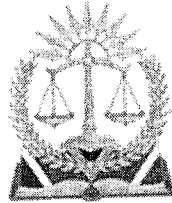


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 25/11/2022

A Mater-Frawley
A Mater-Frawley



CASE NO: 2020/32777

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

HUMAN RIGHTS WATCH

Applicant for admission as *amicus curiae*

and

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

**THE UNITED NATIONS SPECIAL RAPPOREUR
ON TOXICS AND HUMAN RIGHTS**

Third Applicant for admission
as *amicus curiae*

**THE UNITED NATIONS SPECIAL RAPPOREUR
ON EXTREME POVERTY AND HUMAN RIGHTS**

Fourth Applicant for admission
as *amicus curiae*

**THE UNITED NATIONS SPECIAL RAPPOREUR
ON THE RIGHTS OF PERSONS WITH
DISABILITIES**

Fifth Applicant for admission
as *amicus curiae*

**THE UNITED NATIONS WORKING GROUP
ON BUSINESS AND HUMAN RIGHTS**

Sixth Applicant for admission
as *amicus curiae*

**THE UNITED NATIONS WORKING GROUP
ON DISCRIMINATION AGAINST WOMEN
AND GIRLS**

Seventh Applicant for admission
as *amicus curiae*

In re 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
THE SOUTHERN AFRICAN LITIGATION CENTRE

First *amicus curiae*
Second *amicus curiae*

J U D G M E N T

MAIER-FRAWLEY J:

1. This matter concerns two separate applications for the admission of *amici curiae* in an application for certification of a class action that is pending in this court. The respective applicants are:
 - 1.1. Three UN Special Rapporteurs and two UN working groups (*'the UN bodies'*) and
 - 1.2. Human Rights Watch (*'HRW'*).
2. The present applications are opposed by the respondent, Anglo American South Africa Limited (*'Anglo'*).
3. Adv K. Hofmeyer SC (assisted by two junior counsel) appeared for the UN bodies at the hearing of the matter. Adv K. Hardy (assisted by junior counsel) appeared for HRW, whilst Adv S. Budlender SC (assisted by two junior counsel) appeared for Anglo.
4. On 11 August 2022, an order by consent between the parties was granted in this court in terms of which two other institutions were admitted as *amici curiae* in the pending certification application, being Amnesty International (First *amicus curiae* applicant) and The Southern Africa Litigation Centre (second *amicus curiae* applicant).

5. Heads of argument exceeding 700 pages have already been filed by the certification applicants, the respondent and the admitted *amici curiae* in the pending certification application, which has been set down for hearing before Windell J for a period of eight days from 20 to 31 January 2023. The current pleadings (including annexures) run in excess of 10,000 pages.
6. In terms of a directive issued by the Deputy Judge President of this court, the present *amici curiae* applicants, if admitted, are to file their heads of argument by 24 November 2022. The matter was argued as a special motion before me on Thursday the 10th November 2022, on which day I informed counsel that I would be commencing duties in the urgent court on Friday the 11th November 2022 until 18th November 2022 and that I would in all probability lack the time or have the capacity to pen this judgment during that period. Cognizant of the looming date for the filing of the heads, I do not intend to deal exhaustively in the judgment with all the extensive submissions of the parties, however, I will refer to salient aspects which I consider to be relevant and cogent in arriving at the decision in this matter.
7. By way of brief background, the applicants in the certification proceedings seek certification of a class action against Anglo. The purpose of the class action is to claim damages from Anglo on behalf of two proposed classes¹ who reside in the Kabwe district, Zambia, and who have suffered injury as a result of exposure to lead. The applicants' cause of action is grounded in the Zambian law of tort. The applicants allege that Anglo, through its mining activities conducted at a mine in Kabwe during the period 1925 to 1974, both caused and materially contributed to the ongoing harm suffered by children and women of child-bearing age in Kabwe as a result of their exposure to lead pollution deposited in the vicinity of the mine and its surrounds. Anglo

¹ Being the class of children and the class of women of child-bearing age.

avers that it did not cause the present state of uncontrolled and polluted conditions in Kabwe and that it is not liable for any harm caused to the applicants by the current state, nor is it liable to remedy it. It alleges, amongst others, that Zambian Consolidated Copper Mines Limited ('ZMCC') caused the failed state of the mine and concomitant environmental contamination in Kabwe and that ZMCC remains liable today for the rehabilitation and remediation of lead emissions in Kabwe.

8. The parties are in agreement as to the legal principles governing the admission of an applicant as *amicus curiae*. Such an applicant must, in terms of Rule 16 A of the Uniform Rules, satisfy the court that its submissions are (i) new, i.e., different from the existing submissions before the court; (ii) that they are relevant; and (iii) that they will be helpful to the court.²

9. Useful guidelines as to the approach to be adopted in adjudicating applications for admission as *amici* are provided, amongst others, in cases such as *SALC*³ and *Treatment Action Campaign*,⁴ *Children's Institute*,⁵ and *Outa*.⁶

² In terms of Rule 16A of the Uniform Rules of Court, an applicant for admission as an *amicus* must:

- “(a) briefly describe the interest of the *amicus curiae* in the proceedings;
- (b) clearly and succinctly set out the submissions which will be advanced by the *amicus curiae*, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties.”

³ *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae)* 2016 (3) SA 317 (SCA) (“*SALC*”) at paras 29-30, where the following was said:

“[29] An *amicus* is not entitled to submit further evidence to the Court but is confined to the record. That is expressly provided in rule 16(8). It is unnecessary to consider whether there are exceptional circumstances in which the Court hearing the appeal may relax that rule. In making submissions the *amicus* is not permitted to traverse ground already covered by other parties, but is confined to making submissions on the new contentions that it wishes to place before the Court. In that regard it is apposite to point out that adding additional references, whether to case law or to academic writings, on the matters canvassed in the heads of argument of the litigants, does not amount to advancing new contentions. That obviously does not exclude placing material before the Court to demonstrate that a point of controversy between the parties has been settled by way of an authoritative judgment.

10. Anglo does not take issue with the fact that both the UN bodies and HRW have indeed motivated their legitimate interest in the certification proceedings.⁷ It opposed both applications in its papers and written

It would only be if there had, for example, been an authoritative decision placing a legal issue thought to be controversial beyond dispute that an amicus may include that in its argument. Otherwise it is confined to its new and different contentions and these must be clearly stated.

[30] Finally, new contentions are those that may materially affect the outcome of the case. It is not feasible to be prescriptive in this regard but prospective amici and their advisers must start by considering the nature and scope of the dispute between the parties and, on that basis, determine whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of the appeal. Obvious examples would be urging the Court to adopt reasoning based on provisions of the Constitution in construing a statute, where the parties have not taken that course, or a submission that the fundamental legal principles to be applied in determining the dispute are other than those submitted by the parties where their adoption would materially affect the outcome of the case. No doubt others can be imagined.”

⁴ *In Re Certain Amicus Curiae Applications: Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 713 (CC) (**‘Treatment Action Campaign’**) at par 5, where the following was said:

“[5] The role of an amicus is 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. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.”

⁵ *Children’s Institute v Presiding Officer, Children’s Court, Krugersdorp* 2013 (2) SA 620 (CC) (**‘Children’s Institute’**) at 626A-C and 631 H-632B, where the constitutional court clarified that although *amici curiae* must ordinarily raise arguments on the evidence already before court, they are permitted, where it is in the interests of justice, and in the court’s discretion, to introduce evidence in support of their submissions.

⁶ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (**‘Outa’**) at par 16, where the court explained that it is insufficient for a prospective amicus merely to *‘echo the position of [a party] with slight variations.’* In rejecting the amicus application, the court in *Outa* explained that *‘its contentions are not new and will not add anything meaningful to a case that is already burdened by several procedural and substantive issues.’*

⁷ In brief, the UN bodies explain in their papers that they comprise independent experts appointed by the UN Human Rights Council, with the mandate to monitor, advise and publically report on human rights from a thematic or country-specific perspective. Each of the rapporteurs and working groups have a mandate that is directly relevant to those proceedings and their submissions are brought from a unique perspective: that of independent experts specifically tasked to monitor, advise and report on human rights issues, such as those the applicants for certification have experienced. Their specific interest is summarized in the heads of argument in paras 17 to 20 at pp. 086-296 to 086-300 of the papers. HRW explains that it is an international organization devoted to defending the rights of human beings worldwide and has expertise in international human rights law. It has a unique repository of knowledge about the Kabwe district, Zambia, where the applicants who seek certification of their class action reside and who have suffered injury as a result of exposure to lead. It has first-hand knowledge and experience of the lead-contaminated environment in the Kabwe district and its impact on the community. Furthermore, it has been brought directly into this matter by the respondent’s reliance on

argument on grounds that the submissions of the respective applicants are not new, and, in any event, are not helpful or relevant. However, during presentation of oral argument, Mr Budlender fairly and properly conceded that the UN bodies' submissions, as expounded upon during oral argument, are new in the sense that that they have not hitherto been raised or canvassed by any of the parties in the certification proceedings. Anglo however persisted in its opposition to the admission of the UN bodies as *amici curiae* on the basis that their submissions were neither relevant nor helpful.

11. I turn now to address the respective applications brought by the UN bodies and HRW in the light of the relevant legal principles alluded to above.

Application by the UN bodies

12. If admitted, the UN bodies intend to make submissions regarding the impact that Anglo's own stated commitment to a particular set of international standards for corporate conduct - the Guiding Principles on Business and Human Rights - has for the court's assessment of whether it is in the interests of justice for the class action to be certified.
13. The UN bodies submit that the Guiding Principles incorporate various international human rights principles, including the rights of victims of human rights violations to have access to justice and the right to a remedy.⁸

its report: '*We have to be worried-the impact of lead contamination on children's rights in Kabwe Zambia*' and its submissions to the UN committee on the Rights of the Child, on the impact of lead pollution on children's rights.

⁸ In expounding upon their central argument, the UN bodies reference Guiding principle 11, which requires businesses to respect human rights. The UN bodies propose highlighting that 'respect' in this context denotes a responsibility to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved, and to highlight that this principle serves to broaden the responsibility of businesses to be responsive to human rights impacts where they have been involved in them. They also reference Guiding principle 22, which states that if businesses have caused or contributed to adverse [human rights] impacts, they should provide for or co-operate for their remediation through legitimate processes. Legitimate processes would include court processes that can be used by victims of human rights impacts to access remedies.

They further submit that the Guiding Principles commit Anglo, amongst others, to respect the rule of law and to address adverse human rights impacts which it may have caused or contributed to through its business endeavours. They seek to present argument to the certification court as to the effect that Anglo's election to assent to the Guiding Principles that commit Anglo to respect the rule of law and to promote the provision of remedies for adverse human rights impacts, is fundamentally incompatible with its election to resist certification of a class action that is designed to provide access to courts in order to pursue a remedy for the class members.

14. Thus, If admitted as *amici curiae*, the UN bodies will argue that the conflicted position in which Anglo has put itself in, should weigh in the court's analysis of where the interests of justice lie. This is an important and relevant consideration, so say the UN bodies, because, whilst Anglo does not dispute that in the absence of certification of a class action, which is to be pursued in South Africa, prospective class members will be denied any access to justice at all, because (i) they cannot pursue their claims in Zambia in any meaningful way and (ii) in the absence of a class action procedure, individual claimants will be unable to pursue their claims in South Africa, it nonetheless elected to oppose certification,⁹ knowing and accepting that if it succeeds in its opposition, the result will be that prospective class members will have no prospect of advancing their case for a remedy before a court of law.
15. During oral argument presented on behalf of the UN bodies at the hearing of this application, reliance was place on the case of *Njongi*.¹⁰ The UN bodies

⁹ i.e., rather than to defend the class action on its merits so that it can be determined, amongst others, whether Anglo bears responsibility for the adverse human rights impacts suffered and continuing to be suffered by the certification applicants in Kabwe.

¹⁰ *Njongi v Member of the Executive Council, Eastern Cape* 2008 (4) SA 237 (CC) ('*Njongi*') at paras 3, 78 & 79, where the following was said:

“[3] A second perhaps more important dimension of the case emerged during the hearing. It concerns whether and the circumstances in which the State can legitimately decide to avail itself of the defence

seek to argue that the principle to be extracted from that case, which the Constitutional Court recognised, is that in certain circumstances,¹¹ litigants attract heightened obligations or responsibilities when litigating because of the position they hold and the obligations they are duty bound to fulfil, more specifically, in certain situations there will be a particular election that a party has to make about how it approaches the litigation that it faces. In *Njongi*, the court stated that the provincial government, as state respondent, was obligated to respect, protect, promote and fulfil the rights and values of the Constitution.

16. In essence, in *Njongi*, the Constitutional Court recognised that state respondents (or defendants), because of certain constitutional duties that attach to them, have a heightened obligation to think carefully, exercise a moral choice when deciding to make one or another election in the course of litigation in which they are involved. In *Njongi*, the election was whether or

of prescription. This question is significant because courts cannot invoke prescription of their own accord. They may decide whether a claim is prescribed only if the debtor (the State in this case) expressly and properly raises it. If it is competent for the State to raise prescription as a defence the more specific question concerns the factors that the State must consider when deciding whether to deprive the disability pensioner of her right to receive disability grant arrears owed to her by pleading prescription.

[78] I have already said that the Prescription Act requires the debtor to make a decision as to whether it should avail itself of the defence of prescription. It follows from this that the Provincial Government had to make a decision whether to plead prescription or not. There are important reasons why courts cannot by themselves take up the issue of prescription. There is an inevitable and, in my view, moral choice to be made in relation to whether a debtor should plead prescription particularly when the debt is due and owing. The Legislature has wisely left that choice to the debtor. For it is the debtor who would face the commercial, community and other consequences of that choice.

[79] A decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution. It follows that the Provincial Government too, must take a decision whether to plead prescription to defeat a claim for arrear disability grant payments. This is not a decision for the State Attorney to make. It is an important decision and must not be made lightly. It must be made after appropriate processes have been followed and by a sufficiently responsible person in the Provincial Government who must take into account all the relevant circumstances. It is the duty of the State to facilitate rather than obstruct access to social security. This will be a fundamental consideration in making the assessment." (underlining own emphasis)

¹¹ In *Njongi*, the State had belatedly sought to raise prescription as a defence, which if successful, would have deprived the applicant, a disability pensioner, of her right to receive disability grant arrears owed to her.

not to pursue a defence of prescription. The court found that the respondent was under not only a moral duty but a legal duty to make an election to plead prescription, which it had failed to do, instead seeking to raise the issue belatedly (and irregularly) by way of a notice. The UN bodies seek to persuade the certification court that the *Njongi* principle should be extended to the private sphere and applied, by analogy, to the facts of this matter, in circumstances where Anglo elected to oppose the certification of the class action - aimed at addressing human rights impacts - ostensibly in an effort to cut the litigation off before it begins, in juxtaposition to its publically professed commitment to respect and protect human rights, to be accountable for and to redress adverse impacts in which it may be found to have been involved.

17. The UN bodies' argument, as I understand it, entails consideration of a narrow point by the certifying court. At the risk of being repetitive, the argument boils down to this: private parties such as Anglo can also attract heightened duties in litigation. They do so when they elect to commit themselves to certain values and principles, which require certain conduct from them when they become defendants in litigation designed to vindicate those very principles. Anglo's election to commit itself to the Guiding Principles includes a commitment to support access to justice where human rights impacts have occurred. It also includes the commitment to co-operate in processes designed to establish whether there is culpability for those human rights impacts. Having elected to commit itself to these principles, Anglo must then bear a heightened duty when it considers whether to oppose certification. Its decision to oppose certification put it in an intractably conflicted position and this is a factor that should weigh in the interests of justice debate which the certification court will undertake. Stated differently, Anglo's approach in opposing certification, which is

incompatible with its professed commitment to the Guiding Principles and is tantamount to unconscionable conduct, is therefore a relevant consideration which the certification court ought to take into account when it considers the interests of justice test for certification.¹²

18. On behalf of Anglo, Mr Budlender submits that the submissions that the UN bodies intend to make, whilst new, will not be helpful to the certification court and are not relevant to the questions the certification court will be tasked to decide. In this regard, he stressed that the debate about whether Anglo has misconducted itself in the certification proceedings (or, for that matter, in its conduct at the Kabwe mine) or whether it breached certain heightened obligations it may have attracted by committing to the Guidelines, is not relevant to certification because certification does not depend on the stance that Anglo adopts. Certification, so it was submitted, is not about the interests of the respondent but concerns the interests of justice. The certification applicants accept that they require certification from a court before they can proceed with a class action, and even had Anglo filed a notice to abide, the certification court would still have to satisfy itself that certification is consistent with the interests of justice.¹³ The 7

¹² Anglo does not dispute that South African courts would have jurisdiction over a claim brought by an individual victim of lead poisoning in Kabwe against it by virtue of its domicile in South Africa. On behalf of the UN bodies, it was submitted that the *only* question for determination by the certifying court is whether there are interests of justice reasons, nonetheless, to refuse to permit the applicants to use the class action procedure to prosecute their claims.

As recognized by the Constitutional Court in *Mukkadam v Pioneer Foods* 2013 (5) SA 89 (CC) (*'Mukkadam'*) at paras 34-37, the overriding consideration for certification is the interests of justice.

¹³ In *Mukkadam* at par 38, the Constitutional Court endorsed the critical role of certification proceedings. It explained that "*Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in this case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advancing, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it.*"

requirements set out in *Children's Resource Centre*¹⁴ that the certification court will have to consider, do not concern the conduct of a respondent and will remain unaffected by a debate about whether Anglo has acted in an inappropriate matter by opposing certification.

19. It was further submitted that the remarks in par 85 of *Njongi*¹⁵ were made in relation to the court's consideration of the issue of costs and not in relation to the merits of the appeal, and *Njongi* is therefore not authority for the

In *Children's Resource Centre v Pioneer Food (Pty) Ltd & Others* 2013 (2) SA 213 (SCA) (*'Children's Resource Centre'*).at par 24, the Supreme Court of Appeal discussed the rationale for certification proceedings, and explained as follows:

"Most jurisdictions around the world require certification either before institution of the class action or at an early stage of the proceedings... The justifications are various. First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit. Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement..." (footnotes omitted)

In *De Bruyn v Steinhoff International Holdings NV and others* 2022 (1) SA 442 (GJ) at par 300, Unterhalter J identified a further reason for certification when he stated that " *Why would a court trigger the machinery of a class of action to determine something that does not exist in law? To do so would be to place a ghost in the machinery of justice.*", namely,

¹⁴ In par 26 of *Children's Resource Centre* (cited in fn 13 above), Wallis JA provided a list of the criteria a court will take into account when determining certification. They are: (i) the existence of a class identifiable by objective criteria; (ii) a cause of action raising a triable issue; (iii) that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class; (iv) that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination; (v) that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class; (vi) that the proposed representative is suitable to be permitted to conduct the action and represent the class; (vii) whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

¹⁵ There the following was said: "[85] It is not necessary in this case to decide whether the decision of the Provincial Government to invoke prescription was of such a nature that it can or ought to be set aside. That is because the defence of prescription has in any event failed. I am however of the view that, as appears from what I have said earlier, both the decision to oppose as well as the way in which the case was conducted represent unconscionable conduct on the part of the Provincial Government. I do not need to decide whether the fault lay with the legal advisor, an official in the Department, a political office bearer or with all of them."

proposition that where the respondent¹⁶ behaves unconscionably by exercising a moral choice in taking a decision to oppose certification, that is somehow something to weigh in the balance on the merits.

20. It is correct that Anglo has opposed the certification application, as was its right to do, however, Ms Hofmeyer's argument appears to me to be more nuanced. Anglo made two elections: one, to commit itself to the Guiding Principles, amongst others, to promote access to justice in respect of human rights impacts and two, to oppose certification, which, if successful, would deny victims of human rights infringements access to justice. It concerns Anglo's election to oppose in circumstances where it had committed itself to certain values and principles but then acted in opposition thereto when exercising an election to oppose certification. It is this type of inconsistent conduct on the part of Anglo which the UN bodies submit should be taken into account as an additional factor that weighs in favour of certification in the interests of justice debate to be had before the certification court. If the argument is found to be persuasive and the additional factor considered weighty enough by the certification court, it may add to counter balance other factors suggested by Anglo in its papers that weigh against certification. To sum up: What the UN bodies seek to do before the certification court is to distil the legal significance of Anglo's commitments to the Guiding Principles as a factor to be weighed in the balance when determining where the interests of justice lie. They seek to persuade the certification court to extend the *Njongi* principle so that it can apply to private parties (such as Anglo) in this litigation, based on the heightened duty that the UN bodies submit Anglo attracted in committing to the guiding principles and which the UN bodies consequently submit, enjoined Anglo not to oppose certification.

¹⁶ The respondent - whether it be the provincial Government, as in *Njongi* or Anglo in *casu*

21. Seen from this perspective, the requirement, namely, that an amicus's submissions must be new and that 'new contentions are those that may materially affect the outcome of the case' has in my view been met by the UN bodies because it is an argument which, if found to be persuasive, may tilt the scale in favour of certification.
22. Whether or not the UN bodies' argument in respect of the *Njongi* principle is correct or not is for the certification court to determine. I agree with Ms Hofmeyer that Anglo's contentions about the import of the *Njongi* principle and its application to the facts of this matter is really an argument about the correctness thereof, dressed up as one concerning relevancy.
23. As observed by the Constitutional court in *Koyabe*,¹⁷ '*insofar as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.*'
24. Although the list of criteria provided by the Supreme Court of Appeal in *Children's Resource Centre* case does not necessarily focus on the interests of a respondent or a respondent's conduct, it is not a closed list of factors that the certification court is bound to take into account. Unterhalter J conveniently summarised the legal position in *De Bruyn*¹⁸ as follows:

" In *Children's Resources*, the Supreme Court of Appeal set out the factors that should be weighed in deciding whether to certify a class action. These factors are as follows: the existence of a class identifiable by reference to objective criteria; the proposed class representative is suitable to conduct the action and represent the class; a cause of action raising a triable issue; the right to relief requires the determination of issues of fact or

¹⁷ *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23; 2010 (4) SA 327 (CC) para 80 ("*Koyabe*").

¹⁸ *De Bruyn v Steinhoff International Holdings NV and others* 2022 (1) SA 442 (GJ) at paras 11-12. (*De Bruyn*)

law, or both, common to all members of the class; the relief sought or damages claimed flow from the cause of action and are ascertainable and capable of determination; where damages are claimed, there is a procedure by which to allocate the damages to members of the class given the composition of the class and the nature of the proposed action; and that a class action is the most appropriate means by which the claims of the class may be determined.

Children's Resources recognized that these factors may not be exhaustive, but required that a court should be satisfied that the factors are present before granting certification. In *Mukaddam*, the Constitutional Court clarified the position. The factors referenced by the Supreme Court of Appeal are not prerequisites for the grant of certification. Rather, they are considerations to be weighed under the overarching principle of what is required by the interests of justice." (footnotes omitted) (emphasis added).

25. Whilst the UN bodies' submissions may support the contentions of the applicants in the certification proceedings, in my view they contribute a different perspective on the applicants' argument.¹⁹ That is because, in Ms Hofmeyer's words, the submissions of the UN bodies 'seek to take the law where the law has not yet gone' concerning Anglo's elections and its conflicted position. The UN bodies seek ultimately to explain why Anglo's election to abide human rights principles has a necessary implication for the stance it took in the certification application. If the argument is accepted and Anglo's stance is taken into account as an additional factor to weigh in the balance of what the interests of justice require, it is axiomatic that the argument will assist the certification court in its reasoning when deciding whether or not to allow certification. It is thus relevant to the interests of justice debate.
26. For these reasons, I am inclined to exercise my discretion in favour of granting the UN bodies leave to be admitted as the third to seventh *amici*

¹⁹ See: *Minister of Defence v Potsani* 2002 (1) SA 1 (CC) at par 9 and *State v Molimi* 2008 (3) SA 608 (CC) at par 22. In these cases the Constitutional Court recognized that the particular contributions of the amici in those cases, was to offer a different perspective to existing submissions made by the applicants.

curiae for purposes of presenting oral and written argument in the certification proceedings.

27. The UN bodies also seek leave to place before the certification court more evidence about Anglo's commitment to the guiding principles as well as its public invocation of them. They also seek leave to adduce evidence of Anglo's own internal documents evincing its commitment to those principles. I am not inclined to grant this request. I do not think that it will be in the interests of justice to do so. As pointed out on behalf of Anglo, the record of the certification proceedings is already unduly burdened by evidence presented on this very topic by the admitted *amici* as well as the applicants. That Anglo committed itself to the guiding principles both publically internally is common cause between the parties in the certification proceedings. No useful purpose would therefore be served by burdening the record with more evidence on a point that is not in dispute in the certification proceedings.

Application by Human Rights Watch ('HRW')

28. HRW seeks leave to be admitted as *amicus curiae* in order to advance essentially two submissions. First, it wishes to address the purpose and context of its report²⁰ in order to correct what it contends is a misunderstanding or misreading by Anglo of its report and its submissions to the UN Committee on the Rights of the Child ('the CRC'). The Human Rights Watch report was put up and relied on by the certification applicants in their founding papers in support of certification. In response, Anglo explained why the report supported its contentions. Second, it wishes to make submissions on Guiding Principle 11 and the due diligence obligations imposed on corporations by virtue thereof.

²⁰ Anglo is said to have relied on selected parts of the report in support of its case in the certification proceedings.

29. As regards the first submission, HRW submits in its heads of argument that “...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.’ HRW further submits 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’ ”
30. In heads of argument filed on behalf of Anglo, reference is made to the issues in dispute between the certification applicants and the respondent in the certification proceedings, as evidenced in paragraphs 748.1 and 753.1 of the replying affidavit, where the certification applicants address Anglo’s reliance on the HRW report in its answering affidavit. I do not intend to repeat the content of the pleadings, as quoted in para 14.1 of Anglo’s heads. It is however clear from the pleadings that the very issue that HRW seeks to canvass is already in dispute between the parties.
31. Anglo submits that any debate about the meaning of the HRW report will not be helpful to the certification court. It is trite that the interpretation of the HRW report is a matter for the court. I agree with Anglo’s submission that the HRW report is before court, which the certification court can read for itself and hear legal submissions from the certification applicants and Anglo on its effect.
32. HRW made two important concessions in this application. First, that it does not intend to place any evidence before the certification court in order to contextualise the circumstances under which its report was prepared or for purposes of elucidating the purpose of the report. This conveys to me that

HRW accepts that both context and purpose are discernible from the report itself. It follows that if the relevant context and purpose of the report is discernible from the report itself, then HRW's input thereon will not be needed. If it is not discernible from the report itself, then HRW's submissions are in any event unlikely to be able to assist the court as HRW has not sought to adduce additional evidence on the subject. Whilst it is correct that the certification applicants have not made written submissions in relation to the context, purpose or meaning of the HRW report, indicating instead that they will await HRW's submissions in this regard, it remains open for them to do so in oral argument, given that they have disputed that the report corroborates Anglo's case. The fact remains that HRW is in no better position to argue the meaning or effect of the report than the certification applicants or Anglo would be. The court will read the report and form its own view as to what it says.

33. Mr Budlender submits that HRW really seeks to make submissions on the contents of its report in order to set the record straight, given that Anglo is accused of quoting selectively from the report and of misrepresenting what the report says. In *NDPP v Zuma*²¹ former President Mbeki sought leave to intervene as a party or to join the proceedings as an *amicus* in order to set the record straight in the appeal proceedings, as the High Court had made adverse findings against him, which he contended lacked an evidentiary basis. The Supreme Court of Appeal did not consider it apposite for the former President to join either as an intervening party (for reasons given in the judgment) or as an *amicus*, finding in regard to the latter, that the former President's intervention as *amicus* was not required 'since it did not add anything new.' Mr Budlender submitted that HRW is in the same position in that, it, in effect, wants to 'set the record straight' regarding its report. But

²¹ *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* 2009 (2) SA 277 (SCA) ("*NDPP v Zuma*")

that does not give it a right to intervene as an *amicus* or make its submissions helpful to the court. I am inclined to agree. The certification court will not need to hear from HRW about the contents of its report as the report is before court, and the issue of whether or not Anglo misrepresented or misread its contents would be apparent to the court from the report itself.²²

34. HRW submits in its heads of argument that Guiding Principle 11 enjoins business enterprises to respect human rights by avoiding infringing on the human rights of others. It further enjoins businesses to address adverse human rights impacts with which they are involved.²³ HRW submits that in order to meet the responsibility to respect human rights, business enterprises must, *inter alia*, exercise due diligence. Due diligence in international human rights law refers, so it submits, to the processes and activities by which businesses identify, prevent, mitigate and account for how they address their adverse human rights impacts. HRW further submits that the due diligence standard is relevant to the standard of care owed by a corporation such as Anglo. The standard imposes on business enterprises a duty of care, which includes, *inter alia*, the avoidance of complicity in, and profiting from, human rights violations and the responsibility to ameliorate human rights violations which may already exist when the enterprise begins its operations. Ultimately, the core submission by HRW is that '*due diligence provides a useful framework to assist in the evaluation of the respondent's duty of care... The international law principles also inform the nature and content of the applicable standard of care, and whether the respondent has*

²² See: SALC (quoted in fn 3 above) at par 36, where the court, in refusing an application for admission as *amici curiae*, stated that '*Not only were the matters that these parties sought to raise apparent to the Court from the terms of the Rome statute itself, no indication was given of how knowledge of them would affect the determination of the issues in the case.*'

²³ Ultimately, certification of the intended class action is sought by the certification applicants to access justice in order to hold Anglo liable for the adverse human rights impacts on women and children it was involved in through its mining operations at Kabwe, Zambia.

met the relevant duty. This will assist this court in its determination of whether the class action raises triable issues.'

35. HRW accepts that the certification applicants' proposed claim is to be determined in accordance with the Zambian law of tort. In other words, the nature and content of the duty of care is a matter of Zambian law, to be found in Zambian sources of law. Zambian tort law has its own test for the duty of care. This brings me to the second important concession made on behalf of HRW at the hearing of the matter, namely, that HRW does not submit that that test of duty of care in Zambian law is inadequate and needs to be expanded upon or adapted with reference to the Guiding Principles. It follows, as a necessary corollary, that one does not prove the test for duty of care in Zambian tort law by reference to the Guiding Principles, unless those are part of Zambian law, which HRW does not assert.
36. HRW has been unable to say *how* the Guiding Principles will help the court apropos its application of the duty of care test under Zambian law. Instead, HRW has resorted to making generalised statements without specifying why a breach of the requirements of due diligence international standards can or will impact the duty of care test under Zambian law and if so, how.²⁴ I therefore agree with MR Budlender's submission on behalf of Anglo that there is no suggestion by HRW that the principles of due diligence in international law add anything to the test for duty of care in Zambian tort law. If that is so, then HRW's intervention is unnecessary. If the proposition is that they add something, HRW has not said what that is. As no explanation was provided by HRW in its papers or in its written or oral argument as to the effect of international law on Zambian law or the test for the duty of care

²⁴ For example, in its founding affidavit, HRW states that "*Human Rights Watch's submissions further will illustrate how the concept and requirements of due diligence provide useful guidance in an analysis of the nature and content of the applicable standard of care and whether the relevant duty of care has been met by a business enterprise.*" As pointed out on behalf of Anglo, these allegations are 'so underspecified as to be completely unhelpful', a point with which I agree.

under Zambian tort law, the result is that it is unclear how the certification court will be assisted by HRW's intervention on this score.

37. It follows that the HRW application does not meet the requirements for admission as an *amicus curiae* and therefore falls to be dismissed.

Costs

38. The UN bodies and HRW both seek costs in the event that their applications are successful. Anglo, on the other hand, does not seek costs in the event that its opposition is successful (and the applications are dismissed), in which event, it submits that no order as to costs be made.
39. The application of the UN bodies has been substantially successful in that they are to be joined as the third to seventh *amici curiae* in the certification application for purposes of presenting written and oral argument without, however, adducing further factual evidence.
40. On behalf of the UN bodies, reliance was placed on cases such as *Jeebhai*²⁵ and *Dladla*²⁶ in support of the contention that costs may be awarded against a litigant whose opposition is considered to have been unreasonable.
41. Ms Hofmeyer submits that Anglo's opposition to the application for admission as *amici* was unreasonable for two reasons. The first is that the premise of the opposition, namely, that the UN bodies have nothing new or useful to contribute to the certification court, was unfounded, a point aptly (albeit partly) illustrated by the abandonment of Anglo's opposition, on grounds that the UN bodies' submissions are not new, at the hearing of the matter. The second is that Anglo did not miss the opportunity in its answering affidavit (filed in these proceedings) to make a serious allegation

²⁵ *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) at par 52.

²⁶ *Dladla v The City of Johannesburg* 2004 (6) 516 (GJ) at paras 44-46.

of bias by the UN bodies against Anglo, which entirely lacked factual foundation.²⁷

42. As to the first, it remains unrefuted that the UN bodies' argument is novel and if found to be persuasive, it will develop the law on existing heightened duties beyond where it currently is. The argument seeks to explain how the acquisition of a heightened duty, because of Anglo's prior conduct, is a factor that should weigh in the interests of justice balance for purposes of certification. In my view, the contribution to be made by the UN bodies in this regard goes beyond the existing submissions in the certification proceedings, and will be of value to the court apropos the interests of justice enquiry, which renders it relevant. Although Anglo's opposition to the UN bodies' application was unsuccessful, that does not imply that it was therefore unreasonable. *Njongi* was not mentioned in the UN bodies' heads of argument and argument based on the *Njongi* principle was only elucidated at the hearing of the matter. I do however accept that the argument premised upon *Njongi* was foreshadowed in the UN bodies' papers, however, the fact remains that it became illuminated during oral argument.
43. As to the second, allegations of bias are by their nature serious. In *Knoop*,²⁸ Wallis JA cautioned that:
- "...It should not be necessary to remind legal professionals who draft affidavits for their clients that they bear a responsibility for the contents of those documents and may not use them for the purpose of abusing their client's opponents. Such allegations should only be made after due consideration of their relevance and whether there is a tenable factual basis for them..."

²⁷ See par 57 of the answering affidavit where the following was said: 'I point out that the UN Special Procedures demonstrate their bias against Anglo in claiming that "Anglo should not be permitted to obtain the commercial and public relations benefits for its brand of espousing commitment to the Guiding Principles, while in the same breath opposing the certification of this class action." Amici curiae are not permitted to seek to bolster a sectarian or partisan interest against any of the parties.'

²⁸ *Knoop and Another NNO v Gupta (Tayob intervening)* 2021 (3) SA 88 (SCA) at par 145

44. In my view, no proper foundation was laid in the answering affidavit for maligning the integrity of five UN bodies. It was a gratuitous averment, which was irrelevant to whether or not the requirements for certification were met by the UN bodies in their application.
45. In my view, fairness and justice dictates that Anglo should pay the costs of the application brought by the UN bodies. All parties involved in this matter employed the services of more than one counsel, which in my view, was warranted, given the seriousness of the matter to all parties concerned and the complexity of the issues involved. Costs payable by Anglo in respect of the UN bodies' application should therefore include the costs of both senior and junior counsel.
46. Accordingly, the following order is granted:

ORDER

1. The third to seventh applicants for admission as *amici curiae* are admitted as the third to seventh *amici curiae*.
2. The third to seventh *amici curiae* are granted the right to file written submissions and present oral argument at the hearing of the certification application.
3. The respondent is to pay the costs of the application brought by the third to seventh applicants, which will include the costs of one senior and two junior counsel.
4. The application by Human Rights Watch for admission as *amicus curiae* is dismissed.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 10 November 2022
Judgment delivered: 25 November 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 25 November 2022.

APPEARANCES:

Counsel for 3 rd to 7 th applicants: (UN bodies) Instructed by:	Adv K. Hofmeyer SC together with Adv M Mbikiwa & Adv I. Cloete Legal Resources Centre
Counsel for Human Rights Watch: Instructed by:	Adv K Hardy together with Adv BC Meyersfeld Lawyers for Human Rights
Counsel for the respondent: Instructed by:	Adv S. Budlender SC together with Adv L. Sisilana & Adv D. Smit Webber Wentzel Attorneys