HUMAN RIGHTS LITIGATION AGAINST COMPANIES IN SOUTH AFRICAN COURTS: A RESPONSE TO MANKAYI V ANGLOGOLD ASHANTI 2011 (3) SA 237 (CC)

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I. INTRODUCTION

Human rights traditionally protect individuals against the state. Governments are powerful entities, with legislative, executive and judicial force on their side. Human rights protect individual members of society against this government power. Companies, on the other hand, are separate, private legal entities. Within the traditional theoretical framework, they are not burdened with the same legal responsibilities of protecting and promoting human rights as governments. Unless performing a state function, they have no distinct place in public law. The emergence of influential multi-national corporations, some with larger turnovers than the gross domestic product (GDP) of smaller nations, has shown us that this traditional approach increasingly falls short of realistic needs.1

There is a global movement to explore the ways in which companies could be held legally accountable for human rights violations. South Africa, as many other legal jurisdictions, does not have an avenue as convenient as the United States Alien Tort Claims Act (which is indeed a rarity, and may itself be on its way out).2 There are, however, a few examples of human rights litigation...

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1 ‘In terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that thwart human rights than decisions and activities of some nation-states’. JJ Paust ‘Human Rights Responsibilities of Private Corporations’ (2002) 35 Vanderbilt J of Transnational L 801, 802. ‘These impacts are not merely confined to labour rights and environmental impact but span the full panoply of fundamental rights’. D Bilchitz ‘Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations’ (2008) 125 SALJ 754, 754.

against companies within the South African context. On 3 March 2011, the Constitutional Court delivered judgment in *Mankayi v Anglogold Ashanti*, a human rights related case brought by an individual against a company. These types of cases seem to be increasing, as a few more are currently pending. This note attempts to analyse a few South African judgments available in this area, with the view of detecting trends or directions in which the law may be developing.

Specifically, the note attempts to ask if a body of ‘business and human rights’ law is emerging, in terms of which a litigant can rely on the submission that companies have human rights obligations as such, as opposed to having to rely on unrelated causes of action found scattered within statutes or other existing areas of law.

The note is selective by its nature and only focuses on certain cases that provide interesting insights into the possibilities for human rights litigation against companies. For the purposes of this note, human rights litigation is defined to include cases where fundamental human rights were either relied on directly, or used to give content to rights contained in statutes or the common law. The note also only includes cases where a company was cited as a party and relief was obtained against it. References made within the South African context are mostly to companies, as opposed to corporations, in accordance with the language used in the new Companies Act 71 of 2008 (Companies Act).

This note will first briefly discuss the most recent judgment, being *Mankayi*, and thereafter consider the other relevant cases within the different fields in which they have emerged: labour law and equality, mining and environmental law, corporate law, administrative law, and the right to health as advanced within competition law. Thereafter, it will attempt to set out the general lessons learnt from these cases.

3 The focus of this note is on litigation in South African courts. There are, however, examples of cases brought in other jurisdictions for violations that took place within South African borders, which are not discussed. These cases are brought against the head office company, which is situated within the jurisdiction of the foreign court. The US courts have hosted such cases as *Khulumani v Barclays National Bank Ltd* 504 F.3d 254 (US); *In re South African Apartheid Litigation* 617 F.Supp.2d 228 (US) and 633 F.Supp.2d 117 (US) against companies alleged to have been involved in supporting apartheid, brought on the basis of the Alien Tort Claims Act. The UK courts have been the forum for cases such as *Lubbe v Cape PLC* 2000 1 WLR 1545 (HL); and *Sithole v Thor Chemicals Holdings Ltd and Desmond John Cowley* 2000 WL 1421183. See also *Ngcobo v Thor Chemicals Holdings Ltd and Desmond Cowley* 1995 WL 1082070; Meeran (note 2 above) 3. See more materials regarding these decisions <http://www.business-humanrights.org>.

4 2011 (3) SA 237 (CC).

5 Apart from *Mankayi*, this note focuses on the judgments of *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (2) SA 638 (LC); *Bareki NO v Gencor Ltd* 2006 (1) SA 432 (T); *Minister of Water Affairs and Forestry v Stillsfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W); Cape PLC claimants against Gencor, and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC). Unfortunately, where litigation was brought against companies but the parties settled the matter, no judgment was made by the court for students of the field to analyse.
II JUDGMENTS

(a) Mankayi v Anglogold Ashanti

In the matter of Mankayi, the applicant was a former mineworker who contracted tuberculosis and chronic obstructed airways due to exposure to harmful dusts and gases during his employment. His claim was based in delict. He averred that Anglogold Ashanti owed him a legal duty to provide a safe and healthy working environment, and had breached this duty by failing to apply appropriate and effective measures.

Anglogold Ashanti took an exception to Mr Mankayi’s claim. It referred to s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1998 (COIDA), which excludes the common law right to sue for damages arising from occupational injury. It averred that Mr Mankayi’s particulars of claim accordingly lacked the necessary averments to sustain a cause of action. Mr Mankayi’s answer to this was that his employment falls within the application of the Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA). Section 100(2) of ODIMWA precludes him from claiming compensation in terms of COIDA, and therefore s 35(1) of COIDA does not apply to him and his right to claim damages is not extinguished.

The Court, per Khampepe J, held in Mr Mankayi’s favour. It interpreted the relevant statutory provisions within their greater historical and legislative context, and found that s 35(1) of COIDA only applies to those employees whose compensation is regulated by COIDA. In South Africa, there are two separate systems for occupational injuries compensation: the one under ODIMWA being mining-specific, and the other under COIDA to apply to all other employment sectors. The effect of this judgment is that, until legislation to the contrary is passed, mineworkers may claim common law delictual damages from their employers. Unfortunately, Mr Mankayi passed away a week before judgment was delivered in his favour.

The right at stake in the Mankayi case was the right to freedom and security of the person, as per the Constitution of the Republic of South Africa, 1996, which includes the right to be free from all forms of violence from either public or private sources. Although the delictual claim was brought against a company (and no state entity was cited as a party), the result of the exception was that the consideration of the Constitutional Court boiled down to an interpretation and analysis of the relevant legislation. The Court referred to Law Society of South Africa v Minister for Transport, where the impact of the legislation regulating negligent injury from motor vehicle accidents was considered. It compared the analysis in that case to the one before it, stating that

6 The Court explained that this distinction is justified by the country’s ‘singular history of mining, with the massive contribution of this sector to the country’s wealth and the corresponding massive toll on mineworkers’ health’ para 109.
9 2011 (1) SA 400 (CC).
10 Mankayi (note 4 above) para 14.
‘[t]his same constitutional right finds expression in the legislation that seeks to regulate the safety of the mining industry’. It held that an interpretation in terms of which Mr Mankayi’s common law claim would be extinguished, would implicate his s 12(1)(c) right.

In other words, although the right is worded as protection from either public or private sources, the Court’s analysis in this case amounted to a protection from a public source (the legislature) as opposed to a private source (the company). This is a pity, seeing as the meaningful evolution of human rights litigation against companies is largely dependent on the development of horizontal application of human rights. In other words, to prevent a situation where litigants will always have to phrase their human rights claims against companies indirectly (whether in terms of delict or as a statutory or contractual violation) courts would need to start applying those constitutional rights that lend themselves to horizontality directly against companies. The right to freedom and security of the person, apart from being a crucial core right, is conveniently worded for this purpose. If any right would be suitable for direct horizontal application, this would be it.

Moreover, the above discussion of the relevant right is the only human rights analysis contained in the judgment. Indeed, it constitutes the only mention of the relevant right on which the judgment is based. The discussion furthermore takes place in the section relating the determination of whether a constitutional issue arises from the application, as opposed to the main analysis section.

The judgment is significant in that its effect lies against the company: because the legislature failed to provide for specific regulation of Mr Mankayi’s compensation, he may have a claim in delict against the company. By dismissing the exception, the Constitutional Court gave Mr Mankayi the opportunity to pursue his delictual claim against the company. Unfortunately, as Mr Mankayi passed away, he was never able to continue with and execute his delictual claim. It could be said that the potential for the development of the law of delict posed by the Mankayi case was therefore never realised.

As a result, the Mankayi case as it currently stands does not contribute as much as it could towards this development of companies’ human rights accountability. The case entailed only the interpretation of legislation. Whereas human rights were used in the interpretation, the judgment’s human rights analysis is limited and cursory. No delineation of the company’s human rights obligations occurred. The case could have set a more powerful precedent had the Court embellished more on the human rights responsibilities of the company, and if Mr Mankayi had been able to flesh out his delictual claim in the trial court.

There are several other cases where litigants relied on human rights for their claims against companies. These are discussed within the context of the area of law in which they arose.

11 Ibid para 14.
12 Ibid.
13 Bilchitz writes, referring to s 8(2), that ‘the South African Bill of Rights contemplates the direct application of fundamental rights to juristic persons’. Bilchitz (note 1 above) 755.
(b) Labour law and equality

Where human rights in relation to companies are concerned, the right to fair labour practices is perhaps the first right that springs to mind. Two similar cases prominently show the development of labour law legislation within the context of human rights litigation against companies. These judgments, handed down more than ten years apart, both concerned unfair dismissals on the basis of HIV status.

The first judgment, *Hoffmann v South African Airways*\(^\text{14}\) was handed down by the Constitutional Court on 28 September 2000, and is a landmark case in the field of equality and discrimination in the workplace. The rights at stake were the right to equality, dignity and fair labour practices.\(^\text{15}\) Mr Hoffmann applied to be a cabin attendant at South African Airways (SAA). He went through an extensive selection process, after which he was found to be a suitable candidate for employment.\(^\text{16}\) However, after a pre-employment medical examination showed that he was HIV positive, his medical report was changed from ‘suitable’ to ‘unsuitable’. He was informed that he could not be employed.\(^\text{17}\)

SAA argued that the exclusion was justified, as its staff had to be ready to go on worldwide flights, including to yellow-fever endemic countries. It averred that, in accordance with guidelines issued by the National Department of Health, HIV-positive persons could not take the yellow-fever vaccination. The purpose of the discrimination is accordingly in the interests of both potential cabin attendants (including Mr Hoffmann) and the passengers of SAA, to whom he may transmit yellow fever.\(^\text{18}\) However, the evidence put forward by SAA’s own medical experts indicated that only those persons whose HIV infection had reached the immunosuppression stage, and whose CD4+ count had dropped below 350 cells per microlitre of blood, could not be vaccinated effectively.\(^\text{19}\)

The Court held that SAA unfairly discriminated against the applicant, and that neither the purpose of the discrimination nor the objective medical evidence justified such discrimination.\(^\text{20}\) Relating to SAA’s averment that other commercial airlines have similar HIV policies, it held:

> Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.\(^\text{21}\)

\(^\text{14}\) See note 5 above.
\(^\text{15}\) Ibid para 6.
\(^\text{16}\) Ibid.
\(^\text{17}\) Ibid.
\(^\text{18}\) Ibid para 7.
\(^\text{19}\) Ibid paras 8 & 11.
\(^\text{20}\) Ibid para 29.
\(^\text{21}\) Ibid para 34 (footnote omitted).
The Court referred to the fact that SAA was at the relevant time a business unit of Transnet, and that Transnet was a statutory body under the control of the state, with public powers performing public functions in the public interest.\(^{22}\) Although SAA was a commercially operated company, the applicant therefore relied on s 9(3) of the Constitution, which prohibits the state from unfairly discriminating.\(^{23}\) Similar to the right to physical integrity discussed in the context of the *Mankayi* judgment above, the right to equality is another constitutional provision that binds private entities horizontally.\(^{24}\) If SAA were not coincidentally a statutory body, but only a private entity, Mr Hoffmann could theoretically have relied directly on his constitutional right to equality. However, in contrast to s 12(1)(c), which the Court in *Mankayi* only applied vertically, s 9(4) has found direct horizontal application through its insertion into the Labour Relations Act 66 of 1995\(^{25}\) (LRA) and the Employment Equity Act 55 of 1998 (EEA). At the time when Mr Hoffmann’s cause of action was taking place,\(^{26}\) LRA and the EEA were not yet in force.

Today, all employers, whether public or private, are further bound to protect the right to equality by virtue of these acts. These acts accordingly form the basis of the second judgment, *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*,\(^{27}\) handed down by the Labour Court on 16 February 2011. The respondent, the Mooikloof Equestrian Centre, was found liable for dismissing the applicant, a newly appointed stable manager, on the basis of his HIV status.

The basis of Mr Allpass’ claim was his right to equality as provided for in the Constitution, the LRA and the EEA. Section 187(1) of the LRA and s 6(1) of the EEA essentially echo the grounds of unfair discrimination set out in s 9 of the Constitution, except that the EEA expressly includes HIV status as a ground. In other words, in terms of the EEA, discrimination based on HIV status is prima facie unfair and places the onus on the employer to show that the discrimination was fair.\(^{28}\)

As opposed to SAA, Mooikloof was an entirely privately owned commercial entity. The evolution of the legislation and litigation suggests that public and private entities are now regarded by courts as having similar human rights duties regarding equality in the workplace. Labour legislation is fairly sophisticated in this regard, and employees will hardly ever need to rely on direct horizontal application in order to succeed with a labour rights case against a company.

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22 Ibid para 23.
23 My emphasis.
24 Constitution s 9(4).
25 Date of commencement 11 November 1996.
27 Note 5 above.
28 Ibid paras 35-38.
(c) Mining and environmental law

Another prominent human right always featured in any discussion of business and human rights is the right to a clean environment. Similar to labour law, environmental law is also fairly legislated in comparison to the other human rights, especially where environmental law overlaps with mining law.

It will be noticed that the majority of cases discussed in this section have taken place within the mining industry. This is hardly surprising in the light of the large role this industry plays within the South African economy, as well as the nature of the work being performed by mines. In *Mankayi*, the Court refers to the country’s ‘singular history of mining, with the massive contribution of this sector to the country’s wealth and the corresponding massive toll on mineworkers’ health’. 29 The Court also mentions that ‘the history of this country painfully reminds us, mineworkers, African mineworkers in particular, have contributed enormously to this country’s economic wealth and prosperity, at great cost to themselves and to their health’. 30

The case of *Bareki NO v Gencor Ltd* 31 was brought by a traditional leader on behalf of himself, the Bareki tribe and the inhabitants of the Heuningvlei community in the North West Province. 32 The plaintiff claimed that Gencor was responsible, in terms of s 28 of the National Environmental Management Act 107 of 1998 (NEMA), to take reasonable steps to rectify the pollution and/or degradation of the environment caused by the Bute asbestos mine. This mine was operated by the defendants (Gencor and Gefco) between approximately 1976 and 1981. Although the mine had been closed for several years, the remains of the mine were still present in the form of asbestos dumps, a benefication plant, a mill, and a haul road. 33

Gencor excepted to the claim on the basis that the provisions of NEMA relating to their responsibilities are not retroactive. While the Court held in their favour, it significantly indicated that in terms of ss 28(1) and (2) of NEMA (a) even an owner or possessor of land on whose land an activity or process causing pollution has been performed without her knowledge and consent prima facie incurs an obligation to take reasonable corrective measures; 34 (b) the liability created is strict, and may in some cases even be absolute; 35 (c) even where significant pollution is authorised by law or cannot reasonably be avoided or stopped, the person responsible must still take reasonable corrective measures; 36 and (d) there is no monetary limit on such liability. 37

The Court also noted that the duty to enforce these corrective measures lies with the Director-General or provincial head of the Department of Minerals

29 *Mankayi* (note 4 above) para 109.
30 Ibid para 23.
31 Note 5 above.
32 Ibid 433.
33 *Bareki* (note 5 above) 434.
34 Ibid 440.
36 Ibid 441.
37 Ibid 440.
and Energy. However, if the latter does not take the necessary steps to enforce the party responsible for the pollution to take the corrective measures, any aggrieved party may apply to a court for an order compelling the relevant official to take action. In this manner, an individual may approach the court for an order that forces the culprit company to rectify its wrongs. However, it must be emphasised here that the court still does not grant direct relief against the company. Although the company feels the practical effect by having to rectify its wrongs, it is not the company, but the state official, who is held directly liable in terms of such an application.

(d) Corporate law

A few months after the Bareki judgment was handed down, a similar yet even more significant judgment was delivered in the matter of Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd. This matter specifically related to remedies against companies that do not comply with their duties in terms of environmental legislation.

The Stilfontein matter concerned an application for contempt of court against the company Stilfontein and its individual former directors for non-compliance with a court order. The relevant court order directed the company to comply with certain water management directives as set out in the National Water Act 36 of 1998. Failure to comply with these obligations could lead to water pollution, health risks, and flooding, which could cause risk to miners’ lives. Instead of complying with the court order, the directors all resigned simultaneously.

The Court criticised the resignations, finding that the timing of the resignations was rushed in order to meet the hearing date. It held that ‘[o]ne does not expect, within the corporate environment, that the entire board of a public company suddenly resigns. There should, at the very least, be some form of notification’. Importantly, by citing the King Report on Corporation Governance, the Court held:

‘A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits, such as improved productivity and corporate reputation, by taking those factors into consideration’ … The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining

38 Ibid 441, referring to s 28(12) of the NEMA.
39 Note 5 above. Bareki was handed down on 19 October 2005, whereas Stilfontein was delivered on 15 May 2006.
40 Stilfontein (note 5 above) para 16.4.
41 King Committee ‘King Report of Corporate Governance’ (March 2002) also known as King II.
Companies are free to exploit the mineral resources of the country for profit, over the lifetime of the mine; thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation. For this reason too, the second to fifth respondents cannot be permitted to merely walk away from the company, conveniently turning their backs on their duties and obligations as directors. I am persuaded that the second to fifth respondents, notwithstanding their sudden resignation, must be held responsible for the first respondent’s failure to comply with an order of court.

The above dictum is significant for several reasons. Firstly, the Court expressly states that companies have human rights obligations as part of their corporate governance responsibilities. Secondly, the Court held not only the company as corporate entity liable for failing to implement the human rights related directives, but also the former directors. The corporate veil is pierced for the purposes of human rights implementation. Lastly, the Court refers to the principle that taking human rights into account is not merely the law (in this case the legal requirements of the water directives), but also in the best financial interest of the company. This is an approach often referred to as the ‘business case’: being socially and environmentally compliant has an indirect positive impact on the company’s finances, and the social, environmental and human rights impacts of a company are accordingly included in the so-called ‘triple-bottom line’ accounting procedures.

The latter approach is canvassed more comprehensively in the King III Report, which was only released after the Stilfontein judgment was handed down. The reliance by the Court on this approach is indeed a significant development in the area of corporate human rights law.

It is possible that the King III Report, and the Stilfontein approach, may inform the content of the human rights related purpose contained in the new Companies Act. Significantly, the new act includes as its first listed purpose the promotion of ‘compliance with the Bill of Rights as provided for in the Constitution, in the application of company law’.
indirectly.\textsuperscript{48} This may bring about options for human rights litigants within corporate law which were previously unavailable.

Another corporate law judgment, yet again from within the mining industry, is similarly interesting. It illustrates that even legislative provisions that are not human rights-related in themselves, may be used for the purposes of human rights litigation against companies.

During prolonged litigation in UK courts against Cape PLC for violations occurring at the company’s asbestos mines, Gencor was joined as a co-defendant.\textsuperscript{49} During 2002, a group of South Africa asbestos victims, including the Cape PLC claimants, sought an interdict in the Johannesburg High Court against Gencor based on s 90 of the then Companies Act 61 of 1973. This provision prevents a company from making payments to its shareholders if such action would render the company unable to pay its debts. Despite claims lying against it from the asbestos victims (or perhaps because of it) Gencor announced its intention to unbundle its assets and distribute the proceeds to its shareholders as dividends.\textsuperscript{50}

The entire matter, also involving Cape PLC, settled in the UK courts during March 2003. The settlement led to the establishment of the Asbestos Relief Trust Fund in South Africa, against which asbestos victims may claim compensation.\textsuperscript{51} Part of the settlement was that Gencor would be allowed to unbundle, which it subsequently did on 18 June 2003.\textsuperscript{52}

The significance of this case is that a straightforward non-human rights provision of the Companies Act was used for preventing the procedural end to a human rights claim.

\textbf{(e) Administrative law}

The right to just administrative action is often applicable within a commercial context. As this area of law is highly developed, it is a convenient choice for a potential litigant. However, as the matter of Bengwenyama Minerals (Pty) Ltd \textit{v} Genorah Resources (Pty) Ltd\textsuperscript{53} illustrates, the main focus of an administrative action enquiry will inevitably be on the actions of the state, even where the company itself was remiss.

In this matter, the community of Bengwenyama were the owners of the land on which prospecting rights were granted to Genorah. In addition to having objections to Genorah’s application for prospecting rights, the community also applied for prospecting rights on their own land themselves.

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\textsuperscript{49} Meeran (note 2 above) 34.

\textsuperscript{50} Ibid.


\textsuperscript{52} Meeran (note 2 above) 34.

\textsuperscript{53} See note 5 above.
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It transpired, however, that Genorah was awarded the prospecting rights despite crucial procedural irregularities. For example, the community did not receive adequate notice of the nature and purpose of Genorah’s application and was not allowed a reasonable opportunity to respond to it. The community was also not properly assisted by the Department of Mineral Resources, and the department allowed Genorah to file its financial guarantees late, but did not make the same exception for the community. Despite continuing correspondence taking place between the Department and the community, the community was not informed that prospecting rights had already been granted to Genorah, nor were they given notice of any right to review or internal appeal, or of their right to request reasons. Finally, the Department took four months to respond to the community’s internal appeal.

The Court, per Froneman J, accordingly set aside the decision to grant prospecting rights to Genorah.

The right at stake was the right to equality, as given effect through the Mineral and Petroleum Resources Development Act 28 of 2002, which promotes the equitable access to mineral resources for historically disadvantaged people. The Court also refers to the right of everyone to have the environment protected, through ensuring that the nation’s natural resources are protected in an orderly and sustainable manner. It says that the right to administrative action must be determined against this background.

In this matter, the company, Genorah Resources (Pty) Ltd, was the first respondent. However, the second to fifth respondents were all state parties, including the minister for Mineral Resources, the Director-General of the Department of Mineral Resources, and the regional manager of the Limpopo Department of Mineral Resources. These state parties were cited because the application consisted of a review of an administrative law decision, and these state entities were the administrators responsible for making the decision.

The Court’s analysis therefore mostly turned on the actions of the state entities. Although Genorah was cited in its capacity as successful applicant for the prospecting rights, its own actions were not really the subject of the Court’s enquiry. This will surely always be the case with administrative law reviews: the focus will always be on the validity and fairness of the administrator’s actions.

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54 Ibid para 80.
55 Ibid.
56 Ibid para 79.
57 Ibid.
58 Ibid paras 79 & 80.
59 Ibid para 80.
60 Ibid para 79.
61 Constitution s 9; ibid para 3.
62 Bengwenyana (note 5 above) para 42.
63 Constitution s 24.
64 Bengwenyana (note 5 above) para 42, referring to the objects of the Mineral and Petroleum Resources Development Act.
65 Ibid para 42.
However, in evaluating the administrator’s actions, the company’s actions become relevant. The administrator is required to base its decision on compliance by the applicant company with certain requirements or regulatory provisions. In this case, these included that the applicant company was required to consult meaningfully with the affected owners and lawful occupiers, to provide financial securities for the potential damage to be caused by the prospecting, and to have an approved environmental management plan in place. Such a plan must investigate, assess and evaluate the impact of the proposed prospecting operation on the environment and the socio-economic conditions of any person who might be directly affected.

Indeed, the Court mentions that one of the objects of the Mineral and Petroleum Resources Development Act is to ensure that holders of mining and production rights (which are most often companies) contribute towards the socio-economic development in areas in which they are operating. Socio-economic realisation is one of the obligations conferred on the government in the Bill of Rights. Here, therefore, the Act to a certain extent assigns to private corporate entities the same legal responsibilities as government within the area where the company is active.

The Court specifically looks at the requirement of a company in Genorah’s position to engage in good faith with the relevant community, with a view to reach an agreement regarding the prospecting. If the applicant company fails to reach an agreement at this stage of the process, it may have to pay compensation to the landowner in terms of the Act at a later stage. The Act required Genorah to (a) inform the community, being the landowners, in writing of its application for prospecting rights; (b) inform the community with sufficient detail of what the prospecting will entail on the land; (c) consult with the community in order to reach an agreement to the satisfaction of both parties regarding the impact of the proposed prospecting operation; and (d) submit the result of the consultation process to the regional manager.

The Court took Genorah’s non-compliance with these requirements into account in its assessment of the validity of the administrator’s decision. This is yet another illustration of how companies, although they are not state actors, do acquire human rights obligations through certain legislative provisions.

(f) The right to health as advanced within competition law

Another right featured in human rights litigation against business within the South African context is the right to health. During 2003, the Treatment Action Campaign (TAC) and other AIDS activist groups filed a complaint against Glaxosmithkline and Boehringer Ingelheim with the Competition

66 Mineral and Petroleum Resources Development Act s 39(3)(b)(i) and (ii); Bengwenyama (note 5 above) para 34.
67 Mineral and Petroleum Resources Development Act s 54; Bengwenyama (note 5 above) para 66.
68 Bengwenyama (note 5 above) para 67, referring to s 16(4)(b) of the Mineral and Petroleum Resources Development Act.
69 Bengwenyama (note 5 above) para 68.
Commission. The complaint was based on the alleged anti-competitive behaviour of the pharmaceutical companies in providing limited access to antiretrovirals. The complaint was settled between the TAC and the companies, who agreed to provide generic licences for the production and import of the antiretrovirals.\(^{70}\)

During 2007, the TAC and the AIDS Law Project again lodged a complaint with the Competition Commission on the basis of anti-competitive limitation of access to antiretrovirals – this time against the South African subsidiary of Merck. The complaint was again settled between the complainants and Merck.\(^{71}\)

The Competition Commission and the Competition Tribunal are created by the Competition Act 89 of 1998. Although not specifically mentioning human rights, the preamble of the Competition Act refers to the recognition that ‘an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans’ and it aims to ‘regulate the transfer of economic ownership in keeping with the public interest’. The objects of the act also include promoting ‘employment and advance the social and economic welfare of South Africans’ and ‘a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons’. In furthering these objectives, the competition authorities will also take into account black economic empowerment objectives,\(^{72}\) which implicates the right to equality, as well as employment considerations.\(^{73}\)

Dennis Davis and Lara Granville write that ‘the OECD notes that the inclusion of such public interest goals allows the authorities to make direct reference to these concerns in a transparent manner rather than disingenuously justify actions on competition grounds when they are really responding to other considerations’.\(^{74}\)

The TAC complaints were evidently brought in the interest of the right to health. They were settled, but had they not been, they would have fallen squarely within the jurisdiction of the Commission to investigate, and the Tribunal to adjudicate. It is clear from the TAC complaints that competition law can be used by civil society for what is clearly a human rights purpose.

Competition cases that are analogous to the TAC complaints in this respect are the food pricing cases.\(^{75}\) Whilst not conducting a human rights enquiry, the Competition Tribunal stated that:


\(^{71}\) See ‘TAC Complaint Increases Access to Efavirenz: MSO Finally Agrees to Grant Licenses on Reasonable Terms’ (1 June 2008) <http://www.tac.org.za/community/node/2329>.

\(^{72}\) Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd 66/LM/Oct01.

\(^{73}\) D Davis & L Granville ‘Project on Competition Law Enforcement and Governance: Comparative Institutions: South Africa’ in E Fox & M Trebilcock (eds) Global Administrative Law (forthcoming).

\(^{74}\) Ibid.

\(^{75}\) Including Competition Commission v Pioneer Foods (Pty) Ltd [2009] 2 CPLR 323 (CT); Competition Commission v Pioneer Foods (Pty) Ltd 15/CR/Mar10 (Pioneer Foods 2); Competition Commission v Tiger Consumer Brands [2008] 1 CPLR 71 (CT); Competition Commission v Foodcorp [2009] 1 CPLR 82 (CT).
One must have regard to the fact that the product market pertains to a staple food for millions of South Africans, especially the poorest of the poor and any increases in prices would have a disproportionate impact on this sector. While we cannot determine the total or quantify the extent of the damage accurately, the result of this was that the poorest of all South Africans paid more for their bread than any other person.76

These cases are not dealt with separately herein, as they establish the same principle as the TAC complaints: without referring to human rights, competition law was used with the effect of advancing the right to sufficient food.77

(g) Pending cases

There are currently certain matters pending which may develop the law of delict as Mankayi could have done had it been seen to its end. One such pending matter is the case of Blom and several others against Anglo American South Africa, to be heard in the South Gauteng High Court during 2012.78 The case entails a class action by miners suffering from occupational illnesses on the basis of negligent advice given by the mining company with respect to medical and dust prevention systems.79

Another pending case is the matter of the Sekuruwe community against Anglo Platinum. This matter was set down for hearing in the North Gauteng High Court on 26 November 2010 but was postponed for the filing of further papers.80 The Sekuruwe community is asking for an urgent interdict to stop Anglo Platinum’s PPL Mine near Mokopane, Limpopo, from dumping waste and continuing with the construction of a tailings dam.81

III Trends and Observations

(a) General ‘business and human rights’ principles?

When analysing the above judgments, one finds that there is no clear development of the law of ‘business and human rights’ as a specific legal area per se. The litigation takes place within different delineated areas of law, such as labour law, environmental law, administrative law, or corporate law. All the cases rely on the interpretation or application of specific statutory provisions. As such, the judgments do not refer to one another, and no specific ‘business and human rights’ principles are expressed by the courts. Apart from Stilfontein, which has an important bearing on the human rights obligations of companies within corporate law, most of the pre-Mankayi cases may only be precedent-setting within their narrow application, on their own narrow facts, and in relation to the specific statutory provisions they deal with.

76 Pioneer Foods ibid para 160.
77 Constitution s 27(b).
78 D Motau ‘Silicosis Test Case Litigation at an Advanced Stage’ Mining Weekly (13 May 2011).
79 Meeran (note 2 above) 5. See also Meeran (note 51 above); and I Garda ‘South Africa Miners’ Legal Action’ Aljazeera (19 October 2009).
81 Ibid.
The *Mankayi* judgment is slightly different from its preceding cases, in that Mr Mankayi’s claim was based in delict. Although the Constitutional Court judgment only concerned the application of certain statutory provisions, the trial court, had Mr Mankayi been alive to litigate further, would have been presented with the question whether litigants in the late Mr Mankayi’s shoes are entitled to claim that companies have a human rights duty towards them. The development of the common law to include such a duty on companies would constitute the start of the development of the law of ‘business and human rights’ as a subspecies of delictual law.

Unfortunately, the *Mankayi* judgment falls short of setting such a precedent. The Constitutional Court only interpreted the relevant statutes, and gave Mr Mankayi the go-ahead to proceed with his delictual action. If Mr Mankayi had not passed away, his subsequent delictual action would have required the Court to deal specifically with the development of the common law and the content of the company’s human rights obligations.

The *Mankayi* judgment’s precedent potential may go slightly further than the pre-*Mankayi* cases, in that the Court acknowledges that the company could have a legal obligation which is based on a fundamental human right. The Court does not rule on this question, nor does it discuss it, as the Court’s intention was presumably for the trial Court to grapple with the existence and extent of such an obligation. The ideal would be for future judgments to give concrete content to the human rights obligations of companies, in the same way as courts have been tasked to give content to the government’s human rights obligations over the years.82

Despite the absence of specific business and human rights principles, the above cases do illustrate that it is possible for an individual to hold a company accountable for human rights violations. They are valuable in that they reveal some of the avenues in which this may be done, and they hint at the many other possibilities that exist for similar litigation to take place. For example, from the wide range of human rights relied on in these cases, one suspects that the full spectrum of human rights may potentially lend itself towards litigation against companies. Interestingly, it has also proven possible to use certain ordinary statutory provisions, in other words those which do not have a human rights basis or connotation, to achieve the protection of human rights.

(b) Application

The Constitution provides that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and any duty imposed by the right.83 In matters concerning non-state entities, such as companies, the use of this provision would
entail direct horizontal application: the company would be held liable directly for a breach of a constitutional right.

The Constitution further provides for indirect application, by requiring courts to develop the common law where a contractual term or the law of delict contravenes any right in the Bill of Rights, taking into account the spirit, purport and objects of the Bill of Rights. Where companies are concerned, use of the latter provision would entail indirect horizontal application, whereby the company is held liable through the development of the common law.

The debate between scholars on the merits of direct and indirect horizontal application is extensive. For the purposes of this note it suffices to observe that courts prefer indirect horizontal application.

Interestingly, it may seem from the above cases that where companies and human rights are concerned, courts shy away from any horizontality whatsoever, and choose to rather hold the state accountable in some form: whether through finding that the company in question is government-controlled, finding a lack of oversight by the relevant government official, or finding that legislative protection is inadequate. If this seeming preference for verticality were true, this approach would tie in with the traditional notion that com-

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84 Constitution s 39(2).
86 Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) paras 43–60. Here, the law relating to vicarious liability of the state was developed in light of the Bill of Rights. Interestingly, Bilchitz (note 1 above) 788 remarks that the law relating to piercing the corporate veil where subsidiaries were responsible for human rights violations may be similarly developed.
87 Constitution s 39(2).
88 The courts' preference for such indirect application is criticised by Woolman, who states that '[t]he persistent refusal to give rights identifiable content, by avoiding direct application, results in a Bill of Rights increasingly denuded of meaning': Woolman (note 81 above) 763. Michelman’s response, however, is that the court’s choice of indirect over direct application does not ‘reflect any reduced or absent sense on the Court’s part of responsibility to engage with the substance of Chapter Two and its several, rights-naming clauses. It might rather come down to a question of doctrinal good-housekeeping on which nothing of substance depends’. F Michelman ‘On the Uses of Interpretive “Charity”: Some Notes on Application, Avoidance, Equality, & Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa’ (2008) 1 CCR 3. Deeksha Bhana explains, within the context of contract law, that the reasoning behind the use of indirect horizontal application is that it would give rise to a ‘single, constitutionalised body of … law’ whereas the fear is that direct application will result in two separate bodies of law: a pre-constitutional common law, and a post-constitutional ‘piecemeal, incomplete and unpredictable’ body of law. D Bhana ‘The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract’ (2008) 24 SAJHR 300, 308 & 309. Dennis Davis and Karl Klare write: ‘We believe that the Constitution’s new conception of the relationship between a constitution and common law will someday be heralded as one of the great legal innovations to emerge from South Africa’s transition to democracy’. D Davis & K Klare ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 SAJHR 403, 410. On horizontal application see also Khumalo v Holomisa 2002 (5) SA 401 (CC) paras 29–34; Du Plessis v De Klerk 1996 (3) SA 850 (CC) paras 44–49; S Woolman ‘Application’ in S Woolman et al (eds) Constitutional Law of South Africa 2 ed (2008) 31-1 to 31-95. For an analysis of the Khumalo case in the context of human rights and corporate litigation see Bilchitz (note 1 above) 775–9. See also Meeran (note 2 above) 2.
89 Hoffmann (note 5 above) para 23.
90 As referred to in Bareki (note 5 above) 441.
91 Mankayi (note 4 above) para 14 could be said to focus on the role of the legislature as opposed to that of the company, although it does not pertain to legislative protection being inadequate.
panies’ human rights compliance should only be voluntary, whereas states have the duty to hold companies liable through regulation. However, the case law is not yet extensive enough to justify a conclusion on which approach to application courts prefer within the field of human rights litigation against companies. The facts of the above cases where verticality was used may have just lent themselves to such application. It is in any event likely that the precedent for indirect horizontal application will soon be set by the pending delictual cases.

One key limitation that may be said to apply to the use of indirect horizontal application relates to available remedies. In public interest litigation, courts may fashion new remedies to secure the protection and enforcement of human rights. In contrast, the common law delictual action provides only for the payment of damages to a successful plaintiff. The payment of damages does not undo the harm, and future similar violations are not prevented from occurring to others. Pollution is not cleared up, workers’ safety conditions are not improved, and equitable employment policies are not implemented.

Nowhere is this problem more clearly illustrated than in the case of Mr Mankayi: he passed away a week before the Constitutional Court granted him leave to sue for damages. Even if such payment would have been made timeously, it would not have prevented his death, nor those of his colleagues past, present and future: 1,000 of the 7,500 claimants in the UK-based Cape PLC litigation died before receiving any compensation.

If Mr Mankayi could have seen his action to the end, the legacy of the Mankayi judgment could have opened the door for the development of an action against companies for human rights violations on the basis of delict. It would still be indirect horizontal application, in that the litigant would not be relying directly on any constitutional obligations of the company, but rather on the common law of delict as developed in the light of the constitutional provisions. The effect would however be that a litigant could claim that a company

92 Kerr Janda & Pitts (note 43 above) 30–1.
93 This approach ties in with Ruggie’s framework of ‘Protect, Respect and Remedy’, in terms of which states have the duty to protect individuals against human rights abuses by companies, inter alia through regulation; companies have the duty to respect human rights, which essentially boils down to a do-no-harm approach, and individuals must have access to remedies, whether judicial or non-judicial. See J Ruggie ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’ (2008) A/HRC/8/5 <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>; Bilchitz (note 1 above) 769–70.
94 A report by the ICJ on human rights remedies within our current context argues that public law remedies are usually more inventive, whereas common law or delictual remedies usually consist mostly of damages to the plaintiff litigant. ICJ (note 48 above) paras 2.1 & 2.2.5.
95 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 19.
96 ICJ (note 48 above).
97 It is also clear from the UK-based Cape PLC case (note 3 above) that where the litigation is drawn out and the defendant company is in financial straits, successful plaintiffs may not even receive their money. Meeran (note 2 above) 32.
98 ICJ (note 48 above) para 2.2.5.
99 Note 3 above.
100 Meeran (note 2 above) 6 fn 21. He does indicate, however, at 2, that MNC accountability through litigation may lead to deterrence against future violations.
has a legal duty to protect her human rights, that the company has failed to do so, and that it should accordingly pay damages. Once such a duty is found to exist, the law must then be developed to crystallise the content and limits of such duties. Is it applicable to all stakeholders (not only employees)? What are the requirements for reasonableness? Are there limitations on the amount of damages? Does the duty potentially extend to all of the fundamental rights, including socio-economic rights? Now that Mr Mankayi’s case cannot explore these questions, another litigant would have to bring them to court. Perhaps the pending cases mentioned above will begin to answer these questions.

(c) The infiltration of human rights via common law, statutes and contract

Whilst waiting for the law to develop and crystallise, litigants may still choose to rely on other indirect ways of litigating on human rights against companies. The Constitution makes provision for enabling legislation: those statutes that are enacted in terms of the Constitution to flesh out and regulate more specifically the protection of the rights contained in the Bill of Rights. Countless judgments are made on a daily basis in terms of these acts. They include, for example, the Promotion of Administrative Justice Act 3 of 2000, the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, the Promotion of Access to Information Act 2 of 2000, NEMA, the National Credit Act 34 of 2005 (NCA), the new Consumer Protection Act 68 of 2008, competition and labour law legislation, and so forth. All of these Acts hold human rights implications for companies, and are litigated daily. In terms of these Acts, litigants may directly litigate on their human rights complaints against companies.

Even within the law of contract human rights can be relied on. Examples of areas where human rights have been referred to in contract law include restraint of trade clauses in employment contracts, disputes regarding good faith and bargaining power, the application of NCA, waiver clauses, and so forth. The influence of the Constitution on the law of contract is still being explored, as courts and commentators grapple with the boundaries between constitutional supremacy and traditional autonomy of contract.

The infiltration of human rights into the realm of private law through statutes and contracts, as actively applied by courts, currently constitutes perhaps the most important impact of human rights on companies’ legal obligations.

101 Applied in the Bengwenyama case (note 5 above) para 61.
102 Applied in the Bareki case (note 5 above).
103 Discussed above in the context of the TAC complaints against the pharmaceutical companies.
104 Discussed above in the context of Hoffmann and Allpass (note 5 above).
105 Advtech Resourcing (Pty) Ltd v Communicate Personnel Group v Kuhn 2008 (2) SA 375 (C) paras 26–32.
106 Christie (note 85 above) 16–8.
107 Ibid 18–9.
109 Bhana (note 88 above) 303–4. See also Davis and Klare (note 88 above) 468–81.
There, in the nitty-gritty of everyday law, lies the most dynamic current possibilities for human rights litigation against companies in South Africa. As happened in the litigation against Gencor, a run-of-the-mill Companies Act provision, which would normally have no human rights angle to it, was used for a human rights purpose. It would be impossible to imagine all the possibilities which ordinary law provides for ‘business and human rights’ litigation from an academic armchair.

(d) Beyond litigation

As mentioned, there are very few judgments available where human rights litigation is conducted directly against business. However, in the light of the comprehensive protection afforded by the South African Bill of Rights, there are potentially endless options for development of the common law or interpretation of acts mentioned above. Yet Bilchitz writes it is ‘remarkable’ that company law and constitutional law have continued largely as separate disciplines with a very limited area of overlap, despite the ‘express application of the Bill of Rights to natural and juristic persons’. (This separation may well change with the express inclusion of Bill of Rights obligations in the new Companies Act.)

Why are there then so few judgments available for analysis? The one answer is that this field is only starting to develop, even on a global scale. The second answer is, of course, as with all human rights litigation: victims of human rights violations are often the poorest members of society, and litigation is expensive. Many of the actions settle, because of financial risks involved for both sides. Meeran writes that ‘[u]nless [a multi-national corporation] is confident of a resounding victory and that no significant evidence damaging to its reputation will emerge at trial, the risk of going to trial usually makes little commercial sense.’ For these reasons, waiting for the law to change through litigation alone is inadequate.

Globally, the quest to bring human rights into business practice is extending on all fronts. Indeed, the massive participation in voluntary initiatives such as the United Nations Global Compact indicates that businesses are interested in complying with more than the minimum legal standards. Businesses are increasingly operating on the principle that the promotion and protection of human rights benefits not only the company and its shareholders (the ‘business

110 See discussion above.
111 Bilchitz (note 1 above) 773–4.
112 Companies Act s 7.
113 See Meeran (note 2 above) 1.
115 Meeran (note 2 above) 6.
116 For a summary of the history and development of business and human rights, see Bilchitz (note 1 above) 756–71.
case’ incentive),\textsuperscript{117} but its larger community: suppliers, employees, consumers, and all stakeholders (the ‘community investment’ incentive).\textsuperscript{118} Furthermore, investors are showing significant awareness for human rights practices of business, which results in yet another incentive for business.\textsuperscript{119} In the long run, these incentives will surely weigh more heavily, and have more impact on the institutional will of companies to be agents of change, than litigation and the risk of paying damages could ever have.

IV Conclusion

Despite several avenues available for human rights litigation against companies through indirect horizontal application, South Africa currently has no body of law dealing specifically with binding human rights obligations of companies. It is also unlikely that there will be a change in what Stu Woolman describes as the Constitutional Court’s ‘persistent refusal to engage in the direct application of the Bill of Rights’\textsuperscript{120}

Nevertheless, the future of binding human rights obligations for companies looks surprisingly bright, mostly for two reasons: Firstly, Mankayi and the other pending cases mentioned above are setting the stage for the development of the common law to hold companies liable for human rights violations on the basis of delict. Secondly, the new Companies Act expressly requires the promotion of human rights by companies.

It is expected that the next few years will see a significant enrichment of the law of ‘business and human rights’ in South Africa. Specifically, it is possible that, through indirect horizontal application, binding human rights obligations of companies may materialise within the law of delict, with the concrete content of these obligations to be fleshed out in case law.

\textsuperscript{117} Also referred to as ‘enlightened self-interest’ Kerr et al (note 43 above) 41.
\textsuperscript{118} Ibid 497.
\textsuperscript{119} Ibid 47.
\textsuperscript{120} Woolman (note 82 above) 763.