greater exercise of supervisory jurisdiction. The last two proposals are already common features of constitutional litigation in South Africa. My concern is with procedural shifts that allow cases to be launched and conducted without the active participation of people living in poverty who are directly affected and in whose name these battles are won and monies claimed.

Certification addresses this concern in respect of class actions. Dispensing with it would mean that class actions go to trial on the merits without prior judicial scrutiny of the legitimacy, composition and representation of the class and the process of giving notice to potential class members who may be affected by the litigation. The ordinary rules of standing do not address these issues. There would be no opportunity to cure these problems at the outset. The High Court in *Silicosis Certification* may have had this concern in mind, at least in part, when referring to the risk of ‘abuse of court process’ as a reason for always requiring certification.

Further, where individualised relief is sought and not all class members are known, certification enables class members to opt into or out of the class action and allows the court to structure and make findings on the common issues and, if successful, on appropriate relief. Poor litigants’ access to free, high-quality legal representation is fundamental to their interests being robustly protected. This takes on renewed significance where legal representatives are acting in pursuit of profit. I return to this below.

In any event, the distinction between ‘Bill of Rights class actions’ and ‘private law class actions’ is unsustainable. The SCA rejected this distinction in *Children’s Resource Centre Trust*, but an *obiter dictum* by Jafta J in *Mukaddam* suggested that Bill of Rights class actions can be brought ‘as of right’ in terms of s 38 of the Constitution. The distinction dissolves in the face of the constitutional injunction on courts to develop the common law and customary law and interpret legislation to promote the spirit, purport and objects of the Bill of Rights under s 39(1)(b) of the Constitution.

### 4.2 Requirements or factors?

The second question, on the test for certification, is whether the considerations identified by the courts are requirements or merely factors to be considered. In *Children’s Resource Centre Trust*, Wallis JA framed them as requirements. The Constitutional Court in *Mukaddam* held that this was too rigid, approving the considerations but framing them as factors to weigh in the overall assessment of the interests of justice. The approach in *Mukaddam* was approved in *Silicosis Certification*. The approach
that characterises these considerations as factors is to be preferred, but is partially overstated.

The High Court in *Silicosis Certification* was bound by *Mukaddam* and had little room to develop the law. However, future courts may have to confront whether all of the seven factors identified in the test are merely ‘factors’. Considerations such as commonality, the suitability of the procedure for allocating damages, suitability of class representatives and the appropriateness of a class action are pre-eminently in the nature of factors. They do not lend themselves to check-the-box, ‘yes or no’ verification, but will be stronger or weaker in a particular case.

The class definition and a triable cause of action are in the nature of requirements – either present or not. It may be that a class is objectively definable, but there is uncertainty about who will meet the definition. However, at the certification stage, the definition must capture an objectively identifiable class. Similarly, a certifying court will have to find that a *prima facie* triable cause of action exists on the pleaded case. While some cases will disclose an obviously triable issue on settled law, others will be more arguable. Where the pleaded cause of action does not even reach the threshold of being arguable, it will not be competent to grant certification. Accordingly, at least class definition and a triable cause of action are closer to requirements than factors.

### 4.3 The interests of justice test

In *Silicosis Certification*, the High Court concluded that it was in the interests of justice that the class action be certified, as it was the ‘only way justice can prevail in the case of the individual mineworkers or their dependents’. Commentators have been receptive to the High Court’s approach in centring access to justice in the interests of justice test and sought to expand on its implications for future cases.

Estelle Hurter argues that three objectives should underpin the interests of justice test, namely access to justice, judicial economy and behaviour modification. She adds that the potential benefit to defendants, which *Silicosis Certification* mentions, should be seen more as an ‘unintended consequence’ than an objective. Theo Broodryk argues that in future, where the need to provide access to justice does not outweigh manageability concerns as it did with silicosis, courts should be cautious to certify ‘dispersed-incident mass personal injury’ class actions.

The legal roots of class actions in South Africa are fundamentally in s 38(c) of the Constitution. Together with the right of access to courts in s 34, considered below, s 38 embodies a constitutional commitment to access to justice. This conception of access to justice is steeped in a commitment to the transformation of society, social justice and the realisation of human rights. It is not an arid, formalistic conception that treats litigation as a mechanical process. *Silicosis Certification* correctly located access to

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78 *De Bruyn v Steinhoff International Holdings* [2020] ZAGPJHC 145 paras 295–300 aligns with the approach that I advance.
79 *Silicosis Certification* (note 7 above) paras 223–225.
80 E Hurter ‘Civil and constitutional procedure and jurisdiction’ (2013) 1 Annual Survey of South African Law 102, 114.
81 *Silicosis Certification* (note 7 above) para 34.
82 Ibid.
83 Broodryk (note 8 above) 833.
justice – and the absence of alternative means to pursue the claims of class members – at the heart of the interests of justice test. This consideration has emerged as the central question in certification inquiries in South African class action law.

Having engaged the substantive law on certification, I turn to representation and access to justice in class action proceedings.

5. Representation and access to justice in class actions

In this part, I discuss concerns regarding legal representation in class action proceedings in the socio-economic context of South Africa and the constitutional conception of access to justice. I focus specifically on the right to civil legal aid as applicable to class actions and the imperative of ensuring that briefing in class actions reflects racial and gender representivity. Both issues arose in the silicosis class action litigation, as LASA funded the LRC’s work and because the issue of racial transformation of the Bar arose sharply during the hearing of Silicosis Certification.

5.1 Socio-economic context and the constitutional conception of access to justice

Awarding damages alone does not address the widespread and ongoing exploitation of black mineworkers. Before Silicosis Settlement, it was uncertain whether damages for a significant number of mineworkers could even be secured. Hanri Mostert commented, following Silicosis Certification (before Silicosis Settlement), that it ‘remains to be seen whether formal civil action is a suitable mechanism to address the legacy of discrimination and inequity in the gold mining industry.’ However, the subsequent class action settlement of R5 billion coupled with Leigh Day’s Q(h)ubeka R500m settlement demonstrates that substantial damages may be recovered for a class in some complex, sprawling situations. Questions nevertheless remain about how to ensure that future class actions prioritise the interests and wishes of poor class members.

The very reasons why class actions are necessary to secure access to justice in South Africa are also the reasons why class action proceedings need to be carefully regulated. The ‘class unfreedom’85 of people living in poverty in South Africa, and especially black people, to challenge structural inequality leaves them collectively and individually unfree to challenge daily injustices, such as dangerous working conditions, that expose them to occupational diseases like silicosis. The same ‘unfreedom’ restricts their agency in, and control over, class action litigation to challenge such injustices. This vulnerability of class members and the barriers to securing access to justice are a core justification for allowing class actions. But vulnerability and barriers do not vanish when class action proceedings are instituted.

In South Africa, the majority of the population is unable to afford private legal assistance. I return to this issue in part 7, discussing legal fees and costs, where I point to the implications for class actions in relation to the recently recognised right to civil

84 H Mostert ‘Mining law’ (2015) 1 Annual Survey of South African Law 1008, 1045.
85 GA Cohen ‘The structure of proletarian unfreedom’ (1983) 12 Philosophy and Public Affairs 3.
legal aid. Notwithstanding this constitutional right, the prevailing reality during the silicosis litigation and subsequently is that there are limited sources of pro bono representation for poor civil litigants. The current possibilities consist mainly of approximately ten public interest law centres such as the LRC, most of which (though not the LRC) are limited to one urban location and one area of law; 21 university law clinics; and ad hoc pro bono assistance provided by private attorneys and advocates.  

5.2 The right to civil legal aid and LASA’s legal duty

A right to civil legal aid in South Africa was recently recognised in Magidiwana. The case arose as spin-off litigation from the Marikana Commission of Inquiry, which was underway during the same period. It concerned the right of injured and arrested mineworkers to be legally represented at state expense before the Commission. The group of mineworkers was akin to a class, and the application was originally brought as an application to certify a class action, though that approach was later abandoned.

The High Court upheld their claim, confirming that s 34 of the Constitution applied to the Commission and that the state was obliged to provide civil legal aid in the circumstances. Makgoka J held that ‘the right to legal representation is not an absolute one, but depends on the context’. The High Court identified the following factors as relevant to whether s 34 mandates civil legal aid: the nature and type of proceedings, whether the interests of justice and the rule of law would be undermined by not providing it, and whether the constitutional rights of parties or witnesses are implicated or threatened.

The SCA dismissed an appeal by LASA on the basis that the appeal had become moot because LASA had agreed to provide legal aid. The Constitutional Court also held that the matter was moot, but the majority referred to Makgoka J’s approach to s 34 with apparent approval. Nkabinde J, dissenting, held that s 34 confers a right to civil legal aid in ‘exceptional circumstances’ but held that it cannot arise in proceedings before a commission of inquiry.

Magidiwana therefore established that the right of access to courts in s 34 includes a right to legal representation at state expense in certain circumstances. Class actions affecting people living in poverty, who are unable to afford private legal representation, are likely to trigger the obligation to provide civil legal aid: they may affect important interests of poor class members; they are complex litigation that requires qualified, specialist representation; and potential class members may be sidelined or prejudiced without effective representation. Class actions are also an area where civil legal aid can

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86 J Brickhill ‘The right to a fair civil trial: The duties of lawyers and law students to act pro bono’ (2005) 21 South African Journal on Human Rights 293; D Holness, ‘Improving access to justice through compulsory student work at university law clinics’ (2017) 16 Potchefstroom Electronic Law Journal 328.
87 See J Brickhill & C Grobler ‘The right to civil legal aid in South Africa: Legal Aid South Africa v Magidiwana’ (2016) 8 Constitutional Court Review 256–281.
88 Magidiwana v President of the Republic of South Africa [2014] 1 All SA 76 (GNP).
89 Ibid para 37.
90 Ibid.
91 Legal Aid South Africa v Magidiwana 2015 (2) SA 568 (SCA).
92 Legal Aid South Africa v Magidiwana 2015 (6) SA 494 (CC) para 22.
93 Ibid para 110.
be highly impactful and cost-effective, as a single set of legal representatives acts, through representative plaintiffs, for the entire class. This avoids a multiplicity of cases and representation. *Silicosis Certification* recognised the benefit of class actions for judicial resources, but there is also a benefit for legal aid resources.

LASA recognised these considerations in funding the LRC’s involvement in the silicosis litigation. The right to civil legal aid counters the argument that private lawyers should be incentivised to run class actions, as a ‘necessary evil’. Particularly, the state’s duty to provide legal representation in class actions on behalf of poor people significantly affects the regulation of class actions.

The question that arises is whether the state’s s 34 obligation to fund the legal representatives of the class is triggered in circumstances of a class action. In future class actions litigated on a not-for-profit basis, it may be appropriate for the certification court to investigate whether the right to civil legal aid is at issue and whether LASA has agreed to fund the litigation. In appropriate cases, LASA might be compelled by the court to fund the class representative lawyers, as it did in *Magidiwana*, especially if they are not acting on a for-profit basis in the litigation. This will enable public interest law centres, legal aid clinics and pro bono legal services to act in large class actions. Legal representation in class actions should be decided by the constitutional framework, rather than the market. This has implications for the related question of whether it is permissible or appropriate for private lawyers to seek profit from class action litigation on behalf of poor people. I explore this in part 7.

I turn to the need for legal representatives in class actions on behalf of poor and marginalised class members to be representative in racial and gender terms.

### 5.3 Race, gender and representation

During the hearing of the certification application, the representivity of the representatives was widely reported. As mentioned above, only two of the 38 counsel in the hearing were black, and only eight were women. Although this reflected problems with briefing patterns in the legal profession as a whole, the unprecedented number of advocates involved in one hearing brought the issue to the forefront. Responding to media reporting on the issue, Richard Spoor commented that he would only brief ‘exceptional’ counsel with an avowed commitment to public interest law, and that ‘the number of black counsel who meet both these criteria is really small’. Concerns about briefing patterns in the legal profession generally and in the public interest sector itself had been raised for some time, but this incident threw them into sharp relief.

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94 Recall that here, the High Court ordered LASA to fund the injured and arrested mineworkers participating in proceedings of the Marikana Commission of Inquiry.

95 S Skiti & S Shoba ‘Lawyer’s charity jibe sparks race standoff’ (18 October 2015) *Sunday Times*.

96 Centre for Applied Legal Studies ‘Transformation of the legal profession’ (August 2014) <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf>.

97 T Madlingozi ‘Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution’ (2017) 28 *Stellenbosch Law Review* 123, 144; J Brickhill & M Finn ‘The ethics and politics of public interest litigation’ in J Brickhill (ed) *Public Interest Litigation in South Africa* (2018) 108–111.
Spoor’s comment sparked outrage from legal professionals and the public. The LRC immediately issued a statement distancing itself from the comment and apologising for it. Charles Abrahams reflected later that he ‘felt morally compromised’ but did not take a public stance. A group of black advocates read a statement in open court condemning Richard Spoor’s statement and highlighting the lack of black advocates in the case, in the context of a long history of discriminatory briefing patterns. These events jarred the Johannesburg Bar into action and resulted in the adoption of a new rule, declaring it to be unprofessional conduct (potentially attracting disciplinary action) for a white advocate to accept a brief to appear in a matter as part of a team of three or more advocates if none of those advocates was black.

The need for representivity of legal representatives is particularly salient in class actions. It would be problematic for class action work on behalf of poor black class members to be run by a disproportionately white cohort of lawyers. Moreover, a class action like silicosis presents the challenges that lawyers need to understand the social context of mineworkers and ideally need to be able to consult in the first language of the class members. In future class actions, one relevant consideration should be whether the legal representatives, especially in a large team, are broadly representative of the racial and gender demographics of society and that they include lawyers fluent in the language(s) most spoken by the class. While an overly strict approach to this consideration would impede access to justice and should not be adopted, representivity should form part of the inquiry into whether the class legal representatives are suitable.

6. Unresolved questions about settlements of class actions

6.1 Concerns with settlement

Owen Fiss’ influential piece, ‘Against settlement’, captures some of the concerns surrounding settlements in the context of civil litigation:

Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

Fiss offers reasons to be cautious about settlements, at the level of individual justice and the system as a whole. Test cases and class actions exacerbate these concerns because decisions will primarily be made by test case plaintiffs or representative plaintiffs but will have serious consequences for many more.

In test cases, like Blom, while a settlement does not bind non-parties, it may have the effect of making it difficult for the broader group to secure justice. This risk is accentuated where, as is often the case in high-value litigation against corporate

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98 Abrahams (note 4 above) 193.
99 See, for example, M Laganparsad ‘Joburg law resolution puts white lawyers into a panic’ (1 November 2015) Sunday Times <https://www.timeslive.co.za/sunday-times/news/2015-11-01-joburg-law-resolution-puts-white-lawyers-into-a-panic/>
100 Madlingozi (note 97 above) 144.
101 OM Fiss ‘Against settlement’ (1984) 93 The Yale Law Journal 1073, 1075.
defendants, the settlement offer includes legal fees and possibly even a restraint clause preventing plaintiff lawyers from launching new cases against the same defendant.

There is well-developed literature and jurisprudence on class action settlements in the United States, Canada and Australia, but in South Africa both the case law and literature are still thin. There has been considerable criticism of the practice of ‘blackmail’ and ‘sweetheart’ settlements in the US, in particular. In Canada, commentators suggest that settlements have been more positively received.

Accepting the recommendation of the SALC Report, Silicosis Certification confirmed that any settlement reached after certification requires approval by the certifying court for it to be valid. The settlement agreement itself did provide that court approval was a suspensive condition for its validity. The High Court held that court approval is necessary to ensure that the settlement is ‘fair, reasonable, adequate and that it protects the interests of the class’.

Vally J’s concurring judgment in Silicosis Settlement held that a settlement agreement must serve the interests of justice, holding that in order for it to meet this threshold a settlement:

[M]ust at least –

a. Not breach any constitutional principle, be otherwise unlawful or immoral.
b. Be concluded at arms-length and the settling parties must be free of all forms of duress.
c. Provide for a comprehensive system of compensation that can be assessed objectively.
d. Ensure that an application for compensation, the assessment thereof and its outcome is readily and easily accessible to all the class members.
e. Ensure that the cost of the application, if borne by a claimant, is not so burdensome as to make the compensation meaningless.
f. Ensure that all potential claimants as defined by the certification order are covered.
g. Ensure that the claimant who proves his/her claim is compensated as soon as the claim is proven.
h. Ensure that the amount of compensation is neither too high nor too low.
i. Ensure that the cost of implementing the agreement is justifiable.
j. Ensure that the fees of the legal representatives engaged by the class representatives are fair and reasonable.
k. Generally be in the public interest.

102 See Mulheron (note 30 above) 390–396.
103 E Hurter ‘Class action settlements: Issues and the importance of judicial oversight’ (2019) 51 Comparative and International Law Journal of Southern Africa 97.
104 B Hay & D Rosenberg “Sweetheart” and “blackmail” settlements in class actions: Reality and remedy (2000) 4 Notre Dame Law Review 1337; MA McCabe ‘Class backwards: Does the fairness, adequacy and reasonableness of a negotiated class action settlement really have any effect on approval?’ (1997) 28 Texas Tech Law Review 159.
105 J Cassels & C Jones The Law of Large-Scale Claims (2005) 388.
106 Silicosis Certification (note 7 above) para 39.
107 Silicosis Settlement (note 11 above) para 5.
108 Ibid.
109 Silicosis Settlement (Ibid) (Vally J concurrence) para 45.
This eleven-point list is framed as a set of requirements for approval of a class action settlement, rather than factors. However, Vally J explained it is ‘not an exhaustive list of important considerations to be taken into account’, acknowledging that other factors may emerge in future.\(^{110}\)

Max du Plessis and Luke Kelly propose a range of eight factors that should inform the court’s appraisal of class action settlements. These include the terms of the settlement; the likely duration, costs and complexity of the action; the amount offered to each class member in relation to the likelihood of success in the class action; whether, if the class action succeeded at trial, the judgment amount would significantly exceed the settlement; the recommendations and experience of the class legal representatives and neutral parties; the attitude of the class members, including any objections; good faith, absence of collusion and consistency with class action objectives; whether distribution of settlement benefits is satisfactory.\(^{111}\) Hurter, drawing on comparative experience in the United States, Canada and Australia, suggests substantially similar factors to propose an approach for South Africa.\(^{112}\) These factors generally accord with the approach of the High Court in *Silicosis Settlement*.

Beyond this general approach, I argue that certain clauses should not be permitted at all in class action settlements, while others should be subjected to careful scrutiny.

### 6.2 Problematic clauses for class action settlements

*Silicosis Settlement* endorsed the need for judicial scrutiny over settlements and outlined factors to guide the approval of settlements. There are, additionally, certain clauses that should either be strictly barred in class action settlements, or require special justification. Here, I discuss restraint clauses and incentive payments for representative plaintiffs.

A restraint clause in class action settlements would typically restrain the plaintiffs’ attorneys from litigating, funding, advising on or providing any other assistance to future litigation relating to the same issue or cause of action. Typically, a restraint would be granted in exchange for consideration paid to the plaintiffs’ attorneys by the defendants. Such clauses should not be permitted in class action settlement agreements.

There are compelling rationales for prohibiting restraints. First, restraints limit access to representation, especially to lawyers qualified or experienced in litigating similar issues, in a context where access is already a challenge. Second, restraints create a conflict of interest between class members and their attorneys by giving the attorneys a direct pecuniary interest in the settlement. Defendants may attempt to ‘buy off’ the plaintiffs’ attorneys, prejudicing the class. Third, restraints may create a conflict of interests among class members themselves, as those who opt out of a class action would be disadvantaged by the restraint as the same attorneys would be subsequently barred from acting for them. For these reasons, both the US\(^ {113}\) and the province of

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\(^{110}\) Ibid para 46.

\(^{111}\) M du Plessis & L Kelly ‘The settlement of class actions’ in Du Plessis et al (eds) (note 72 above) 88–91.

\(^{112}\) Hurter (note 103 above) 111–115.

\(^{113}\) Rule 5.6(b) of the American Bar Association Model Rules of Professional Conduct.
British Columbia, Canada bar attorneys in class actions from entering into restraints. South African courts should similarly prohibit such clauses. If such a restraint were to be included in a settlement in a class action, that may give cause for the court to refuse to approve the settlement.

The second clause that I consider is incentive payments for named plaintiffs. These are payments offered specifically to representative plaintiffs to induce settlement of the entire class action. Such clauses are considered acceptable but controversial in the US and other jurisdictions. South Africa should disallow such clauses as they create a conflict of interests between the representative plaintiffs (who have a duty to act in the interests of the class) and the other class members.

7. Costs and fees

Finally, I turn to legal fees and costs. One of the main issues in Silicosis Settlement was whether the court should approve the costs agreed in the settlement and subsequently claimed. Fees and costs are strands in a broader web of issues implicating access to justice and (legal) ethics. Which lawyers represent class members, what damages and costs are awarded and what fees lawyers charge are all related. If the only way in which pro-poor class actions can be litigated is for private lawyers to claim significant profits from these cases, some may argue that this is necessary or even desirable. Others may argue that such lawyering is an exercise of freedom of profession. However, that is not the constitutional paradigm of access to justice in South Africa.

There is a danger that South Africa may absorb some of the market-driven legal professional practices that accompany class action litigation in the US. As I explained above, the Constitution guarantees the right of access to courts in s 34, one element of which is civil legal aid if a ‘fair hearing’ is not possible without it. Relatedly, the Legal Practice Act 28 of 2014, which is the primary legislation governing the legal profession, recognises access to justice as a central statutory purpose. The state’s duty, implemented through LASA, is to provide legal representation in class actions on behalf of poor people. Concomitantly, though for-profit representation must be permitted, the opportunities for private lawyers to profit from class actions should be restricted.

As the American experience demonstrates, class actions are massively profitable for lawyers in private practice. South African private law does not award punitive damages, awarding only compensatory damages for delictual and other private law claims. Additionally, South Africa has a fairly strict regime for the recovery of legal costs. There are therefore limited opportunities in the South African legal system for the worst forms of profiteering. However, the possibility of profit-making from class actions still presents threats to the administration of justice.

One of the threats is unhealthy competition among lawyers to act for the class, or for the largest number of class members. In relation to the silicosis litigation, I have described above how Abrahams Kiewitz, Spoor Attorneys and the LRC launched

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114 Rule 3.2–10 of the Law Society of British Columbia’s Code of Professional Conduct.
115 See Du Plessis & Kelly (note 111 above) 95–96.
116 Mulheron (note 30 above) 466–468; B Anderson & A Trask The Class Action Playbook 2 ed (2012) 253; Thomas v Albright 139 F3d 227, 229.
Abrahams describes the competing commercial interests of the firms involved initially and the resulting fragmentation:

We had Hausfeld’s backing, but Richard [Spoor] felt it wasn’t enough. He approached Motley Rice, a large US law firm known for getting a settlement of $246 billion in its historic tobacco-industry class action. Motley Rice agreed to get involved, but wanted to finance the case and provide advice without Hausfeld. I vehemently disagreed and refused to abandon Hausfeld as a matter of loyalty and principle. Efforts to bring the two together failed, setting me and Richard on separate paths; something I hadn’t thought possible earlier.117

The LRC, which had been litigating silicosis for almost a decade by the time the first class actions were launched, was concerned at the risks that splintering posed to the affected mineworkers. It therefore proposed collaboration with Spoor Attorneys and Abrahams Kiewitz. The cooperation agreement established principles for collaborative decision-making and working and principles governing potential competition for cost recovery. The LRC’s position remained that it would only recover ordinary costs from the defendants if successful and would never recover from clients’ awards, nor seek any contingency fee or uplift. As described above, the LRC claimed approximately R12 million that it considered represented the work actually done after a verification process on ordinary tariffs.118

The commercial firms involved in the litigation planned to recover contingency fees with a 200 per cent uplift in the event of success. When the settlement was concluded, Spoor Attorneys and Abrahams Kiewitz did not recover a contingency fee but indeed charged the 200 per cent success uplift on professional fees. Spoor and Motley Rice claimed R191.7 million and Abrahams Kiewitz and Hausfeld R163 million. Part of this would go to repaying approximately R50 million that Hausfeld provided to Abrahams Kiewitz and R49 million that Motley Rice advanced to Spoor Attorneys. The US firms charged rates that the court accepted were reasonable ‘by US standards’.119

The bills of costs were prepared by experienced costs consultants. However, they were not referred to taxation because the costs were settled. Therefore, the full amounts claimed, and approved by the High Court, were paid to these firms. The sum of R364 million in costs is extraordinarily high in the context of even large commercial litigation in South Africa and, notwithstanding the court’s approval, remains a concern.

The Constitutional Court has expressed discomfort at legal fees charged on the basis of costs orders following successful litigation and from lawyers’ own clients in the ordinary course. In Camps Bay Ratepayers and Residents Association v Harrison,120 in the context of a review of the taxation of counsel’s fees, the Court distinguished between what a party was legally entitled to recover in costs and what it is ‘reasonable’ for lawyers to charge, going on to:

117 Abrahams (note 4 above) 189.
118 Silicosis Settlement (note 11 above) para 41.
119 Ibid para 122.
120 2012 (11) BCLR 1143 (CC).
express our disquiet at how counsel’s fees have burgeoned in recent years. To say that they have skyrocketed is no loose metaphor. No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal.

[...] 

No doubt skilled professional work deserves reasonable remuneration, and no doubt many clients are willing to pay market rates to secure the best services. But in our country the legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear.121

These concerns apply with even greater force to class actions. The resistance to high fees ordinarily expected from losing defendants, and from plaintiffs themselves regarding their lawyers is diminished in a class action. For defendants settling a class action, the legal costs are simply part of the overall ‘price’. It makes little difference to a defendant whether money is allocated to plaintiffs’ damages or legal costs, provided that the class action is likely to end litigation. Indeed, defendants will have a financial incentive to pay higher legal costs to the plaintiffs if that will drive the overall ‘price’ of settlement down.

Accordingly, certifying courts should closely scrutinise fees sought to be recovered in successful class actions, especially when the fees are agreed with defendants. A supervisory role is appropriate for judges regarding the quantum of damages in class actions.122 This should extend to costs. Additionally, the following practices concerning compulsory taxation and remuneration of foreign lawyers should be adopted in the future.

First, bills of costs in class actions should be compulsorily referred to taxation, irrespective of prior agreement by parties. In ordinary litigation, a losing party may elect to dispense with taxation and simply agree costs. In class actions, class members are not consulted on such a decision. Unless the certifying court decides that the costs need not be referred to taxation, the default position should be that taxation is mandatory in all cases (with the possible exception of class actions litigated not-for-profit). The taxing master will provide a strong check through their special expertise and responsibility for assessing bills of costs, which High Court judges do not ordinarily do, save in the rare event of litigation over a taxed bill.

Secondly, the rates at which foreign lawyers may charge fees recoverable as disbursements should be assessed based on South African standards. Foreign legal expertise was arguably necessary in the silicosis class action since the case employed comparative law to develop new rules for South Africa. In contrast, future class actions will be governed by a growing body of South African class action jurisprudence. Should foreign lawyers be used in future, their recovery should be at South African professional rates rather than their own, unless there is a particular justification for the use of foreign lawyers (such as the involvement of multinational companies).

121 Ibid paras 10–11.
122 Broodryk (note 8 above) 842.
8. Conclusion

The river of disease of silicosis in South Africa’s gold mines swept through black underground mineworkers, unchecked for decades. The only compensation that silicotic mineworkers received were meagre ODIMWA statutory awards.

It was only in 2004 that damages were sought, in the Blom test cases launched by the LRC and Leigh Day. The test cases flowed steadily towards trial, washing through the sediment of thousands of historical documents released by Anglo during discovery. Shortly before trial, the course of the test cases was diverted, and Blom settled at the eleventh hour with Anglo paying each of the test case plaintiffs undisclosed amounts.

The litigation flowed on. The Mankayi tributary cleared the statutory bar on employees suing employers for occupational diseases. By now, class action litigation had become the main channel of flow, initially as separate streams in class action proceedings brought by Abrahams Kiewitz, Spoor Attorneys and the LRC. This braiding threatened to sap the current of the litigation, but the joining of the class actions culminated in a torrent, sweeping in its waters 69 plaintiff representatives, 32 mining companies, 82 mines\(^\text{123}\) and scores of lawyers on both sides.

Although certification was fiercely resisted, given the breadth of the action across decades and virtually the entire industry, the class action was certified. A settlement produced guarantees of R5 billion plus, with possibilities of substantial damages to every mineworker who contracted silicosis and/or TB.

The silicosis class action established class actions as a powerful vehicle for access to justice in South Africa. Its widely publicised success, scale of the settlement and legal fees are likely to attract potential litigants and lawyers to class actions. However, several unresolved questions and apprehensions about the future of class actions remain.

I addressed three such questions on certification. I argued that certification should be required in all class actions; that some of the ‘factors’ in the test for certification (class definition and triability) are, rather, ‘requirements’; and that the interests of justice test for certification should continue to centre access to justice. Regarding representation, I outlined the implications of a constitutional right to civil legal aid for class actions, many of which will be paradigmatic cases for state-funded legal aid. I also highlighted the imperative for legal representation in class actions to be broadly representative in race, gender and linguistic terms. On settlements, I sounded some notes of caution regarding settlements in class actions and argued that restraint clauses and incentive payment clauses should be barred. Finally, I identified risks relating to fees and costs in class actions, and suggested restrictions that should be imposed to prevent lawyers from profiteering in the name of poor litigants.

Unfortunately, the river of disease, after almost two decades of litigation, has not yet reached the sea. The Tshiamiso Trust is operative, and class members are coming forward to claim payments, but at the time of writing none had been paid\(^\text{124}\) – though the lawyers have. The litigation itself wound a meandering course, charting the way for

\(^\text{123}\) Listed in Annexure A to Silicosis Certification (note 7 above).

\(^\text{124}\) J Stent ‘Two years after silicosis settlement, no one has been paid’ (20 July 2020) GroundUp <https://www.groundup.org.za/article/two-years-after-r5-billion-silicosis-settlement-no-one-has-been-paid/>; T Mathe ‘Tshiamiso Trust makes due on silicosis payout’ (2 March 2021) Mail & Guardian https://mg.co.za/news/2021-03-02-silicosis-payout-court-tshiamiso-trust/. 
future class actions and providing important lessons for the development of class action law if it is to centre access to justice for poor claimants and disincentivise profiteering.

**Disclosure statement**

The author was personally involved in the litigation discussed in this article from 2008 to 2016, as an attorney and later in-house counsel at the Legal Resources Centre, acting for the test case plaintiffs in the *Blom* litigation and later for the class representatives in the consolidated class action.

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