The South African Experience: Litigating Remedies

Charles ABRAHAMS¶*

Abstract

Many transnational corporations (TNCs) that conducted business in South Africa during apartheid had deemed it profitable and desirable, despite the country's systemic human rights violations against its majority black population. In the aftermath of the 1960 Sharpeville Massacre and 1976 student uprising, various United Nations and other international resolutions condemned TNCs for their incestuous relationship with apartheid South Africa and called for international sanctions against the regime. The demise of apartheid in 1994 brought about a new democratic, constitutional dispensation based on respect for human rights. However, attempts at holding TNCs liable for aiding and abetting the apartheid regime were fraught with obstacles and proved unsuccessful. Yet, the pursuit of strategic, class action litigation in areas as diverse as collusive conduct in bread manufacturing to occupational lung disease in South Africa's goldmining industry have proven to be more successful in developing legal remedies against corporate harm. Areas impacted are extended legal standing under the common law, development of new causes of action and generous application of contingence fees arrangement.

Keywords: apartheid, constitution, *Children's Trust*, class action, *Khulumani*, *Nkala*

I. Introduction

On 16 June 2011, the United Nations Human Rights Council (UNHRC) endorsed the Guiding Principles on Business and Human Rights (UNGPs). The date is insightful as it coincides with one of South Africa's most observed public holidays – 16 June 1976 – also known as the Soweto Uprising. On that day, thousands of students marched against the apartheid government's forceful introduction of 'Bantu' education laws that would have made it compulsory for black students to be taught in Afrikaans, alongside English. In reaction to peaceful protests, heavily armed security forces responded with live ammunition and tear gas. By the end of that day, scores were injured and a 13-year-old

¶ Conflicts of interest: The author has litigated the Khulumani, Children's Trust and Nkala cases mentioned in this article.

* Charles Abrahams is a senior partner at Abrahams Kiewitz Inc., a boutique law firm in Cape Town, South Africa. He holds a Master's Degree in Public International Law from Leiden University, the Netherlands and is currently pursuing a doctoral degree in constitutional law at the University of Cape Town.

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student, Hector Pieterson, was tragically killed. Pieterson's death became the galvanizing catalyst for subsequent demonstrations and uprisings across South Africa and led to an international outcry and condemnation of the apartheid regime.[1]

The date of 16 June marked yet another defining moment of the apartheid regime's systemic disregard for the human rights of its majority black population. Sixteen years earlier, on 21 March 1960, security forces responded with lethal force against thousands of peaceful black demonstrators who had demonstrated against the shameful pass laws, killing 69 people. The bloodbath caused international outrage and condemnation with the United Nations Security Council (UNSC), issuing a stern resolution rebuking the apartheid regime for the killings.[2] Known as the Sharpeville Massacre,[3] the United Nations has since declared it as the International Day for the Elimination of Racial Discrimination.[4]

Amidst this systemic violation and disregard for human rights, Apartheid South Africa was an extremely lucrative business place for transnational corporations. Koenderman notes that in 1967, 'the average return on British companies' investments in South Africa was 12.4%, compared with an average for all areas of 8.3%. US companies earned 19.2% on their South African investments and 10.1% on all their foreign investments.'[5] About a decade later, more than 1800 foreign corporations were invested in South Africa and by the early 1980s that number had grown to between 2000 and 2500.[6]

This view of Apartheid South Africa being a profitable place was shared by several transnational corporations. The chairman of the largest Swiss bank, UBS, in the aftermath of the Sharpeville Massacre, was asked: 'Is apartheid necessary or desirable?'. His response was: 'Not really necessary, but definitely desirable'.[7] Similarly, in 1976, Barclays Bank acquired the largest single purchase of South African Defence Bonds (about one-eighth of all the bonds sold), directly financing the South African Defence Force.[8] At the payment and handover ceremony, the bank's then national managing director, Bob Aldworth, stated that 'the bank regards the subscription as part of its social responsibility not only to the country at a particular stage in its history, but also to our staff members who have been called up'.[9] In 1984, research conducted by the

[1] For more information on 16 June 1976, see https://www.sahistory.org.za/article/june-16-soweto-youth-uprising (accessed 16 April 2021).

[2] Security Council Resolution, S/RES/134, 1 April 1960.

[3] For more information on 21 March 1960, see https://www.sahistory.org.za/article/sharpeville-massacre-21-march-1960 (accessed 16 April 2021).

[4] For more information on the United Nation's International Day for the Elimination of Racial Discrimination, see https://www.un.org/en/observances/end-racism-day (accessed 16 April 2021).

[5] Tony Koenderman, *Sanctions – The Treat to South Africa* (Jonathan Ball Publishers, 1982) 151,

[6] Ibid, 155.

[7] Truth & Reconciliation Commission, Report of the Reparation & Rehabilitation Committee: Reparations and the Business Sector (vol 6, section 2, chapter 5) 144.

[8] Ann W Seidman and Neva Makgetla, 'Activities of Transnational Corporations in South Africa' (1978) *UN Centre Against Apartheid Notes and Documents* 75.

[9] Terry Shott, 'The Banks and the Military in South Africa', paper was distributed at the 'International Seminar on Bank Loans to South Africa' co-sponsored by the U.N. Special Committee Against Apartheid in cooperation with the World Council of Churches, the Swiss Anti-Apartheid Movement, the Berne Declaration Group and the Non-Governmental Organizations Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization on 5–7 April 1981.

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Centre for Business Studies at the University of Witwatersrand concluded that private corporate support was largely responsible for the success of the apartheid government's policies.[10]

The incestuous relationship between the apartheid regime and the international business community has long since been identified by the international community as morally and politically odious. In 1968, for instance, the General Assembly condemned South Africa's trading partners for their political, military and economic collaboration.[11] This was followed by several resolutions condemning transnational corporations for strengthening the apartheid regime through their continuous collaboration.[12]

By the mid-1980s, South Africa was in the grip of an international voluntary and mandatory sanctions regime. Yet this did not deter German and Swiss arms corporations like Rheinmetal Group[13] and Oerlikon-Contraves Group[14] from repeatedly violating the UNSC compulsory arms embargo.[15] The same transnational corporate violations occurred in other sectors such as oil, banking, technology, transportation and mining as they found deceitful ways of circumventing voluntary embargoes. Notwithstanding, the collective impact sanction, sustained international pressure and increasing revolt in South Africa ultimately resulted in the demise of the apartheid regime in the early 1990s, resulting in the establishment of a new democratic order in 1994.[16]

II. Early Attempts at Corporate Accountability

The distinguishing feature of South Africa's new democratic dispensation is its human rights-centric Constitution,[17] with an enshrined Bill of Rights, adopted in 1996. Notable is the direct application of the provisions of the Bill of Rights to corporate entities.[18]

Since 1994, South Africa has implemented a range of policy measures and legislative enactments to address the gross socio-economic imbalances caused by apartheid such as black economic empowerment and employment equity legislation.[19] Corporations have

[10] Statement of Dr Jean Sindab, Executive Director, Washington Office on Africa, quoting PW Botha, 'Economic Sanctions and their Potential Impact on U.S. Corporate Involvement in South Africa', Hearing before the Subcommittee on Africa of the House Foreign Affairs Committee (1985) 99th Congress 1st Session, 31 January, 24.

[11] General Assembly Resolution, 'The Policies of Apartheid of the Government of South Africa', A/RES/2396 (XXIII) (2 December 1968).

[12] General Assembly Resolution, 'Policies of Apartheid of the Government of South Africa: Economic Collaboration with South Africa', A/RES/31/6 H (9 November 1976).

[13] Signe Landgren, *Embargo Disimplemented: South Africa's Military Industry* (Oxford: Oxford University Press, 1989) 88–95.

[14] Limmat Verlag, '*Die Bührle Saga. Festschrift zum 65. Geburtstag des letzten aktiven Familiensprosses in einer weltberühmten Waffenschmiede*' (Zürich, 1986) 139, 142.

[15] United Nations Security Council Resolution, 'The Question of South Africa', S/RES/418 (4 November 1977).

[16] The end of official apartheid is generally marked by the first democratic elections held on 27 April 1994.

[17] Constitution of the Republic of South Africa, 1996 (South Africa).

[18] Constitution of the Republic of South Africa Act 1996 (South Africa) section 8(2): 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

[19] Broad-Based Black Economic Empowerment Act 2003 (South Africa); Employment Equity Act 1998 (South Africa).

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generally resorted to 'relatively widespread, systematic implementation of corporate social investment (CSI), or philanthropic initiatives primarily in education and health'.[20] The concern for human rights due diligence, however, varied across different industry sectors.[21]

Attempts at holding domestic and foreign corporations liable for past human rights violations in South Africa have been fraught with obstacles. The first major litigious attempt was in 2002 when the Khulumani Support Group (Khulumani), a South African grassroots and civil-society organization, representing survivors and dependants of apartheid-era abuses, brought a lawsuit against about two dozen foreign multinational corporations (MNCs) seeking to hold them liable for aiding and abetting the apartheid regime.[22] Two key considerations for filing the suit in New York instead of South Africa were the absence of an equivalent Alien Tort Statute (ATS)[23] and the lack of South African common law rules and principles with respect to corporate aiding and abetting.

Although the lawsuit contributed to the body of corporate liability jurisprudence under the ATS,[24] it was dismissed in the aftermath of the US Supreme Court decision in *Kiobel*[25] in 2013 when the court found that causes of action under the ATS do not reach conduct that occurs within the territory of another sovereign.[26] The dismissal did not deter the attempts at seeking to hold corporate actors liable for socio-economic and human rights abuses occurring in South Africa.

III. The Rise of Targeted Domestic Corporate Human Rights Litigation in South Africa

Over the last decade or so, a few targeted lawsuits in South Africa, principally aimed at domestic corporations, have changed the legal landscape to make enforcement of legal remedies against corporate actors for socio-economic and human rights violations increasingly possible. Areas of law that have been transformed are, amongst others, the expansion of legal standing, recognition of novel causes of action and the generous application of contingency fee arrangements. Each of these are briefly considered below.

A. Expansion of Legal Standing

In South Africa, legal standing under the common law was traditionally limited to a party having personally suffered a legal injury and proving to a court that 'the litigant has a

[20] Ralph Hamann et al, 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence' (2009) 87 *Journal of Business Ethics Supplement 2: Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights* 457.

[21] Ibid, 459.

[22] The complaint was initially filed on 11 November 2002 in the Eastern District Court of New York but was consolidated with two other cases in the Southern District Court of New York.

[23] Alien Tort Statute 1789 (US), grants jurisdiction to federal district courts of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States.

[24] *Khulumani v Barclay National Bank Ltd*, 504 F.3d 254, 260 (2d Cir. 2007).

[25] *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

[26] Ibid, 10.

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direct and substantial interest in the subject matter of the litigation'.[27] Such restrictive standing made it extremely difficult, if not impossible, for marginalized and vulnerable groups, who were often exposed to collective harms under apartheid, from collectively pursuing remedies as they were simply unable to do so individually.[28]

However, under the Bill of Rights, access to courts is a fundamental right[29] and its corollary is found in section 38, which provides for expanded standing under the Constitution.[30] Despite its radical departure from the common standing, this constitutional expansion is limited to an infringement or threatened infringement of a right in the Bill of Rights. The interpretive effect thereof is that that common law violations could potentially be immune for such extended standing.

This issue was recognized in the *Children's Trust* case,[31] when several civil society organizations in 2010, acting on behalf of bread consumers, filed a putative case in the Western Cape High Court against leading South African bread manufacturers for colluding to increase the bread price.[32] The court recognized that '[t]here are certainly strong indications that standing to bring class action also in non-Bill of Rights cases should become part of our law'[33] but did not decide the issue. On appeal, the Supreme Court of Appeal (SCA) decisively held:

> [I]t would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights … Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation.[34]

Since then, South African courts have become more receptive to collective actions, particularly those involving poor, vulnerable and marginalized groups.[35] In 2016, the South-Gauteng High Court in Johannesburg certified a class action of tens of thousands of

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[27] The Recognition of Class Actions and Public Interest Actions in South Africa' (1998) 88 *The South African Law Commission*, Project 12.

[28] *PE Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd*, 1980 (4) SA 801 (T).

[29] Constitution of the Republic of South Africa Act 1996 (South Africa), section 34: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[30] Constitution of the Republic of South Africa Act 1996 (South Africa), section 38: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

[31] *The Trustees for the Time Being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others*, *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* [2011] ZAWCHC 102.

[32] Ibid, para 12.

[33] Ibid, para 38.

[34] *Children's Resource Centre Trust v Pioneer Food* (50/2012) [2012] ZASCA 182, para 21.

[35] *Pretorius v Transnet Second Defined Benefit Fund* 2014 (6) SA 77 (GP).

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current and former goldminers who had contracted silicosis and tuberculosis whilst working in South African goldmines. Commonly known as the *Nkala* lawsuit,[36] it was instituted in 2012 against leading South African goldmining companies including Anglo American South Africa Limited, AngloGold Ashanti Limited, Gold Fields Limited, Harmony Gold Mining Company Limited (Harmony), AngloGold Ashanti Limited (AngloGold) and Gold Fields Limited.

Whilst the mining companies opposed the lawsuit on several substantive grounds, one of their principal oppositions was the lack of commonality between the miners' work experiences at different mining companies. Harmony AngloGold for instance pointed out that 'to the extent that conditions in one mine may have been worse than those in other mines the interests of the mineworkers employed in the former mine may conflict with those of the other mines'.[37] Such a view is consistent with the opinion of the US Supreme Court in *Wal-Mart Stores*,[38] which reconfirmed the opinion of the former Chief Justice of the US Court of Appeals for the Ninth Circuit who opined that members of the class:

> held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed… . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.[39]

The US approach did not find favour in *Nkala.* As most miners were from impoverished rural areas spread across South Africa, Lesotho, Swaziland, Mozambique, Botswana, Zimbabwe and Zambia, the issue of access to court played a pivotal role in the court's determination to certify the class action. The court held:

> [T]he institution of hundreds of thousands of separate individual hearings is not more appropriate than the proposed class action to resolve the disputes between the mineworkers and the mining companies.[40]

> The only way justice can prevail in the cases of the individual mineworkers or their dependants is if they are afforded an opportunity to pursue their claims by at least having significant parts of it determined through a class action.[41]

B. Recognition of Novel Causes of Action

Ordinarily, the tort law concept of negligence, as opposed to piercing the corporate veil or customary international law, constitutes the basis upon which legal action against MNCs

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36 *Nkala v Harmony Gold Mining Co Ltd 2016 (5) SA* 240 (GJ)

37 Ibid, para 79.

38 *Wal-Mart Stores, Inc. v Dukes et al*, 564 S Ct (2011).

39 Ibid, 19.

40 *Nkala*, note 36, para 115.

41 Ibid, para 223.

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are pursued.[42] In the United Kingdom (UK) for instance, most cases focus on the acts or omissions (i.e., duty of care) of the parent company rather than the subsidiary and 'attempt to establish direct liability of the parent company as a primary tortfeasor through the breach of the duty of care it is said to have owed to the claimant.'[43]

This matter arose in *Nkala.* Even though South Africa has no settled jurisprudence on the matter, the court recognized the evidence of the goldminers, i.e., that parent companies 'had authority over, advised and guided their respective employing subsidiary company, and were aware that its subsidiary company would accept its direction, guidance or advice and that that direction, guidance or advice materially impacted upon the health of the mineworkers, especially with regard to them contracting silicosis or TB.'[44]

This unresolved issue is foreshadowed by the SCA in the *Children's Trust* when the court laid down the guiding elements for class certification.[45] One of these is the recognition of novel causes of action for which no legal precedent exists. It is highly likely that should the issue come before trial, South African courts, in line with UK courts, would consider as triable the issue of a parent company's liability for the negligent acts and/or omissions of its subsidiary.

C. Generous Application of Contingency Fees Arrangements

Prior to 1994, however, South African courts regarded litigation funding as champertous, based on the English law influence, and contrary to public policy and void. Since then, the enactment of the Contingency Fees Act[46] (CFA) has made it possible for legal practitioners to undertake cases on a contingent-fee basis, making legal representation and access to court more accessible to the majority of South Africans.[47] The *Nkala* litigation was made possible by litigation funding.

Notwithstanding the CFA, litigation funding remains a contentious issue. In *Nkala*, Gold Fields Limited brought an application to join Motley Rice LLC, one of the litigation funders, as co-applicant, seeking a costs order against it in the event of the litigation being unsuccessful.[48] Gold Fields argued that Motley Rice controlled the litigation and stood to

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[42] Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14 *Utrecht Law Review* 7.

[43] Ibid.

[44] *Nkala*, note 36, para 71.

[45] The following elements should guide a court in making a certification decision, being: the existence of a class identifiable by objective criteria; a cause of action raising a triable issue; that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class; that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination; that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class; that the proposed representative is suitable to be permitted to conduct the action and represent the class; whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

[46] Contingency Fees Act 1997 (South Africa).

[47] Contingency Fees Act 1997 (South Africa), section 2: 'Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client …'.

[48] *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others*, 2015 (4) SA 299 (GJ).

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benefit financially from it.[49] Yet, it acknowledged that without litigation funding the mineworkers' claims would not get off the ground, and that the workers would be prevented from pursuing their claims. In dismissing the application, the court articulated the undeniably positive impact of the litigation funding in promoting access to justice as 'the funded litigant is one who, because of poverty and lack of resources, would otherwise not have been able to litigate or access justice.'[50]

IV. Looking Forward

South Africa has come full circle from being an international pariah state to being at the forefront of giving effect to the UNGPs. A recent report from the South African Human Rights Commission states that 'while the UNGPs are non-binding per se, they do set out existing international law and best practice' and are 'a useful tool in determining the extent to which South Africa has domesticated international human rights law principles in the context of business and human rights.'[51]

Notwithstanding their usefulness, the UNGPs have been criticized for being non-binding and weak in substance.[52] However, in 2014, South Africa co-sponsored a UNHRC resolution 'to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.'[53] The mandate of the working group (OEIGWG) is 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'[54] A second revised draft treaty was discussed during the sixth session of the OEIGWG in October 2020.[55]

Whilst the mandate of the OEIGWG constitutes a significant step in the struggle for greater corporate accountability, the adoption of a final treaty will be a long and engaging process. Hence, the usefulness of the UNGPs and the resourceful, litigious efforts like the *Children's Trust* and *Nkala*, will need to continue to create enabling environments for access to adequate judicial remedies particularly in countries like South Africa, where socio-economic and human rights violations may continue to persist despite a new constitutional dispensation.

Ordinarily, the unavailability or inaccessibility of remedies in host states are often 'due to the host state's unwillingness to act against corporations, driven by its desire to protect foreign direct investment (FDI)' and 'the constant threat that MNCs will pack up and go, because globalisation and the mobility of capital make it easy for them to

[49] Ibid, para 37.

[50] Ibid, para 55.

[51] South African Human Rights Commission, 'Business and Human Rights Dialogue Report' convened by the South African Human Rights Commission on 13–14 March 2018.

[52] Tebello Thabane, 'Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's "Protect, Respect and Remedy" Framework and Guiding Principles' (2014) 14 *African Human Righs Law Journal* 43–60.

[53] Resolution adopted by the Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (14 July 2014).

[54] Ibid.

[55] https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx (accessed 16 April 2021).

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switch countries.'[56] Certain home states in turn afford remedies in the form of 'private negligence claims brought by the victims of overseas corporate wrongs against parent companies before the courts of the home states.'[57] While home state jurisdictions serve as important *fora* in the fight for corporate accountability, they often raise broader social and political issues in respect of the North–South power imbalance. Hence, the South African experience with corporate accountability adjudication could serve as a useful example to other African countries that grapple with the same problems.

[56] Thabane, note 52, 50.

[57] Aristovan, note 42, 6.

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