

Civil Liability for Human Rights Violations



INKUNDLA YOMGAQOSISEKO
INKANTOLO YOMTHETHOSISEKELO
KHOTO YA VUMOTWA
INKANTOLO YEMTSETFOSISEKELO
KGOROTSHENO YA MOLAOTHEO
KHOTHO YOMTHETHOSISEKELO
CONSTITUTIONAL COURT
LENGOTHA LA DINYEWE LA MOLAOTHEO
KHOTHE YA ODAYOTSWA
KONSTITUSIONELE
KHOTLATSHISEKELO YA MOLAOTHEO



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[PROFILE](#)

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FREQUENTLY USED ABBREVIATIONS

BCEA	Basic Conditions of Employment Act 75 of 1997
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
LRA	Labour Relations Act 66 of 1995
NEMA	National Environmental Management Act 107 of 1998
ODIMWA	Occupational Diseases in Mines and Works Act 78 of 1973
PAJA	Promotion of Administrative Justice Act 3 of 2000

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CONTENTS



RETURN TO THIS
TABLE OF CONTENTS





VIEW THE START OF
THE CURRENT SECTION



INTERACTIVE

TABLE OF CONTENTS

Page	Content	Average Read Time
P4	Overview of Jurisdiction	1 minute 
P5	Introduction 	2 minutes
P6	General Questions	1 minute
P7	Question 1	3 minutes
P8	Question 2	3 minutes
P10	Question 3	2 minutes
P11	Question 4	2 minutes
P12	Question 5	2 minutes
P13	Question 6	3 minutes
P15	Question 7	1 minute
P15	Question 8	1 minute
P17	Case Scenarios	1 minute
P18	Case Scenario 1	2 minutes
P20	Case Scenario 2	2 minutes
P21	Case Scenario 3	2 minutes



SOUTH AFRICA



The law of civil remedies in South Africa has the potential to foster human rights accountability. A broad range of constitutional rights applies not only to public authorities but, in a growing number of instances, to private parties. There are well-established civil law doctrines of direct, accessory, vicarious and veil-piercing liability. However, challenges remain. The costs of litigation are a serious disadvantage. There are also general delays associated with litigation.

INDICES

44/167

Democracy Index
2021 Ranking

79/100

Freedom House
2022 Score

70/180

Transparency International
Corruption Index 2021 Ranking

The focus jurisdictions within the scope of the project have been selected to maximise diversity and representativeness. They reflect both common law and civil law traditions, a wide geographic distribution, different political systems, and varying levels of socio-economic development. The latter factors may impact the overall efficacy of the law on civil remedies and respect for the rule of law as a value. To provide useful context about the jurisdiction, each report indicates the relevant ranking or score of that jurisdiction in three leading global indices on democracy and the rule of law: [Democracy Index](#) by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); [Freedom House](#) (rates people's access to political rights and civil liberties with 100 being an optimal score); and [Transparency International Corruption Index](#) (ranks 180 countries by their perceived levels of public sector corruption).



Introduction

1. The Republic of South Africa has a mixed legal system.¹ Roman-Dutch civil law (prior to codification) was introduced in the early days of colonialism. Over time, as England took over and colonised territories previously controlled by the Dutch and their successor Republics, English common law had a marked influence in the legal system (in civil procedure and public law), and in the development of substantive private law. The 'third grace' of South Africa's legal system is indigenous customary law, which has gained proper recognition since the end of apartheid.
2. From its Roman-Dutch heritage, South Africa's civil law of remedies is governed by the law of delict, which is applicable to both private and public bodies. The law of delict is covered by three general actions rather than by specific torts (as in common law jurisdictions). The principles of delict are predominantly sourced in case law. And while actions are Roman-Dutch in origin, South African courts often cite cases from other Commonwealth jurisdictions in developing the law.
3. South Africa's Constitution² (the Constitution) is the supreme law. It contains a Bill of Rights, protecting amongst others the rights to life, personal freedom, dignity, bodily security, psychological integrity, property, privacy and freedom of expression. The courts are constitutionally required to develop the common law by promoting the 'spirit, purport and objects' of the Bill of Rights.³ Claims for the civil violation of these constitutionally protected rights have been given effect through the law of delict, by their **indirect rather than direct application**.⁴ The Constitution also mandates courts to consider international law when interpreting the Bill of Rights.⁵ The international law considered by the courts includes binding and non-binding instruments, as well as decisions and comments of courts and bodies responsible for their enforcement and interpretation.⁶
4. Parliament has also enacted legislation giving effect to and protecting various rights, as well as providing remedies for the breach of such rights. This includes in the labour and employment context, as well as in environmental protection.⁷ Other statutes, which do not explicitly give effect to rights, may also provide remedies for civil wrongs.⁸
5. Finally, South Africa has a constitutional right to administrative justice,⁹ (which is also given effect in statute¹⁰) and the courts have strong powers of judicial review over all exercises of public power. This branch of law also provides remedies for civil wrongs in certain contexts.

1 See, generally, Reinhard Zimmerman and Daniel Visser 'Introduction: South Africa as a Mixed Legal System' in Reinhard Zimmerman and Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta & Co Ltd 1991) 1.

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

3 [Constitution s 39\(2\)](#).

4 *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) [56].

5 Constitution s 39(1)(b).

6 *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) [35].

7 Which are discussed in detail in [6], [17]–[18] below.

8 For example, the [Road Accident Fund Act 56 of 1996](#) creates a statutory compensation scheme funded by a fuel levy. The Fund is obliged to compensate any person for any loss or damage they have suffered as a result of a bodily injury or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle in South Africa where the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle.

9 Constitution s 33.

10 [Promotion of Administrative Justice Act 3 of 2000](#) (PAJA).

General Questions





Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

6. Yes, such a claim can be brought in terms of the law of delict against both private and public bodies, and certain statutory remedies may also be available under the [Labour Relations Act 66 of 1995](#) (LRA), the [Basic Conditions of Employment Act 75 of 1997](#) (BCEA) or the [National Environmental Management Act 107 of 1998](#) (NEMA).
7. There are three causes of action in delict at common law. The **Aquilian action** provides a remedy to obtain damages to compensate for patrimonial loss caused by another's wrongful and intentional or negligent positive conduct or, in certain circumstances, by omission.¹¹ The **action for pain and suffering** allows a victim to recover damages for non-patrimonial loss for bodily injuries, such as pain or disfigurement. The **actio iniuriarum** remedies intentional violations of common law personality rights to reputation (defamation), dignity (violation of privacy), and bodily integrity (assault or wrongful arrest and imprisonment).¹² Damages are compensatory and not punitive in nature.¹³
8. As mentioned, these actions apply both to private parties (whether natural or juristic persons¹⁴) and to public bodies, although the precise application of the principles varies depending on the harm at issue and the body being sued.
9. It is important to emphasise that juristic entities are both beneficiaries of rights and duty-bearers of rights under South Africa's Constitution.¹⁵ The courts have accordingly imposed obligations upon companies in a variety of contexts. For example, mining companies and their directors may in some circumstances be bound by the right to a healthy environment.¹⁶ And where private persons purchase property in order to develop it, the right to housing may bind them to continue housing illegal occupiers where their immediate eviction would lead to homelessness.¹⁷
10. In the labour and employment context, section 23 of the Constitution entrenches a right to 'fair labour practices'. The LRA and the BCEA give effect to this right. Other statutes regulate harmful labour conditions and provide for compensation to be paid from statutory schemes.¹⁸ The LRA proscribes unfair dismissals and unfair labour practices,¹⁹ and provides a variety of remedies.²⁰ This includes compensation²¹ which is limited to either 12- or 24-months remuneration, depending on the nature of the dismissal or practice.²²

11 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A. An English translation of the judgment is available: *Minister of Police v Ewels* [1975] ZAENGTR 2 (23 May 1975).

12 Alistair Price, 'South Africa: Civil Liability for Constitutional Wrongs' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022) 289, 297.

13 JC van der Walt and JR Midgley, *Principles of Delict* (4th edn, LexisNexis 2016) para 192.

14 A juristic person is one that is recognised by the law and that is capable of acquiring rights and incurring obligations and capable of suing and being sued. This includes companies and corporations.

15 Constitution ss 8(2), (3) and (4). See, generally, Mbuyiseli Madlanga, 'The Human Rights Duties of Companies and other Private Actors in South Africa' (2018) 29 *Stellenbosch Law Review* 359.

16 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W).

17 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC).

18 See [Compensation for Occupational Injuries and Diseases Act 130](#) of 1993 (COIDA) and [Occupational Diseases in Mines and Works Act 78](#) of 1973 (ODIMWA).

19 LRA Ch VIII.

20 LRA s 193.

21 LRA s 193(1)(c) and (4).

22 LRA s 194.

11. Section 24 of the Constitution guarantees the right to a safe environment, and imposes obligations on the State to protect the environment through reasonable legislative and other measures. NEMA is the principal statute giving effect to this constitutional right. Section 28 of NEMA provides for environmental liability.
12. Civil wrongs may potentially also be remedied by the award of direct constitutional damages where it is necessary and 'appropriate'²³ to protect and enforce the rights in the Bill of Rights. However, the courts are ambivalent about this remedy, and its application is limited as the common law of delict is usually broad enough to provide the relief that would be 'appropriate' for a breach of constitutional rights.²⁴
13. The law of unjust enrichment provides for remedies where one party is enriched at the expense of another.²⁵ Where a claim cannot be established in delict, but a claimant can demonstrate that another party has been enriched at their expense, this may provide a remedy. In proceedings for the judicial review of administrative action, compensation may be awarded where a government decision is set aside, but only in extraordinary circumstances.²⁶ Negligent exercises of public power do not generally give rise to delictual liability.²⁷



What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

Suing in delict

14. In order to establish Acquilian liability, the plaintiff must demonstrate that the defendant's wrongful and intentional or negligent conduct or omission caused the plaintiff harm or loss which is not too remote.²⁸ The action for pain and suffering has the same elements.²⁹ The *actio iniuriarum* also has the same elements, save that the element of fault requires intention.³⁰
15. The element of wrongfulness or unlawfulness is normative in nature. The courts consider whether there is a legal duty to avoid or prevent loss. A positive act which causes harm is presumed to be wrongful. A negligent omission which results in harm, by contrast, is generally presumed to be lawful (ie not wrongful).³¹ But a negligent omission will be regarded as wrongful where the legal convictions of the community having regard to all relevant circumstances require that there is a legal duty to act to avoid loss.³² Intentional harm-causing acts or omissions

²³ Constitution s 38 provides for a '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 (author's emphasis) ...'.

²⁴ *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC) [60]–[69].

²⁵ Daniel Visser, *Unjustified Enrichment* (Juta & Co Ltd 2008).

²⁶ PAJA s 8(1)(c)(ii)(bb).

²⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC).

²⁸ Anton Fagan, *Acquilian Liability in the South African Law of Delict* (Juta & Co Ltd 2019) ix.

²⁹ Van Der Walt and Midgley (n 13) paras 2–3.

³⁰ *ibid.*

³¹ *Minister of Safety & Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA) [12].

³² *ibid* [13]. Claims for pure economic loss – financial loss with no physical harm to a claimant's person or property – are similarly presumed to be lawful, and will be held to be wrongful where that is required by the legal convictions of the community, as informed by the values and norms of the Constitution – see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73, 2006 (1) SA 461 (SCA) [13].

are more readily found to be wrongful.³³ For example, intentional and dishonest exercises of public power may give rise to delictual liability.³⁴ The element of wrongfulness ultimately depends on a judicial determination on whether it would be reasonable to impose liability in the circumstances. Such judicial determination of reasonableness depends on considerations of public and legal policy.³⁵ The Constitution embodies an '**objective value system**' which informs this inquiry.³⁶ Values underpinning the Bill of Rights³⁷ and broader constitutional principles such as accountability³⁸ are applied in this analysis. In this way, rights are indirectly applied in civil claims.

16. In order to establish liability, the wrongdoer's conduct or omission must be the **factual cause** of the claimant's loss. The traditional 'but-for' test is usually applied to establish a causal link or the absence of such a link.³⁹ The question is whether the loss would have occurred in the absence of the negligent conduct or omission. If that is so, then the conduct or omission is not a factual cause of the loss. The element of **remoteness or legal causation** requires, in addition, that the culpable conduct or omission be linked sufficiently closely to the loss, which is determined by considerations of legal and public policy.⁴⁰ In this way, not all conduct which is the factual cause of harm results in liability and the remoteness element acts as a limiting factor where imputing liability would be untenable. It is a flexible test which consider various factors, including the foreseeability of loss and the proximity of the conduct and loss. While wrongfulness and remoteness both require considerations of legal and public policy, they are distinct elements. Foreseeability is considered in the remoteness inquiry, but not in the inquiry into wrongfulness.⁴¹

Statutory claims

17. The LRA provides a wide definition of what will constitute a dismissal, and the circumstances in which it will be unfair,⁴² and defines unfair labour practices.
18. NEMA, as mentioned, empowers the State to recover costs from a polluter. A private party wishing to claim damages for environmental harm, could sue in delict. If criminal proceedings are pursued by the State and the polluter is convicted, the criminal court would be empowered to award damages to compensate a person for loss suffered.⁴³

Constitutional damages

19. The law governing the award of constitutional damages remains undeveloped. Thus far, the apex courts have held that two considerations are relevant: first, the **existence of an alternative remedy** that would vindicate the infringement of the rights; and second, whether that alternative remedy is **effective or appropriate**

33 *Minister of Finance and Others v Gore NO* [2006] ZASCA 98, 2007 (1) SA 111 (SCA) [88]–[89].

34 *ibid.*

35 *Le Roux v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC) [122].

36 *Carmichele* (n 4) [56].

37 *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36, 2016 (3) SA 528 (CC).

38 *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA) [20].

39 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134, 2009 (2) SA 150 (SCA) [30].

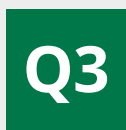
40 *ibid* [30]–[31].

41 *MTO Forestry (Pty) Ltd v Swart NO* [2017] ZASCA 57, 2017 (5) SA 76 (SCA) [18].

42 LRA ss 186, 187 and 188.

43 NEMA s 34(1), (2) and (3).

in the circumstances.⁴⁴ While alternative remedies do not preclude the award of constitutional damages, they are a weighty factor against them.⁴⁵ Given the relatively flexible character of both the Aquilian action and the *actio iniuriarum*, notably through the element of wrongfulness, the law may be developed to cover new circumstances and give effect to constitutional values. The Constitutional Court has also held recently that constitutional damages are unlikely to be appropriate to address violations of socio-economic rights, which are better addressed through the assessment of the reasonableness of measures taken by the State to give effect to those rights⁴⁶ (which may include the right to a safe environment).



Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?

20. South African law recognises vicarious and accessory liability, and also holds the State liable for the wrongful conduct of others in certain instances.
21. All private and public employers may be held **vicariously liable** for their employees' delicts committed in the course of their employment. There must be a 'sufficiently close' link between the employee's actions for their own interests and the purposes and the business of the employer.⁴⁷ For example, the Minister of Safety and Security was held liable in delict for damages suffered by a claimant who had been raped by three uniformed and on-duty policemen when she had accepted a lift home from them. The Constitutional Court made the finding that there was a sufficiently close link because: the policemen in question and the Minister (their employer) owed a duty to protect members of the public; the claimant had placed her trust in the police officers; and their conduct consisted of both positive actions (in brutally raping the claimant) and omissions (in failing to protect her).⁴⁸
22. **Accessory liability** arises where a party is not the immediate perpetrator of the delict, but instigated or aided it.⁴⁹ It also applies in respect of statutory wrongs.⁵⁰
23. As mentioned, the State has been held liable for negligent failure to protect against crimes committed by third parties. So where a passenger on a train was robbed, beaten up and thrown out of a door in the carriage which did not close, the state-owned entity in charge of the train was held liable, for having failed to post a guard in the train and to ensure that the doors of the carriage closed.⁵¹
24. South African law also recognises a principle of joint and several liability, where **joint wrongdoers** are held liable for the harm caused by their joint wrongdoing.⁵²

⁴⁴ *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37, 2022 (1) BCLR 46 (CC) [103].

⁴⁵ *ibid* [104].

⁴⁶ *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45, 2022 (8) BCLR 985 (CC) [177].

⁴⁷ *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC) [32].

⁴⁸ *ibid* [50]–[52].

⁴⁹ *McKenzie v Van der Merwe* 1917 AD 41 (AD) at 51.

⁵⁰ Price (n 12) 302.

⁵¹ *Mashongwa* (n 37).

⁵² Van der Walt and Midgley (n 13) paras 220–222.

Q4

When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or independent contractor in a supply chain?

25. South African corporate law recognises that in certain instances the **corporate veil** may be pierced so that the shareholders of a company (whether that be natural persons or other juristic entities) are held liable for the debts of the company, including its delicts. The common law as supplemented by a statutory provision⁵³ empowers the courts to pierce the veil where there has been fraud, dishonesty or a similar illegitimate use of the concept of juristic personality that adversely affects a third party in a manner which should not be countenanced.⁵⁴ The courts balance the imperative to preserve separate legal personality and the abuse of separate legal personality, and they look to substance rather than form.⁵⁵
26. Liability has also (rarely) been imposed for the wrongdoing of sub-contractors. A principal is, however, only liable for the wrongs of an independent contractor where the **principal is at fault**.⁵⁶ That is, a principal is only liable where it owed a duty to a third party and acted negligently towards the third party. The liability is Aquilian in nature, and it is the conduct of the principal itself which gives rise to liability. In other words, the principal is not held liable vicariously for the conduct of the contractor. A claimant would have to demonstrate that the principal was negligent in appointing the sub-contractor which resulted in the harm or loss claimed.
27. In principle, a holding company could also be held liable for its own conduct in not preventing wrongs committed by subsidiary companies (where a duty to do so is established) on this basis.

SPOTLIGHT: CASE STUDY

At the time of preparing this report, [an application to certify a class action](#) against Anglo American SA Ltd, a South African mining company, is pending before the High Court. The claimants contend that Anglo American is liable for lead poisoning suffered by women and children who lived in proximity to the Kabwe lead mine in Zambia between 1925 and 1974, when a subsidiary of Anglo American controlled the mine. Anglo American's duty of care to the claimants is asserted on the basis of its knowledge of lead pollution risks, its control of the mine, and its investments in and oversight and support of the mine.

53 [Companies Act 71 of 2008](#) s 20(9).

54 *Ex parte Gore NNO* [2013] ZAWCHC 21, 2013 (3) SA 382 (WCC) [35].

55 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* [1995] ZASCA 53, 1995 (4) SA 790 (AD) 803H.

56 *Chartaprops 16 (Pty) Ltd v Silberman* [2008] ZASCA 115, 2009 (1) SA 265 (SCA) [28].

Q5

What remedies are available under the law of civil remedies to victims of the three defined harms in your jurisdiction?

28. The delictual actions give rise to various remedies. The most common remedies are the **awarding of compensatory damages** and **issuing of interdicts** (injunctions) to prevent anticipated wrongdoing or stop ongoing wrongdoing.⁵⁷ An **apology** is available in defamation actions.⁵⁸
29. In the case of wrongful arrest, a claimant may have a claim arising from all three of the delictual actions if the claimant can establish patrimonial loss, a violation of their common law right to dignity, and physical harm.
30. As mentioned already, NEMA provides certain **remedies for environmental degradation**. Anyone who causes or may cause 'significant pollution or degradation of the environment' is under a duty to take reasonable measures to prevent or minimise the pollution or degradation, failing which the party may be held liable for the costs of remedying the environmental harm. The State is empowered to remedy the degradation of pollution, and to claim the costs for this from the party at fault. General delictual actions provide remedies for private individuals who suffer loss due to environmental damage, which will be informed by the constitutional right to a healthy environment.
31. If the state fails to take reasonable legislative and other measures to address harms to the environment, a public law case could be instituted to challenge such conduct, and to seek **public law remedies**. This might, for example, include requiring the Minister responsible for the environment to adopt regulations governing greenhouse gas emissions in industry.⁵⁹
32. In the employment context, the LRA provides other **remedies for unfair dismissals and unfair labour practices** in addition to compensation. These include orders to reinstate employees.⁶⁰
33. In relation to workplace injuries, the [Compensation for Occupational Injuries and Diseases Act 130 of 1993](#) (COIDA) and other similar statutes, provide a '**no-fault system**' where an employee may claim compensation from a statutory scheme set up for this purpose. Compensation is capped and calculated by an administrative official in accordance with formulae set out in the statute. COIDA also extinguishes an employee's common law claim for compensation against their employer. By contrast, the [Occupational Diseases in Mines and Works Act 78 of 1973](#) (ODIMWA) also creates a statutory compensation scheme, but it does not extinguish the employer's common law liability for additional compensation.⁶¹

⁵⁷ Price (n 12) 291.

⁵⁸ *ibid.*

⁵⁹ *Trustees for the time being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 208.

⁶⁰ LRA s 193.

⁶¹ *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3, 2011 (3) SA 237 (CC).

SPOTLIGHT: CASE STUDY

Mr Mankayi, a mineworker, instituted an action for delictual damages against his employer AngloGold Ashanti Ltd. He contended that AngloGold had breached its legal duty under the common law and statute to provide a safe and healthy environment in which to work. He contended that while he was entitled to claim compensation under ODIMWA (and had done so) he was not precluded from suing AngloGold at common law. While COIDA extinguishes an employee's common law claim against their employer, Mr Mankayi pointed that this did not apply to him as ODIMWA barred him from claiming benefits under COIDA. While the High Court and Supreme Court of Appeal had found that COIDA barred his claim, the Constitutional Court agreed with Mr Manyaki's contentions and held: that COIDA did not apply to him as an employee; and that his common law claim against his employer had not been extinguished.⁶²

Q6

What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?

Advantages

34. From the discussion above, it should be apparent that the law of delict is the primary means by which civil claims may be pursued to obtain monetary redress for human rights violations. The **flexibility** of the common law and the influence of constitutional values – including those underpinning the rights under discussion – provide scope for remedying a wide range of civil wrongs.
35. South African courts have also developed a **class action procedure**.⁶³ This procedure has been used effectively by current and previously employed mineworkers in the gold mining industry, and their dependants, to claim compensation from mining houses for having contracted silicosis and tuberculosis during their employment with the mines.⁶⁴

62 *ibid.*

63 *Children's Resources Centre Trust v Pioneer Foods* [2012] ZASCA 182, 2013 (2) SA 213 (SCA); *Mukkadam v Pioneer Foods* [2013] ZACC 23, 2013 (5) SA 89 (CC).

64 *Nkala v Harmony Gold Mining Company Limited* [2016] ZAGPJHC 97, 2016 (5) SA 240 (GJ); *Ex Parte Nkala* [2019] ZAGPJHC 260.

SPOTLIGHT: CASE STUDY

In May 2018, five mining groups representing 32 companies and 82 mines, agreed to pay R5 billion to settle a class action brought by thousands of mineworkers who contracted tuberculosis and silicosis, and their dependants. This litigation was preceded by test cases and parallel litigation which established the class action procedure in South African law (setting out the test for certification) and established that ODIMWA does not extinguish mineworkers' common law claims for compensation against mining groups. The mining groups vigorously opposed certification of the class action as it concerned losses stretching over many decades and affected the whole industry. The settlement was eventually reached after certification.⁶⁵

36. In South African civil procedure, legal costs are usually ordered against the losing party in the proceedings. The Constitutional Court has however developed a principle which provides that **costs ordinarily will not be awarded against a private party** who unsuccessfully litigates against the State, where the party **asserts constitutional rights or raises genuine constitutional issues**.⁶⁶ This excludes litigation that is frivolous, vexatious or manifestly inappropriate.⁶⁷ The Constitutional Court has recently emphasised that this principle applies also when a private party asserts constitutional rights against the State by suing in delict.⁶⁸ Thus, victims of rights violations should not be dissuaded from pursuing civil claims due to the risk of an adverse costs order.
37. A further advantage is that section 38 of the Constitution grants **standing** to a wide variety of persons to institute legal proceedings concerning the violation of human rights, including persons acting in the public interest.

Disadvantages

38. The **costs** of litigation are a serious disadvantage and may impede access to justice. This can be remedied if lawyers work on a contingency or pro bono basis.
39. There are also general **delays** associated with litigation. Certifying a class action, for example, can take many years and requires many hours of legal work. Even once a class action is certified and settled, payment of claims to the victims of rights violations may also be delayed. Even simple claims may take years to be finalised. For example, while the High Court approved the R5 billion silicosis settlement in July 2019, two years after the trust had been set up to administer the compensation process, payment had still not been made to a large proportion of the claimants.⁶⁹
40. Another disadvantage of pursuing civil claims is that in most circumstances, they are **individualistic and backwards looking** (ie aimed at rectifying past wrongs), and do not necessarily result in fewer rights violations in future. Other constitutional remedies, such as supervisory orders concerning Government social programmes,⁷⁰ may be more suited to addressing systemic problems.

65 Jason Brickhill, 'A river of disease: Silicosis and the future of class actions in South Africa' (2021) 37 *South African Journal on Human Rights* 31.

66 *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14, 2009 (6) SA 232 (CC) [21]–[25].

67 *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45, 2017 (1) SA 645 (CC) [18]–[23].

68 *AK v Minister of Police* [2022] ZACC 14.

69 Thabo Molelekwa, 'Silicosis: Can they just pay me before I die?' *Mail & Guardian* (Johannesburg, 3 May 2021).

70 Kent Roach and Geoff Budlender, 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325.

Q7

Can civil claims be brought against a foreign defendant and if so, what are the rules for that?

41. Yes, delictual claims may be pursued against foreign defendants in South African courts. This may be achieved in two ways.⁷¹
42. First, a plaintiff may obtain an order from a South African court attaching assets of the foreign party⁷² to found or confirm the court's jurisdiction.⁷³ Jurisdiction is 'founded' if the only basis on which the court will have jurisdiction is the attachment of assets. Jurisdiction is 'confirmed' or strengthened by attaching assets where there is another basis or ground for the court to assert jurisdiction, such as the delict being committed within the court's geographical jurisdiction. The purpose of the procedure is to ensure that an asset is available to be executed in compensation in the event that the claimant succeeds. There are limits. A foreign plaintiff cannot attach a foreign defendant's assets to assert a South African court's jurisdiction if there is no other jurisdictional link to the court (for example, if the alleged wrong occurred outside the court's geographical jurisdiction). Thus, only a plaintiff domiciled and resident in South Africa⁷⁴ may seek the attachment of a foreign defendant's assets to found the South African's court's jurisdiction.
43. Second, the foreign defendant may submit or consent to the South African court's jurisdiction. If there are no other grounds for the court to assert jurisdiction, the consent will only be effective if the plaintiff is domiciled and resident in South Africa.

Q8

Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

44. [SAFLII](#) is an open-access resource which publishes judgments in all cases from South Africa's apex courts, as well as most of the important judgments from the High Courts. Links are provided to the judgments on SAFLII discussed in this chapter.
45. South Africa has a number of public interest law firms, NGOs and independent public bodies operating in various sectors and addressing various human rights issues. Their websites contain a wealth of information pertaining to ongoing and finalised human rights claims and other human rights resources. These include:
- [Legal Resources Centre \(LRC\)](#)
 - [Southern Africa Litigation Centre \(SALC\)](#)
 - [Centre for Environmental Rights \(CER\)](#)

⁷¹ See, generally, Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel, *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edn, Juta & Co Ltd 2009) Ch 3.

⁷² A 'peregrinus'.

⁷³ An attachment *ad fundandam jurisdictionem* or *ad confirmandam jurisdictionem*. The principles are summarised in *Federation Internationale de Football Association v Sedibe* [2021] ZASCA 113, [2021] 4 All SA 321 (SCA) [24]–[27].

⁷⁴ An 'incola'.

- [Centre for Applied Legal Studies \(CALS\)](#)
- [Lawyers for Human Rights \(LHR\)](#)
- [South African Human Rights Commission \(SAHRC\)](#)
- [Equal Education Law Centre](#)
- [Ndifuna Ukwazi](#)

46. **Websites:**

- [Miners' silicosis litigation](#)
- [Kabwe lead poisoning litigation](#)

47. **Useful academic texts include:**

- Anton Fagan, *Aquilian Liability in the South African Law of Delict* (Juta & Co Ltd 2019)
- JC Van Der Walt and JR Midgley, *Principles of Delict* (4th edn, LexisNexis 2016)
- Max Du Plessis et al (eds), *Class Action Litigation in South Africa* (Juta & Co Ltd 2017)
- Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta & Co Ltd 2018)
- Alistair Price, 'The Influence of Human Rights on Private Common Law' (2012) 129 *South African Law Journal* 330
- Alistair Price, 'South Africa: Civil Liability for Constitutional Wrongs' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022)
- Jason Brickhill, 'A river of disease: Silicosis and the future of class actions in South Africa' (2021) 37 *South African Journal on Human Rights* 31



Case Scenarios

1 Case Scenario

A wave of peaceful anti-government protests in the capital city of X Country denounced controversial legislation reforming electoral law. X Country's police responded to the peaceful protests with violence and brutality. The protesters were beaten and tear gassed. Some were detained for several days without charge or access to the lawyers. Human rights activists reported alleged torture and other ill-treatment in detention.

The protesters gathered in the market square where many shops and office buildings are located. Security Co is a private company providing security to the premises and personnel of the shops and offices. There is no evidence that personnel of the Security Co were involved in the violence that injured protesters. There is, however, evidence that on several occasions personnel of Security Co provided X Country's police with vehicles, equipment, and water. [READ MORE](#)

2 Case Scenario

X Group is a group of extractive companies. Parent Co is the parent company of X Group which is responsible for the overall management of X Group's business. X Group's extractive operations are carried out by its subsidiaries. Every subsidiary is incorporated as a separate legal entity and is responsible for an individual project. Subsidiary Co is a licence holder and operator of a major extractive project. Parent Co is the sole shareholder of Subsidiary Co.

X Group has been accused of severe environmental pollution arising from oil spills caused by Subsidiary Co's extractive project. Oil extracted by Subsidiary Co leaked and flowed into local rivers and farmland in the neighbourhood of the project site, destroying crops and killing fish. The result was that the food and water supplies of the local population were severely affected, and in addition members of the local community also experienced breathing problems and skin lesions. Journalists

and environmental activists publicised the harm done to the local environment and community. Parent Co has made no statements about the oil spills but, in a recent report to its shareholders, Parent Co repeated that the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations. [READ MORE](#)

3 Case Scenario

Factory Co owns a garment factory that supplies many large international clothing retailers. The working conditions in Factory Co's factory have generally been poor and exploitative and have included physical abuse for non-compliance with production targets, sexual harassment of female workers by male supervisors, and compulsory unpaid overtime. Local trade unions have regularly accused Factory Co of poor factory workplace safety, including a lack of emergency procedures, ineffective fire safety equipment and few emergencies medical supplies. Two months ago, during a fire at Factory Co's garment factory, seventy-six workers died and fifty-eight were injured, many seriously. Preliminary investigations suggest that employees suffocated or were burned alive because windows were barred, emergency exits closed, smoke alarms did not work, and supervisors did not implement safety protocols and fire evacuation procedures.

Brand Co is the major purchaser of clothes produced by Factory Co's garment workers. It has been an enthusiastic and very public advocate for human rights standards and expressed its commitment to responsible business practices. Several civil society organisations wrote an open letter to the CEO of Brand Co calling on Brand Co to demonstrate leadership in preventing, addressing, and remedying adverse human rights impacts in its supply chain. [READ MORE](#)



CaseScenario 1

Q1

Could injured or unlawfully arrested protestors bring civil claims against the police and/or Security Co (and/or its personnel) in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

48. The victims could sue the Minister of Police and also Security Co in delict, based on the principles of vicarious liability.
49. Claims against the Minister of Police could be instituted based on **Aquilian action** for patrimonial loss suffered by the victims – including medical expenses and loss of earnings caused by the arrest – and also based on action for pain and suffering insofar as the victims suffered from bodily injury. These actions provide effective remedies to vindicate the right not to be tortured.⁷⁵
50. A claim under the *actio iniuriarum* could also be instituted for unlawful arrest and unlawful detention. The victims would have to establish that the officers intentionally deprived them of their liberty.⁷⁶ As the deprivation of liberty is assumed to be wrongful, the police would bear the onus to show why the action was not wrongful.⁷⁷
51. A claim in delict could also be pursued against Security Co. The victims would have to plead and establish that Security Co owed them a duty of care not to provide vehicles, equipment and water to the police in the circumstances of the case. A claim could potentially also be pursued on the basis that Security Co aided the immediate perpetrator of the wrong, the police.
52. Claims could in principle also be instituted against the individual police officers and the employees of Security Co. However, it may be difficult to execute upon any judgment debt against these employees.

Q2

If civil claims would not be the preferred route for holding perpetrators in Case Scenario 1 to account, please indicate any other legal avenues available to the protestors.

53. Civil claims would be the ordinary route for holding the perpetrators to account.

⁷⁵ Constitution s 12(1)(d). See *Fose* (n 24) [67].

⁷⁶ *De Klerk v Minister of Police* [2019] ZACC 32, 2021 (4) SA 585 (CC) [14].

⁷⁷ *ibid.*

54. Other avenues could possibly be pursued alongside the civil claims, such as lodging complaints with the Independent Police Investigative Directorate (IPID),⁷⁸ the independent police watchdog, or the Private Security Industry Regulatory Authority.⁷⁹

SPOTLIGHT: POLICE VIOLENCE



ViewFinder, an investigative journalism platform, has reported that IPID has failed properly and effectively to investigate complaints of police violence, and has in some instances even reportedly covered up police brutality.⁸⁰ Where oversight bodies fail, civil claims may be the only accountability mechanism available to victims.



Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 1?

55. In August 2012, 44 mineworkers were killed by the South African Police in the event that has come to be known as the Marikana massacre, which occurred during a strike at the Lonmin Platinum Mine in the North West Province. The mineworkers had demanded a monthly wage of ZAR 12,500 from their private employer (equivalent to USD 1,500 at the time). The families of the deceased, and other mineworkers who lost income, instituted claims against the South African Government. These claims are slowly being settled.⁸¹



78 Established in terms of Constitution s 206(6) and [Independent Police Investigative Directorate Act 1 of 2011](#).

79 Established in terms of the [Private Security Industry Regulation Act 56 of 2001](#).

80 Daneel Knoetze, 'IPID's cover-up of police brutality in SA' ViewFinder (Cape Town, 7 October 2019).

81 Khaya Koko, 'Marikana lawsuits to be finalised by end of August' Mail & Guardian (Johannesburg, 10 August 2022).

CaseScenario 2

Q1

Could the local community, or its representatives, or someone acting on their behalf, bring civil claims against Parent Co and Subsidiary Co in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

56. A civil claim in delict could be instituted against Subsidiary Co. The victims would have to establish that the oil spill was the factual cause of the harm to their health, drinking supply and food security. In this regard, the Constitutional Court has developed the 'but-for' test for factual causation to introduce a causal principle of liability for negligently exposing others to a risk of harm, where that harm eventuates.⁸²
57. Parent Co could be sued on two bases. First, the victims could demonstrate that Parent Co incorporates separate legal entities for each of its projects to avoid liability for negligent wrongdoing in the execution of a project. If that were possible, a court may pierce the veil of Subsidiary Co's separate juristic personality and hold Parent Co liable for its debts. Second, the victims could plead that Parent Co owed them a legal duty to ensure that its subsidiary took appropriate steps to ameliorate any environmental risks, and negligently failed to comply with that duty. In that case, Parent Co would be held liable for its own wrongdoing.

Q2

If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 2 to account, please indicate any other legal avenues available to the local population.

58. In addition to civil claims, victims could pursue litigation under NEMA. They could apply to court to issue a directive to require Subsidiary Co and Parent Co to take specific measures.⁸³ Failing to comply with such directive is an offence under the Act.⁸⁴
59. If Subsidiary Co and Parent Co were convicted of such offence, the court could award damages in favour of the victims. The responsibility for pursuing a criminal case would, however, primarily rest with the State.

82 *Lee v Minister of Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC).

83 NEMA s 28(12) read with s 28(4) and (5).

84 *ibid* s 49A(1)(g).

Q3 Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?

60. The class action proceedings against Anglo American in respect of lead poisoning at the Kabwe Mine in Zambia is a high-profile case which is currently ongoing before the Gauteng Division of the High Court in Johannesburg, South Africa. (See Spotlight case following para [27] above.)



CaseScenario3

Q1 Would it be possible to bring a civil claim against Factory Co and/or Brand Co? Please also indicate the key elements of liability to be shown by the claimants to hold Factory Co and/or Brand Co liable.

61. The surviving workers and the dependants of the deceased workers would not have a claim in delict against Factory Co. This is because section 35 of COIDA extinguishes such a claim. The constitutionality of this provision has been confirmed by the Constitutional Court.⁸⁵ This is because workers would have a claim for compensation under COIDA.

62. However, as COIDA only excludes the liability of the 'employee's employer',⁸⁶ a claim against Brand Co could potentially be pursued. The victims would have to demonstrate that Brand Co owed them a legal duty that has been violated. In other words, the victims would have to demonstrate that Brand Co's failure to take steps to prevent, address, and remedy adverse human rights impacts in its supply chain (including by Factory Co) was wrongful. This would depend on a variety of factors.

⁸⁵ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18, 1999 (2) SA 1 (CC).

⁸⁶ COIDA s 35(1).

Q2

If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 3 to account, please indicate any other available legal avenues available to the victims and/or their families?

63. COIDA extinguishes the delictual claim of an employee or their dependant against the employer, as it creates a scheme for compensation. The accident would have 'aris[en] out of and [been] in the course of an employee's employment' and would have resulted in the employees' deaths and personal injuries.⁸⁷ Section 22 provides for a right of compensation in terms of the Act.
64. The victims could also complain to the Department of Employment and Labour, which has statutory powers to investigate and institute formal inquiries into the tragedy.⁸⁸

Q3

Are there any high-profile lawsuits in your jurisdiction relevant for Case Scenario 3?

65. While there are no high-profile lawsuits, harmful workplace environments in the textile industry are often reported in the media.⁸⁹



⁸⁷ COIDA s 1, definition of 'accident'.

⁸⁸ [Occupational Health and Safety Act 85 of 1993](#) ss 31–33.

⁸⁹ Mercury Reporters '[Newcastle textile industry workers conditions resemble 'modern day slavery'](#)' *The Mercury* (Durban, 20 February 2019).

