

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/48226

DATE: 24/06/2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
_____	_____
DATE	SIGNATURE

In the matter between:

BONGANI NKALA AND 55 OTHERS

Applicants

And

**HARMONY GOLD MINING COMPANY LTD AND
31 OTHERS**

Respondents

JUDGMENT
[APPLICATION FOR LEAVE TO APPEAL]

MOJAPELO DJP, VALLY J et WINDELL J:

[1] We have before us two applications: one for the rectification of order dated 13 May 2016 and the other for leave to appeal against the judgment and orders of the Court handed down on 13 May 2016.

- [2] The rectification application is brought only by the 25th and 26th respondents in the main application. We have already granted the application at the hearing of the application and record that here. For the purposes of the record, paragraph 2.1 of the order is amended to include the words “excluding any employees or dependants of any employees of the twenty-fifth and twenty-sixth respondents”.
- [3] As for the application for leave to appeal, there are six applications for leave to appeal against the whole of the judgment and the certification order and the order pertaining to transmissibility of general damages.
- [4] The applications are brought in terms of s 20 of the Supreme Court Act, 59 of 1959 (the old Act) alternatively s 17 of the Superior Courts Act, 10 of 2013 (the new Act).
- [5] At the hearing of the application there was a lively debate as to whether the old Act or the new Act is applicable to this application for leave to appeal. It is certainly an interesting debate. However on the basis of the conclusion we have arrived at we deem it unnecessary for us to engage with this issue.
- [6] For us there are two separate issues that need to be dealt with: (i) whether the certification application is appealable and, if so, whether leave should be granted and, (ii) whether leave to appeal should be granted against the order and part of the judgment that allowed for the transmissibility of general damages to the estates of deceased mineworkers.
- [7] We begin with the second issue.

[8] As for the second issue, it is common cause that it is an appealable issue and that there are reasonable prospects of success on appeal.

[9] As far as the first issue is concerned, we hold that a certification of a class action is not appealable, for the following reasons:

- (i) It is interlocutory in nature;
- (ii) It does not dispose of any of the relief sought in the class action that was certified;
- (iii) It is not dispositive of any of the rights of any of the parties to the class action.

[10] However, even if we are wrong in this, we find that the application for leave should not be granted because, in our view, there are no reasonable prospects that another court will come to a different conclusion to the one we have come to with regard to the certification of the class action. The following factors, *inter alia*, reveal why this is so:

- (i) An appeal will unduly delay the matter;
- (ii) The respondents (applicants in the main application) will suffer undue delay should leave be granted and the appeal fail;
- (iii) The respondents will suffer undue and possibly even irreparable prejudice should leave be granted and the appeal fails;
- (iv) Granting leave in this matter, where none of the relief sought in the class action trial is disposed of, carries with it the real risk that this case

will experience more than one appeal before it is finalised. Such piecemeal appeals are not in the interest of justice;

- (v) The applicants for leave do not dispute that the matter is of immense importance to the respondents and that it, in the words of counsel for one of the applicants, Anglo American, it is one involving “a socio-economic catastrophe”;
- (vi) The applicants for leave are unable to show that there is any real alternative to the matter being adjudicated on a class-wide basis;
- (vii) The applicants for leave do not deny that if the class action was not certified, most of the putative class members will not ever be able to have the cases adjudicated. In fact, counsel for one of the applicants, Harmony, conceded that a refusal to certify the class action is the end of the road for many of these persons, because they are indigent, unsophisticated and incapable of litigating on their own.

[11] In coming to this conclusion we do not turn a blind-eye to the fact that the case is unprecedented, that it is complex, that it involves novel issues and that it will require close case management. But these issues, in our view, are not weighty enough that they would tip the scales of justice in favour of granting leave. Having found that there is no reasonable prospect that another court will disturb the certification order (and all the ancillary orders thereto), we believe that these issues, important as they are, pale in significance when placed against the weighty factors we refer to above. In addition, we hold that the class action is not unmanageable.

[12] For these reasons we believe that it is not in the interests of justice that leave be granted against the certification order (as well as all the other orders ancillary thereto) and the relevant parts of the judgment.

[13] As for costs, it was agreed by all that if the applicants fail to secure leave against the certification order they should bear a percentage of the costs of this application.

[14] Accordingly, the following order is made

1. Leave to appeal to the Supreme Court of Appeal against paragraph 8 of this Court's order and the relevant portions of the judgment dated 13 May 2016 is granted;
2. Leave to appeal to the Supreme Court of Appeal against all the other orders and the balance of the judgment of this Court's dated 13 May 2016 is denied;
3. The applicants are jointly and severally to pay fifty per cent (50%) of the costs of this application, which costs are to include those occasioned by the employment of three counsel.

Mojapelo DJP

I agree

Vally J

I agree

Windell J

24 June 2016

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