

# The Evolution of *Litis Contestatio* and its Impact on Common Law

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## INTRODUCTION

*Litis contestatio*, a concept rooted in Roman law, continues to play a critical role in modern legal systems. Initially, it was a procedural stage that marked the “joining of issues” between litigants.<sup>1</sup> It has now evolved into what is known as the “close of pleadings” in South African law.<sup>2</sup> The close of pleadings indicates the stage in legal proceedings when all parties have delivered their preliminary filings in instituting/defending action/application proceedings, the trial issues are clearly established and any further amendments or filings require court approval. This article explores the origins of *litis contestatio*, its adaptation in contemporary legal practice, and recent developments in its interpretation through landmark cases such as *Nkala and Others v Harmony Gold Mining Company Limited and Others* and *Ngubane v Road Accident Fund*.

## DEFINING THE ROLE OF *LITIS CONTESTATIO*

The term “*litis contestatio*” (or “the close of pleadings”) refers to a crucial juncture in legal proceedings when all parties conclude their initial submissions, thereby clarifying the triable issues.<sup>3</sup> Besides laying out the structure for the case, this procedural stage also affects the management of claims in circumstances where a plaintiff has died prior to finalising or adjudication of the case.<sup>4</sup> *Litis contestatio* highlights the continual interaction between historical legal principles originating from Roman law and present-day challenges faced in achieving justice for litigants.<sup>5</sup>

## *LITIS CONTESTATIO* AND THE COMMON LAW OF SOUTH AFRICA

For decades, South African courts adhered to a common law principle that a deceased’s estate could only claim damages if the injured party had initiated legal action and reached *litis contestatio* before the injured party’s death.<sup>6</sup> This principle posed challenges for plaintiffs in lengthy litigation processes, particularly in cases involving wrongful acts resulting in injury and eventual death.<sup>7</sup>

The ruling in *Nkala and Others v Harmony Gold Mining Company Limited and Others*<sup>8</sup> represented a major turning point in this domain. The case involved mineworkers seeking compensation for illnesses such as silicosis and tuberculosis caused by inadequate safety measures in gold mines. Prior to this judgment, the death of a plaintiff before the close of pleadings nullified their claim for general damages. The court in *Nkala* evolved the common law so that claims for general damages could be transferred to a deceased person’s estate, even if *litis contestatio* had not yet been established at the time of death.

The court stressed that this development pertained only to general damages such as pain and suffering, disfigurement, and loss of life amenities and did not include special damages, which are more complicated to calculate. The purpose of the amendment of the common law position was to strike a balance between fairness for plaintiffs and their dependents and the need for consistent legal procedures.

## CHALLENGES AND CONTRADICTIONS IN SUBSEQUENT JUDGMENTS

Unlike the *Nkala* case, the court in *Ngubane v Road Accident Fund*<sup>9</sup> served to reaffirm the original common law principle. In this instance, the Gauteng Division of the High Court refused to allow general damages claims to be pursued by a deceased’s estate when the plaintiff had died prior to *litis contestatio* being reached. The court maintained that the common law ought to prioritize the protection of individuals’ direct rights, rejecting the idea that transferring such claims would remedy inequality.

These judgments are at odds with one another, underscoring a continuing dispute regarding the evolution of common law in this domain. *Nkala* set up a more inclusive approach to general damages, but later cases such as *Ngubane* took a more conservative approach, stressing that any legal progress must be in accordance with the Bill of Rights.

## CONCLUSION

The evolution of *litis contestatio* reflects efforts to tackle contemporary challenges, but recent cases highlight the complexities involved in balancing fairness, efficiency and consistency within the realm of law. The differing rulings in *Nkala* and *Ngubane* showcase the evolving character of common law, allowing for ongoing discussion and adjustment in this field while honouring established frameworks.

<sup>1</sup>*Ms Khan 2018 Are close of Pleadings now irrelevant? An Evaluation of the Impact the Nkala Judgment has on Litis Contestatio*

<sup>2</sup>*Ibid*

<sup>3</sup>*Ibid*

<sup>4</sup>*Ibid*

<sup>5</sup>*Ibid*

<sup>6</sup>*Ibid*

<sup>7</sup>*Ibid*

<sup>8</sup>*Nkala and Others v Harmony Gold Mining Company Limited and Others 2016 (7) BCLR 881 (GJ)*

<sup>9</sup>*Ngubane v Road Accident Fund (2020/20008) [2022] ZAGPJHC 275*



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