

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

Case No. 32777/2020

In the application for admission as *amicus curiae* of:

**HUMAN RIGHTS WATCH**

Applicant

In the matter between:

**VARIOUS PARTIES ON BEHALF OF MINORS**

First to twelfth applicants

**████████████████████**

Thirteenth applicant

and

**ANGLO AMERICAN SOUTH AFRICA LIMITED**

Respondent

with

**AMNESTY INTERNATIONAL**

First *amicus curiae*

**THE SOUTHERN AFRICAN LITIGATION CENTRE**

Second *amicus curiae*

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**HUMAN RIGHTS WATCH'S HEADS OF ARGUMENT  
APPLICATION FOR ADMISSION AS AN *AMICUS CURIAE***

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## INTRODUCTION

1. Human Rights Watch applies to be admitted as an *amicus curiae* in the certification application and to make both written and oral submissions.
2. If admitted, Human Rights Watch will make submissions on two issues.

### The Human Rights Watch report

3. The first part of the submissions will address the Human Rights Watch report entitled: “‘We have to be worried’ – the impact of lead contamination on children’s rights in Kabwe, Zambia” (“**the Human Rights Watch report**”)<sup>1</sup> and submissions to the United Nations Committee on the Rights of the Child (“CRC”) on the impact of lead pollution on children’s rights (“**the CRC submissions**”).<sup>2</sup> The respondent uses the Human Rights Watch report and the CRC submissions to substantiate its defence against the applicants’ claim. Human Rights Watch will address the relevant facts and law omitted by the respondent in its presentation of the Human Rights Watch report and the CRC submissions.

### International human rights law and corporate responsibility to respect

4. The second part of the submissions will deal with the principles of due diligence under international human rights law as developed by the United Nations Guiding Principles on Business and Human Rights (“**the Guiding Principles**”)<sup>3</sup> and the

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<sup>1</sup> Attached to the applicants’ founding affidavit (FA) as ZMX10 p. 001-550 to 001-653.

<sup>2</sup> Attached to the respondent’s supplementary answering affidavit (SAA) as SA2 p. 001-7524 to 001-7529. See also HRW1 attached to Human Rights Watch’s founding affidavit (HRW FA).

<sup>3</sup> United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) (‘Guiding Principles’), endorsed by the Human

way in which the notions of the duty of care in tort law interact with components of due diligence in practice.

5. We submit that Human Rights Watch's intervention will draw attention to facts of material relevance to the issues before the court and to which the court's attention would otherwise not be drawn. This will assist the court in its assessment of whether it is in the interests of justice to certify the proposed class action.<sup>4</sup>

## THE CERTIFICATION APPLICATION

6. The applicants seek certification of their class action. The purpose of the class action is to claim damages from the respondent on behalf of two proposed classes who reside in the Kabwe district, Zambia and who have suffered injury as a result of exposure to lead: the class of children and the class of women of child-bearing age.<sup>5</sup>
7. The applicants' cause of action against the respondent is grounded in Zambian law, specifically the tort of negligence.<sup>6</sup>
8. The applicants allege that the respondent both caused and materially contributed to the ongoing harm suffered by children and women of child-bearing age in Kabwe as a result of exposure to lead pollution deposited in the vicinity of the

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Rights Council, Resolution 17/4 of 16 June 2011, available at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>4</sup> See *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) para. 5; *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) para. 7.

<sup>5</sup> Applicants' FA p. 001-24 para. 23.

<sup>6</sup> Applicants' FA p. 001-123 para. 265-266; annexure ZMX1 p. 001-149 to 001-190.

Mine during the period 1925 to 1974 (“the relevant period”).<sup>7</sup>

9. The respondent contends that it did not cause the current harm and is not liable for harm caused by the current state, nor liable to remedy it. The respondent alleges that Zambian Consolidated Copper Mines Limited (“ZCCM”) caused the failed state of the Mine and its surrounds and it remains liable today for rehabilitation and remediation.<sup>8</sup>

### **The respondent’s reliance on the Human Rights Watch report**

10. The respondent relies on the Human Rights Watch report in support of its contention that the certification application must fail *inter alia* because ZCCM is responsible for the current uncontrolled and polluted conditions and is liable for the ongoing exposure to harm by the community.<sup>9</sup> The respondent contends –

10.1. “The lack of implementation of [the Zambian Mining and Environmental Remediation Improvement Project] has given rise to scathing reports by Human Rights Watch ... . This criticism was squarely, and fairly, directed at the failings of ZCCM and the Zambian government and, indeed, their continued gross and reckless disregard of ZCCM’s responsibilities from the mid-1990s to remediate and rehabilitate lead emissions in Kabwe.”<sup>10</sup>

10.2. That the applicants failed to draw the court’s attention to “several highly important aspects” of the Human Rights Watch report. In highlighting

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<sup>7</sup> Applicants’ FA p. 001-25 to 001-27 para. 27-36.

<sup>8</sup> Respondent’s answering affidavit (AA) p. 001-2675 to 001-2677 para. 6-10.

<sup>9</sup> Respondent’s AA p. 001-2675, 001-2680 para. 7, 25.

<sup>10</sup> Respondent’s AA p. 001-2738 para. 191

these aspects, the respondent states “that ZCCM’s and [the] Zambian government’s lacking response and, indeed, aggravation of the lead pollution in Kabwe has directly led to the current situation. This is recognised by HRW.”<sup>11</sup>

10.3. “Although HRW concentrates on ‘*government*’, it is clear that they are witheringly criticizing ZCCM’s failures as the lead implementing agency ... Human Rights (*sic*) was essentially saying the same as Komex and Water Management Consultants, but only in blunter terms.”<sup>12</sup>

10.4. “HRW accordingly issued a range of recommendations to the Zambian government, government departments, other spheres of government, the World Bank, donors and the United Nations on steps that need to be taken to address the lead contamination in Kabwe. Chief among those was that the Zambian government should ...”<sup>13</sup>

11. We submit that the respondent’s presentation of the Human Rights Watch report is misguided and incorrect. The respondent relies on selective parts of the report to substantiate its opposition to the applicants’ claim but fails to consider the clear purpose and context of the report.<sup>14</sup> We deal with this below.

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<sup>11</sup> Respondent’s AA p. 001-2860 para. 540

<sup>12</sup> Respondent’s AA p. 001-2861 para. 542

<sup>13</sup> Respondent’s AA p. 001-2862 para. 547

<sup>14</sup> HRW FA p. 6 para. 19.

### The respondent's reliance on the CRC submissions

12. The respondent delivered a supplementary answering affidavit *inter alia* to draw the attention of the court “to certain material developments which have occurred” and “which bear directly on, and indeed, corroborates various matter raised in the answering affidavit”.<sup>15</sup>
  
13. One of the so-called material developments referred to by the respondent (and related to its reliance on the Human Rights Watch report) was the CRC submissions.<sup>16</sup> The respondent asserts that some “of the fundamental points” raised in the CRC submissions are:
  - 13.1. “Mine remediation post closure has been neglected, and the ongoing remediation efforts by the Zambian government are still too limited in scope (specifically because they do not address the source of the contamination), ...”.<sup>17</sup>
  
  - 13.2. “There has been insufficient corporate responsibility for the lead pollution, particularly since the Mine closed; and the (unregulated) licensed and unlicensed mining operations since closure pose severe health risks and affect children in Kabwe: ...”.<sup>18</sup>
  
14. The respondent thus acknowledges the fact that there has been insufficient corporate responsibility as a fundamental point raised by Human Rights Watch

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<sup>15</sup> Respondent's SAA p. 001-7505 para. 3.2.

<sup>16</sup> Respondent's SAA p. 001-7509 para. 8.1, 9-10.

<sup>17</sup> Respondent's SAA p. 001-7509 para. 11.1.

<sup>18</sup> Respondent's SAA p. 001-7511 para. 11.2.

but denies that it bears any responsibility. This is an untenable position from a business and human rights perspective, which Human Rights Watch will demonstrate in its submissions, should it be admitted.

15. We shall show in these heads of argument why Human Rights Watch should be admitted as an *amicus curiae*. We do so in three main parts:

15.1. First, we set out the factors to be considered by a court when exercising its discretion to admit an *amicus curiae*.

15.2. Second, we discuss Human Rights Watch's interest in the class certification.

15.3. Third, we provide an overview of the submissions to be made by Human Rights Watch if admitted.

## THE FACTORS CONSIDERED IN THE DISCRETION TO ADMIT AN *AMICUS CURIAE*

16. The principles that govern the admission of an *amicus curiae* are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court, and are different from those of the other parties.<sup>19</sup>

17. The Constitutional Court described the role and duty of an *amicus curiae* as:

“to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court.”<sup>20</sup>

18. By presenting legal argument not canvassed by the parties, an *amicus curiae* equips a court to consider a different perspective on the issue under consideration.<sup>21</sup> An *amicus curiae* can raise awareness about an aspect of the case that the court may otherwise miss<sup>22</sup> and ensure that courts consider a wide range of options and are well informed.<sup>23</sup>

<sup>19</sup> Rule 16A(6). See also *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) para. 7; *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) para. 29.

<sup>20</sup> *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) para. 5.

<sup>21</sup> *SJ v SE and Another (EAF as amicus curiae)* [2018] JOL 53110 (GJ) para. 28.

<sup>22</sup> *South African National Roads Agency Limited v Zuku and Others* 2015 JDR 2482 (GP) para. 5.

<sup>23</sup> *Children’s Institute v Presiding Officer, Children’s Court, Krugersdorp and Others* 2013 (2) SA 620 (CC) para. 26.



**HUMAN RIGHTS WATCH'S INTEREST IN THE CLASS CERTIFICATION**

19. Human Rights Watch is an international organisation devoted to defending the rights of human beings worldwide and has expertise in international human rights law.<sup>24</sup>
20. The Human Rights Watch report is the product of Human Rights Watch's fact finding and field research over the course of 2018 and 2019. Human Rights Watch conducted more than 100 interviews and eleven discussions in groups of four or more with over 100 individuals in the Kabwe district.<sup>25</sup>
21. Human Rights Watch also made two submissions to the CRC on Zambia that focused on the impact of lead pollution on children's rights. The first submission was made in December 2019 and the second submission was made in September 2021.<sup>26</sup>
22. Human Rights Watch is well positioned to assist this court because of its first-hand knowledge and experience of the lead-contaminated environment in the Kabwe district and its impact on the community. The combination of Human Rights Watch's in-depth knowledge of the realities on the ground in Kabwe and its expertise in international human rights law provide a different perspective on the issues before court and will be useful to the court.
23. No other party to these proceedings shares the experience and perspective of Human Rights Watch. Human Rights Watch is the only party that intends

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<sup>24</sup> HRW FA p. 3-4, para. 10-12.

<sup>25</sup> Applicants' FA, annexure ZMX10 p. 001-572.

<sup>26</sup> Respondent's SAA, annexure SA2; HRW FA, annexure HRW1.

providing an in-depth analysis of corporate responsibility under international law and the principle of due diligence.<sup>27</sup>

24. In addition to Human Rights Watch's unique repository of knowledge about Kabwe, it has been brought directly into this matter by the respondent's reliance on the Human Rights Watch report and the CRC submissions.<sup>28</sup> Human Rights Watch has an interest in demonstrating that the respondent's reliance on its research is misplaced and does not support its contention that it has no liability for the ongoing human rights violations.<sup>29</sup>

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<sup>27</sup> HRW FA p. 9 para. 33.

<sup>28</sup> HRW FA p. 4, para. 12.

<sup>29</sup> HRW FA p. 4 para. 13.

## AN OVERVIEW OF HUMAN RIGHTS WATCH'S SUBMISSIONS

### The Human Rights Watch report and the CRC submissions in context

25. The respondent's main ground of opposition to the certification application is based on its contention that ZCCM is solely liable for "the failed state of the Mine and its surrounds" and that ZCCM knew "fully of the harm it caused and continues to cause".<sup>30</sup>
26. The respondent relies on Human Rights Watch's "scathing report" and "criticism [that] was squarely, and fairly, directed at the failings of ZCCM and the Zambian government" in support of its opposition.<sup>31</sup> The respondent criticises the applicants for failing to highlight "several highly important aspects" of the report, and alleges that Human Rights Watch recognises that ZCCM and the government's "lacking response" and "aggravation of the lead pollution in Kabwe has directly led to the current situation".<sup>32</sup>
27. The respondent contends that "it is clear that [Human Rights Watch] are witheringly criticizing ZCCM's failures ... essentially saying the same as Komex and Water Management Consultants".<sup>33</sup> The respondent also refers to Human Rights Watch's recommendation that the Zambian government should "[a]cknowledge full responsibility for remedying the ongoing harms caused by the now-defunct Kabwe mine".<sup>34</sup>

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<sup>30</sup> Respondent's AA p. 001-2676 to 001-2677 para. 10.

<sup>31</sup> Respondent's AA p. 001-2738 para. 191.

<sup>32</sup> Respondent's AA p. 001-2860 para. 540.

<sup>33</sup> Respondent's AA p. 001-2861 para. 542.

<sup>34</sup> Respondent's AA p. 001-2862 to 001-2863 para. 547.

28. The combined effect of these averments is to demonstrate that ZCCM is the direct cause of the lead-contamination in Kabwe and bears sole responsibility for the ongoing harms to the community. However, in highlighting selective parts of the Human Rights Watch report that support its opposition to the class certification, the respondent fails to consider the purpose and context of the report.
29. The purpose of the Human Rights Watch report was to document the impact of lead on children's rights and the Zambian government's response to the crisis.<sup>35</sup> Field research and interviews were conducted to assess the government's approach and its implications for children's rights to health, a healthy environment, education, and play.<sup>36</sup> Human Rights Watch "set out to assess how the government's approach to lead cleanup, testing, and treatment has affected children's rights, 25 years after the closure of the Kabwe mine."<sup>37</sup> Parents and guardians were interviewed to find out "treatment efforts the government had carried out in the years after the Copperbelt Environment Project (CEP) ended in 2011"; local education officials were interviewed to "learn about government efforts to examine contamination in schools"; and community members were asked "what they would like the government to do to address the lead contamination".<sup>38</sup>
30. The Human Rights Watch report was designed to shine a spotlight on the response of the Zambian government. It was *not* designed to demonstrate (nor did it conclude) that no other entity, including the respondent, was liable for

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<sup>35</sup> Applicants' FA, annexure ZMX10 p. 001-564.

<sup>36</sup> Applicants' FA, annexure ZMX10 p. 001-564.

<sup>37</sup> Applicants' FA, annexure ZMX10 p. 001-572.

<sup>38</sup> Applicants' FA, annexure ZMX10 p. 001-591.

causing and failing to remedy the lead contamination.

31. Human Rights Watch's research often focuses on state conduct. This is because under international human rights law states have the primary duty to respect, protect, and fulfil human rights. This is explained in the Human Rights Watch report, which documents Zambia's domestic and international obligations.<sup>39</sup> However, the Human Rights Watch report notes specifically that governments are not the only duty bearers under international law:

“While governments have the primary responsibility to respect, protect, and fulfil human rights under international law, private entities, including businesses, also have internationally recognised responsibilities regarding human rights, including workers' rights and children's rights. The UN Guiding Principles on Business and Human Rights are widely accepted as a legitimate articulation of businesses' human rights responsibilities. They specify that businesses should exercise human rights due diligence to identify human rights risks associated with their operations, take effective steps to prevent or mitigate those risks, and ensure that the victims of any abuses have access to remedies.”<sup>40</sup>

32. The Human Rights Watch report provides further that:

“The CRC has maintained that ‘duties and responsibilities to respect the rights of children extend in practice beyond the State and ... apply to private actors and business enterprises,’ and that ‘all businesses must meet their responsibilities regarding children's rights and States must ensure they do so.’”<sup>41</sup>

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<sup>39</sup> Applicants' FA, annexure ZMX10 p. 001-635 to 001-646.

<sup>40</sup> Applicants' FA, annexure ZMX10 p. 001-645.

<sup>41</sup> Applicants' FA, annexure ZMX10 p. 001-645.

33. The emphasis by the CRC of the state's obligation to ensure that business enterprises meet their responsibilities regarding children's rights is due to the nature and mandate of treaty bodies – to monitor implementation by state parties of international human rights treaties.
34. That is the context in which the CRC submissions must be considered – a submission to a treaty body that focused on implementation of the Convention of the Rights of the Child by Zambia as a state party to that treaty.
35. The respondent fails to consider these contexts.
36. Instead, the respondent focuses on those parts of the Human Rights Watch report that support its opposition and does not draw the court's attention to other relevant and material facts. For example, the Human Rights Watch report records that:
- 36.1. the high concentrations of lead in the soil and dust at the mine and in residential areas surrounding the mine are caused by decades of mining;<sup>42</sup>
- 36.2. by 1927, the respondent had obtained a controlling interest in the Rhodesian Broken Hill Development Company, which opened the mine in 1904. As early as 1916, there were reports that the mine's management lacked the technology and personnel to mitigate toxic lead fumes. In 1936, miners asked for compensation for workers who could not work because of sickness from the lead fumes. Doctors' certificates from the time

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<sup>42</sup> Applicants' FA, annexure ZMX10 p. 001-575.

revealed that smelter workers often experienced lead poisoning;<sup>43</sup> and

36.3. over a 2.5 year period from 1971 to 1974, 27 children from Kasanda were admitted to Kabwe General Hospital for convulsions and comas and were confirmed to have lead poisoning. Despite receiving chelation therapy, four died, two of them solely because of their lead levels.<sup>44</sup>

37. We submit that when the Human Rights Watch report and the CRC submissions are considered in their proper context and against their intended purpose, it is clear that they do not exculpate the respondent – or any other business enterprise – for any conduct that may have caused or contributed to “the failed state of the Mine and its surrounds”.
38. Therefore, the fact that the emphasis in the Human Rights Watch report and the CRC submissions is placed on Zambia’s obligations does not mean that business enterprises do not bear any responsibility.
39. In the next section (which would be the second part of Human Rights Watch’s submission) we explicate what the relevant parts of that responsibility ought to be.

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<sup>43</sup> Applicants’ FA, annexure ZMX10 p. 001-575.

<sup>44</sup> Applicants’ FA, annexure ZMX10 p. 001-583 to 001-584.

## Human rights due diligence and the duty of care

### The principle of due diligence under international law

40. The Guiding Principles are considered the global authoritative standard on business and human rights, and “the responsibility to respect human rights is the global standard of expected conduct for all business enterprises wherever they operate”.<sup>45</sup> The responsibility exists over and above compliance with national laws and regulations protecting human rights.<sup>46</sup> The Guiding Principles comprise three pillars. The first pillar focuses on state duties under international human rights law. The second pillar focuses on the corporate responsibility to respect. The third pillar deals with access to remedies, which applies to both states and business entities.

41. The foundational principle of pillar two, the corporate responsibility to respect human rights, is as follows:

“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>47</sup>

42. In order to meet their responsibility to respect human rights, business enterprises must, *inter alia*, exercise due diligence. Due diligence in international human rights law refers to the processes and activities by which businesses identify, prevent, mitigate, and account for how they address their adverse human rights

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<sup>45</sup> Guiding Principles A/HRC/17/31 p. 13.

<sup>46</sup> Guiding Principles A/HRC/17/31 p. 13.

<sup>47</sup> Principle 11 of the Guiding Principles A/HRC/17/31 p. 13.



impacts.<sup>48</sup>

43. The due diligence process “should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”<sup>49</sup> Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.<sup>50</sup>
44. The United Nations Office of the High Commissioner for Human Rights has defined the concept as an activity that is properly to be expected from, and ordinarily exercised by, a reasonable and prudent enterprise under the particular circumstances. It is not measured by any absolute standard but depends on the relative facts of each case.<sup>51</sup>

The link between the international law principle of due diligence and domestic tort law

45. Human Rights due diligence is relevant to the standard of care owed by a corporation such as the respondent. For example, conducting appropriate human rights due diligence may assist a business enterprise address the risk of legal claims against it by showing that it took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to

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<sup>48</sup> Guiding Principles A/HRC/17/31 p. 16-20.

<sup>49</sup> Principle 17 of the Guiding Principles A/HRC/17/31 p. 13.

<sup>50</sup> Principle 12 of the Guiding Principles A/HRC/17/31 p. 24.

<sup>51</sup> UNOHCHR (2012) “The Corporate Responsibility to Respect Human Rights: An Interpretative Guide” p. 6.

human rights abuses.<sup>52</sup>

46. The due diligence standard imposes on business enterprises:
- 46.1. a duty of care, which includes the avoidance of complicity in, and profiting from, human rights violations;
  - 46.2. an obligation to ensure that persons exposed to habitual discrimination, such as women and children, are particularly protected from human rights violations caused by the enterprises' operations; and
  - 46.3. a responsibility to ameliorate human rights violations which may already exist when the enterprise begins its operations.
47. The applicants argue that the respondent owed a duty of care to protect Kabwe residents from the harmful effects of lead pollution due to its *de facto* control over, and technical advice provided to and management of the relevant aspects of the Mine operations during the relevant period.<sup>53</sup> The applicants submit that the respondent breached its duty of care by acting negligently in its failure to investigate, failure to protect, failure to cease and relocate, failure to remediate, and failure to warn.<sup>54</sup>
48. The respondent argues that the applicants do not establish a *prima facie* case that it owed a duty of care to future generations.<sup>55</sup> The respondent submits that to the extent that the applicants *prima facie* establish that it owed a duty of care

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<sup>52</sup> Guiding Principles A/HRC/17/31 p. 17.

<sup>53</sup> Applicants' FA p. 001-25 para. 27.

<sup>54</sup> Applicants' heads of argument p. 007-162 para. 353.

<sup>55</sup> Respondent's heads of argument p. 008-99 to 008-100 para. 290.

to members of the proposed classes, the applicants have not made out a case that the respondent breached that duty or that its conduct was unreasonable in the circumstances that prevailed over the relevant period.<sup>56</sup>

49. The respondent has adopted the Guiding Principles. In its Human Rights Policy, the respondent confirms its acceptance and support of the responsibility to protect human rights and commits to actively seek to avoid involvement with human rights abuses. The respondent also “aim[s] to identify, assess and minimise potential adverse human rights impacts that [it] may cause or contribute to, or that are linked to [its] business, through on-going due diligence and appropriate management, as stated in the Guiding Principles.”<sup>57</sup> Indeed, in its answering affidavit, the respondent acknowledges that corporations may have responsibility for human rights violations at Kabwe, although it denies, inexplicably, that it has any such responsibility.<sup>58</sup>
50. A corporation’s responsibility to respect human rights “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations.”<sup>59</sup> The respondent’s responsibility for human rights violations at Kabwe, therefore, would exist independently of the Zambian government’s duties under international human rights law.
51. It is relevant to note that the respondent, in its Human Rights Policy, explains its position vis-à-vis international human rights law as follows:

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<sup>56</sup> Respondent’s heads of argument p. 008-101 para. 292.

<sup>57</sup> Applicants’ FA, annexure ZMX5 p. 001-510.

<sup>58</sup> Respondent’s SAA p. 001-7511 para. 11.2: “There has been insufficient corporate responsibility for the lead pollution, particularly since the Mine closed...”

<sup>59</sup> Commentary to Principle 11 of the Guiding Principles A/HRC/17/31 p. 13.

“Our commitment to respect human rights includes recognition of all internationally-recognised human rights, in particular: those contained in the International Bill of Human Rights (which includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights); the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work; and international humanitarian law, where applicable.”<sup>60</sup>

52. The focus in due diligence is placed on those persons whose basic dignity and equality are at risk of harm from the ways in which business gets done.<sup>61</sup> Due diligence may also help a business enterprise decide whether or not to go ahead with, or to discontinue operations or business relationships.<sup>62</sup>

53. Due diligence has three main components.

53.1. The first component comprises the identification and assessment of human rights risks and impacts connected to the business enterprises’ operations and value chains.<sup>63</sup> Special attention should be given to any human rights impacts on individuals that may be at heightened risk of vulnerability, such as women and children.

53.2. The second component focuses on the actions required to prevent or mitigate the identified risks and impacts.<sup>64</sup>

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<sup>60</sup> Applicants’ FA, annexure ZMX5 p. 001-510.

<sup>61</sup> Ruggie JG et al “Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations” (2021) 6 Business and Human Rights Journal 179 at 187.

<sup>62</sup> OECD (2018) “OECD Due Diligence Guidance for Responsible Business Conduct” p. 16.

<sup>63</sup> Guiding Principles A/HRC/17/31 p. 17.

<sup>64</sup> Guiding Principles A/HRC/17/31 p. 18.

- 53.3. The third component is to track the effectiveness of the enterprises' efforts to prevent and mitigate the adverse impacts identified.<sup>65</sup>
54. We submit that due diligence provides a useful framework to assist in the evaluation of the respondent's duty of care in the circumstances. The international law principles also inform the nature and content of the applicable standard of care, and whether the respondent has met the relevant duty. This will assist this court in its determination of whether the class action raises triable issues.

## CONCLUSION

55. Human Rights Watch's proposed submissions in the certification application are relevant to the issues before the court. They clearly differ from the submissions made by the parties and other *amici curiae* and, as such, will be useful to the court in its determination of whether it is in the interests of justice to certify the proposed class action.
56. Human Rights Watch has established its interest and should be admitted as an *amicus curiae* in the certification application.

**K HARDY**

**B C MEYERSFELD**

Human Rights Watch's counsel

Johannesburg

28 October 2022

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<sup>65</sup> Guiding Principles A/HRC/17/31 p. 19.