

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

CASE NO: 2020/32777

In the application 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 the matter between:

VARIOUS PARTIES ON BEHALF OF MINORS

First to Twelfth Applicants

[REDACTED]

Thirteenth Applicant

and

ANGLO AMERICAN SOUTH AFRICA LIMITED

Respondent

and

AMNESTY INTERNATIONAL

First applicant for admission
as *amicus curiae*

**THE SOUTHERN AFRICA
LITIGATION CENTRE**

Second applicant for admission
as *amicus curiae*

FOUNDING AFFIDAVIT

I, the undersigned,

MARCOS ANDRÉS ORELLANA

do hereby make oath and say:

- 1 I am the United Nations Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (also known as the Special Rapporteur on Toxics and Human Rights).
- 2 I am duly authorised to depose to this affidavit on behalf of the following entities:
 - 2.1 the United Nations Special Rapporteur on Extreme Poverty and Human Rights;
 - 2.2 the United Nations Special Rapporteur on the Rights of Persons with Disabilities;

2.3 the United Nations Working Group on Business and Human Rights;
and

2.4 the United Nations Working Group on Discrimination against Women
and Girls,

(collectively, "**the Special Procedures**").

- 3 In the performance of his or her mandate as UN Special Rapporteurs or Independent Experts and members of UN working groups, the mandate-holders are accorded certain privileges and immunities as experts on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946, to which South Africa is a party since 30 August 2002. This submission is drafted on a voluntary basis for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. In full accordance with the independence afforded to the respective mandates of the mandate-holders, authorization for the positions and views expressed herein was neither sought nor given by the United Nations, including the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, or any of the officials associated with those bodies. I have considered the legal submissions prepared by our legal representatives and confirm that this disclaimer applies to the heads of argument which accompanies this affidavit.

- 4 I attach, as **Annexures MO1.1 to MO1.5**, letters of authorisation from the Special Procedures, authorising me to bring this application and to depose to this affidavit on their behalf.
- 5 The facts to which I depose are true and correct and are within my personal knowledge except where it is apparent from the context that they are not.
- 6 The submissions of law I make in this affidavit are made on the advice of the Special Procedures' lawyers, which advice I believe to be true and correct.

OVERVIEW

- 7 This is an application to admit the Special Procedures as *amici curiae* in the class action certification proceedings before this Court.
- 8 I am advised that an *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. It differs from an intervening party in the sense that it need not have a direct interest in the outcome of the litigation, and joins the proceedings as a friend of the Court because of its expertise or interest in the matter before the Court.
- 9 As I explain in greater detail later in this affidavit, the Special Procedures have met each of the requirements for admission as *amici curiae*.
- 10 The Special Procedures comprise three UN Special Rapporteurs and two UN working groups. Special Rapporteurs and working groups are independent experts, appointed by the Human Rights Council, with the mandate to

monitor, advise and publicly report on human rights from a thematic or country-specific perspective. The Special Rapporteurs and working groups form part of the special procedures system of the UN, which has 56 thematic and country mandates on a broad range of human rights issues. Whereas Special Rapporteurs are individual experts, working groups comprise a collection of independent experts from each of the five UN regional groupings.

- 11 Each of the Special Procedures seeking admission in these proceedings has a mandate that is directly relevant to these proceedings, as I explain in due course.
- 12 The Special Procedures seek admission as *amici curiae* in the certification proceedings to advance a new and important submission. It relates directly to the question whether it is in the interests of justice for this Court to certify the class action before it. The Special Procedures' submission is based on Anglo American's own stated commitment to international human rights principles, and in particular, a set of international standards for corporate conduct – the Guiding Principles on Business and Human Rights. If they are admitted as *amici curiae*, the Special Procedures will advance submissions that show how Anglo American's own decision to endorse the Guiding Principles has important implications for its opposition to the class action certification in this matter.
- 13 The intended submissions will, I submit, be of substantial assistance to the Court. They are novel, and address the key question in the certification

proceedings: whether it is in the interests of justice to certify the class action. Moreover, the intended submissions are brought from a unique and important perspective in these proceedings – that of the independent experts specifically appointed by the UN Human Rights Council to monitor, advise and publicly report on human rights issues, such as those that the applicants for certification have experienced. The prospective *amici* are able to offer real assistance to the Court as amici, and should, I submit, be admitted.

14 In what follows, I address the following issues in turn:

14.1 The procedural requirements under Uniform Rule 16A;

14.2 The Special Procedures' interest in this matter; and

14.3 The Special Procedures' intended submissions.

RULE 16A'S PROCEDURAL REQUIREMENTS

15 Uniform Rule 16A requires of a party seeking admission as an *amicus curiae* that it:

15.1 seeks the written consent of the parties;

15.2 in the absence of such consent, applies to court for admission;

15.3 has an interest in the proceedings; and

15.4 will make submissions that are relevant, will assist the court, and are different from those of the other parties.

- 16 On 29 September 2021, the attorneys for the Special Procedures, the Legal Resources Centre ("the LRC") addressed correspondence to the parties in this matter, explaining that the issues raised in the papers filed at that stage may intersect with the Special Procedures' respective mandates. The LRC indicated that the Special Procedures may seek leave to intervene as *amici curiae*, but would only be in a position to make a decision in this regard after the close of pleadings. A copy of the letter is attached as **Annexure MO2**.
- 17 On 3 May 2022, the LRC wrote to the parties again. The LRC explained that, having now considered the full set of pleadings, the Special Procedures took the view that they have a substantial interest in these proceedings, and are able to make submissions that have not been addressed by any of the parties and will be of assistance to the Court. They sought the parties' consent to intervene as *amici curiae*. A copy of the letter is attached as **Annexure MO3**.
- 18 On 5 May 2022, the applicants' attorneys confirmed that the applicants had no objection to the admission of the Special Procedures as *amici*. A copy of the letter is attached as **Annexure MO4**.
- 19 Anglo, however, did not consent. On 5 May 2022, its attorneys, Webber Wentzel, sent a letter indicating that Anglo was not in a position to consent at that stage, as it appeared that the submissions the Special Procedures intended to advance would repeat those advanced by the first and second applicants for admission as *amici curiae*. The letter concluded:

"We would suggest however that you defer further consideration relating to the proposed intervention of your client until such time

as you have had an opportunity to consider the written submissions to be filed by CALS and the heads of argument to be filed in due course by the Applicants. If, at that stage, you consider that there are matters which have not been raised by either CALS or the Applicants and which you believe are useful to the Court, we can revisit the position."

- 20 A copy of this letter is attached as **Annexure MO5**.

- 21 The LRC responded on 6 May 2022. It maintained that the Special Procedures' request for consent for admission as *amici curiae* met the test for admission under Rule 16A, in that the submissions they intended to make would assist the court and be different to those advanced by the parties. However, the LRC indicated that the Special Procedures would revisit the question of their admission as *amici curiae* after considering the parties' heads of argument. A copy of this letter is attached marked **Annexure MO6**.

- 22 Pursuant to a case management meeting on 20 May 2022, this Court issued a directive requiring prospective *amici* to file their applications for admission by no later than 28 October 2022.

- 23 The Special Procedures have now had an opportunity to consider the heads of argument filed by the applicants, Anglo, and the first and second applicants for admission as *amici curiae*. They remain of the view that they have a substantial interest in these proceedings, and are able to make submissions that have not been addressed by any of the parties and will be of assistance to the Court. They accordingly make this application for admission as *amici curiae*, in terms of Uniform Rule 16A(5).

THE SPECIAL PROCEDURES' INTEREST IN THIS MATTER

- 24 The Special Procedures have a clear interest in the subject-matter of this application.
- 25 As is clear from the papers already filed in this matter:
- 25.1 The applicants seek to certify a class action. The proposed classes comprise children and women of child-bearing age who have suffered injury and harm as a result of exposure to lead pollution in the Kabwe District, Central Province, Zambia.
- 25.2 The purpose of the class action is to claim damages from Anglo American, which was the parent company and head office of the Anglo Group that operated, managed and advised the Broken Hill Mine (later known as the Kabwe Mine) between 1925 and 1974, for the injuries caused by lead pollution from its mining operations.
- 25.3 The applicants allege that Anglo knew or ought reasonably to have known of the risks of lead pollution from the mine and measures required to prevent and address the pollution, and breached a duty of care to protect existing and future generations of residents of Kabwe against the risks of lead pollution arising from the Mine's operations.
- 26 The application raises issues of constitutional and international significance that fall squarely within the respective mandates of each of the Special Procedures. In particular:

- 26.1 The UN Special Rapporteur on Toxics and Human Rights seeks to assist states, businesses, and other stakeholders to adopt solutions to prevent exposure of people to harmful substances. The proposed classes in this matter are persons who have suffered harm as a result of exposure to harmful substances – lead pollution – in Kabwe. They seek redress through a class action in this Court.
- 26.2 The UN Special Rapporteur on Extreme Poverty and Human Rights advocates to highlight the human rights consequences of the systematic neglect suffered by those living in extreme poverty. In this matter, the proposed classes are a poor and vulnerable population, who have suffered injury and harm as a result of exposure to lead pollution in Kabwe.
- 26.3 The UN Special Rapporteur on the Rights of Persons with Disabilities promotes the rights of persons with disabilities by, inter alia, engaging with stakeholders, supporting national efforts to realise the rights of persons with disabilities, and offering recommendations on how to promote and enforce the relevant standards, bearing in mind the implications of gender in his or her work. Among the proposed classes are persons whose injuries have resulted in disability.
- 26.4 The UN Working Group on Business and Human Rights has a mandate to promote, disseminate and implement the Guiding Principles on Business and Human Rights (**"the Guiding Principles"**) and to exchange and promote good practices and lessons learned on the implementation of the Guiding Principles. I attach the Guiding

Principles as **Annexure MO7**. In this matter, the proposed classes seek a remedy for injuries sustained as a result of exposure to lead pollution, for which they allege Anglo – a corporate entity – is responsible. Moreover, Anglo publicly professes its commitment and adherence to the Guiding Principles, which, *inter alia*, provide that companies should address the adverse human rights impacts of conducting their businesses.

26.5 The UN Working Group on Discrimination against Women and Girls has a mandate to eliminate all forms of discrimination against women and girls. The proposed classes comprise children, including girls, and women of child-bearing age, who have suffered injury and harm as a result of exposure to lead pollution in Kabwe.

27 The human rights impacts of the lead pollution in Zambia are extensive. They fall squarely within the mandates of the Special Procedures. These are issues on which the Special Procedures are singularly well-placed to assist the Court.

28 That the Special Procedures have an interest in this matter is evident not only from their mandates, but also from their own prior intervention in the situation in Kabwe.

28.1 First, Special Procedure mechanisms can intervene directly with governments and other stakeholders on allegations of abuses of human rights that come with their mandates. Two of the Special Procedures have already done so, in relation to Kabwe.

28.2 As Anglo notes in its answering affidavit (at paragraphs 191 and 585 to 594), in May 2021, two of the Special Procedures – the UN Special Rapporteur on Toxics and Human Rights, and the UN Special Rapporteur on the Rights of Persons with Disabilities – wrote to the Zambian government, Jubilee Metals (the company planning to reprocess metals at the former mine), and the South African government. The Special Rapporteurs expressed concerns regarding lead contamination in the Kabwe region and its impact on human rights. Their letters are attached to Anglo's answering affidavit as AA105 – 107.

28.3 The Special Rapporteurs, after setting out the information received, concluded as follows:

"While we do not wish to prejudge the accuracy of these allegations, we wish to express our serious concerns regarding the situation of ongoing lead contamination in Kabwe and the serious human rights violations it results in, affecting the life, health and well-being of local residents, including children, who are particularly vulnerable to the damage caused by lead poisoning and bear its long-term consequences on their health."

28.4 They went on to request further information from the governments and Jubilee metals on a number of questions.

28.5 Second, in its recent report to the Human Rights Council in 2022, the UN Special Rapporteur on Human Rights and the Environment, in collaboration with the UN Special Rapporteur on Toxics and Human Rights, highlighted business responsibilities and good practices relevant to ensuring a non-toxic environment by preventing pollution, eliminating the use of toxic substances, and rehabilitating

contaminated sites. In doing so, the Report made specific reference to the lead contamination in Kabwe.¹

29 Therefore, I submit that the Special Procedures' interest in the present proceedings is substantial. It is against this background that the Special Procedures wish to make submissions in the certification proceedings as *amici curiae*.

THE SPECIAL PROCEDURES' INTENDED SUBMISSIONS

30 If they are admitted as *amici curiae*, the Special Procedures 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.

31 Below, I set out a brief summary of the submissions that the Special Procedures intend to make, if admitted as *amici curiae*.

Anglo has publicly committed itself to the Guiding Principles

32 Anglo has publicly and repeatedly professed its commitment to the Guiding Principles. Those principles commit Anglo, amongst other things, to address adverse human rights impacts which it, through its business endeavours, may have caused.²

¹ In order not to overburden these papers, I do not attach the report, but it is available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/004/48/PDF/G2200448.pdf?OpenElement>

² Principle 11; principle 22.

33 Its commitment to the Guiding Principles is expressed, for example, in Anglo's publicly available internal policies and procedures:

33.1 Anglo's Code of Conduct, which I attach marked **Annexure MO8**, refers to the Guiding Principles and states expressly that Anglo will ensure the remediation of adverse impacts caused by its operations:

"We have a fundamental commitment to respecting labour and human rights. This informs our core values. It is further expressed through our observance of core labour rights; being guided by relevant laws and regulations; being a signatory to the United Nations Global Compact and a supporter of the UN Guiding Principles on Business and Human Rights. We aim to identify, assess and minimise potential adverse human rights impacts that we cause or contribute to, or that are linked to our business, including by our suppliers or third parties acting on our behalf, through ongoing due diligence and appropriate management. We further emphasise our commitment to civic freedoms and the rule of law, including respecting the rights of human rights defenders. Should adverse impacts occur as a result of our operations, our objective would be to ensure that these are remediated to the greatest possible extent." (My emphasis).

33.2 Anglo's Group Human Rights Policy (Version 2 of which was published in 2018), which I attach marked **Annexure MO9**, describes Anglo's commitment to identifying, assessing and minimising adverse human rights impacts caused by and linked to its activities. It expresses Anglo's commitment to embedding the policy into its corporate culture and practices, and says that its efforts will be guided by the relevant principles in the Guiding Principles, including *"[c]ollaborating with or providing access to remedy through effective complaints and grievance procedures."*

33.3 These are also the standards to which Anglo holds its suppliers, as is evident from its Responsible Sourcing Standard for Suppliers (the **"Sourcing Standard"**), which I attach marked **Annexure MO10**. The

Sourcing Standard requires Anglo's suppliers to "*respect the human dignity and the rights of individuals and of the communities associated with their operations, consistent with the UN Guiding Principles on Business and Human Rights and other accepted human rights norms.*"

34 Anglo has publicly committed itself to the Guiding Principles in various official reports:

34.1 In its 2011 Sustainable Development Report, the relevant portion of which I attach marked **Annexure MO11**, Anglo welcomed the Guiding Principles (which had been published earlier that year) and expressed its commitment to ensuring full alignment with those principles in future.

34.2 In its Sustainable Development Reports from 2012 to 2014, and its Sustainability Reports from 2015 to 2021, the relevant portions of which I attach marked **Annexure MO12.1 to Annexure MO12.10**, Anglo repeatedly professed its commitment to the Guiding Principles; has claimed to be conscious that many aspects of its business can impact on human rights; has undertaken to implement the "Protect, Respect and Remedy" Framework provided for in the Guiding Principles; and has suggested that human rights best practices are built into the "Anglo American Social Way".

34.3 Similarly, in its Annual Reports in 2013, 2018, 2019 and 2021, the relevant portions of which I attach marked **Annexure MO13.1 to**

Annexure MO13.4, Anglo has claimed that human rights practices are built into its "Social Way", said that its approach is aligned with the Guiding Principles, and claimed that the Guiding Principles are integrated into its Code of Conduct and corporate standards.

- 34.4 Anglo's 2015 Annual Report and Sustainability Report were accompanied by a Press Release (attached marked **Annexure MO14**), dated 14 March 2016, titled "*Anglo American Drives Change to Define A More Sustainable Future*", in which Anglo said the following:

"Despite the current economic environment, Anglo American is committed to the need to continue to embody good governance in sustainability, and to demonstrate best practice. Incorporating respect for human rights into regular business practice is both a moral and business imperative, and is closely aligned with the UN Guiding Principles on Business and Human Rights.

Anglo American was an active participant in the UN Sustainable Development Goals (SDGs), launched in September 2015. The SDGs reflect many of the socio-economic issues that already sit at the heart of Anglo American's approach to sustainability and it believes strongly that its role as a private sector player is to support its host governments in meeting these targets, while reinforcing the real and positive difference mining and Anglo American can make in society."

- 34.5 In Anglo's UN Global Compact Communications On Progress in 2014, which I attach marked **Annexure MO15**, the company reiterated its full support of the Guiding Principles as follows:

"Anglo American has a strong commitment to human rights, as illustrated by our company guiding values being explicitly set out within our Business Principles and our Group Human Rights Policy, published in December 2014. In addition to our membership of the UN Global Compact we fully support the UN Guiding Principles on Business and Human Rights (UNGP) and the Voluntary Principles on Security and Human Rights (VPSHR). Human rights principles are embedded in a number of internal policy documents, including those related to employment practices, business integrity, environmental management, health, safety standards, social

performance, supply chain and security. You can find a summary of our approach and performance here, in our Sustainable Development Report (see page 43) and below, with links to further information alongside."

- 34.6 Similarly, in Anglo's published self-assessment as part of its UN Global Compact Communication On Progress 2019, which I attach marked **Annexure MO16**, the company emphasised its commitment to human rights and the Guiding Principles, and, in particular, ticked the box for:

"Commitment to comply with all applicable laws and respect internationally recognized human rights, wherever the company operates (e.g., the Universal Declaration of Human Rights, Guiding Principles on Human Rights) (BRE1 + ARE1)"

- 34.7 In its response to a questionnaire by the UN Special Rapporteur on the situation of human rights defenders, which I attach marked **Annexure MO17**, Hermien Botes (Anglo's Head of Sustainability Investment) and Sikhulekile Duma (Anglo's International and Government Relations Specialist) explained that within the Anglo Social Way there is a Social and Human Rights Impact and Risk Analysis ("**SHIRA**") tool, which provides a comprehensive, cross-functional assessment of social and human rights impacted annually. They explained further that:

"The SHIRA includes a prioritisation rating that reflects the UNGP process. There is focus on impacts to rights holders as opposed to only business risk. The SHIRA is guided by the mitigation hierarchy of avoiding, minimising, mitigating, remediating and offsetting/compensating."

- 34.8 In its Annual Report on the Voluntary Principles on Security and Human Rights 2021, the relevant portions of which I attach marked **Annexure MO18**, Anglo expressed its commitment to respecting "all

internationally recognised human rights", which commitment it said was expressed through its support for the Guiding Principles and embedded in its internal policies, including its Human Rights Policy.

35 Anglo has also expressed its commitment to the Guiding Principles in numerous non-official communications. For example:

35.1 On 2 July 2013, in an interview with Business Fights Poverty (which I attach marked **Annexure MO19**), Anglo's Government Relations Manager, Mr Jan Klawitter, emphasised Anglo's longstanding commitment to international human rights. He said that Anglo wants to be "*the development partner of choice*", and has therefore "*actively engaged with the UN Guiding Principles and related initiatives*".

35.2 In a 25 February 2013 article titled "*Shell, Rio Tinto, Chevron, Anglo American and De Beers to Discuss CSR Risk in the Extractive Industry*", which I attach marked **Annexure MO20**, Anglo's Jon Samuel (Head of Social Performance) was reported as describing Anglo's priorities as follows:

"Boosting community development impact through leveraging our core business more effectively, implementing ways to get good social performance widely recognised by key external stakeholders, managing social risks in our capital project pipeline, and ensuring that we are fully compliant with the UN Guiding Principles on Business and Human Rights."

35.3 In a letter to Facing Finance e.V dated 12 February 2016, and upon learning that Anglo was to be included in the 2016 "Dirty Profits Report", Mr Klawitter boasted about Anglo's long-track record in

relation to human rights, including its commitment to the Guiding Principles:

"Generally, Anglo American has a long track record of being one of the most progressive mining companies and we work to ensure that our host communities benefit from our presence. We were the first major company in the world to offer free anti-retroviral treatment to all HIV positive employees, an example now followed by almost all major employers in southern Africa. We are strong advocates for tax transparency, having been publishing tax data for over a decade; and for business and human rights issues, including actively supporting the implementation of the Voluntary Principles on Security and Human Rights as well as the UN Guiding Principles on Business and Human Rights. When it comes to sharing social performance standards across our industry, we have made our award-winning social performance guidance, the Socio Economic Assessment Toolbox (SEAT), publicly available for anyone to use, and continue working to advance best practices in mining. SEAT has helped Anglo American and other extractive sector companies understand and respond to community concerns in a way that is industry leading."

This appears on page 1 of the letter, which is attached marked **Annexure MO21**.

- 36 Anglo's commitment to the Guiding Principles, and indeed to the protection of human rights generally, has received public recognition. To take just one example, its commitment to the Guiding Principles was recognised by the World Business Council for Sustainable Development's 2014 Report titled *"Scaling Up Action on Human Rights: Operationalizing the UN Guiding Principles on Business and Human Rights"*, which I attach marked **Annexure MO22**. The purpose of the report was to *"encourage more companies to take action on operationalizing the UNGPs"*. Anglo's commitment was, in other words, used as an example for others to follow.

Anglo's commitment to the Guiding Principles is incompatible with opposing certification

- 37 In this matter, the applicants seek a remedy for injuries they allege they suffered as a result of Anglo's business activities. They seek to use the class action process to do so.
- 38 Because Anglo is domiciled in South Africa, there is no debate that South African courts would have jurisdiction over a claim brought by an individual victim of lead poisoning in Kabwe against Anglo. Anglo itself does not deny this. This means that the only question for this Court is whether there are interests of justice reasons, nonetheless, to refuse to permit the applicants to use the class action procedure for prosecuting those claims.
- 39 Anglo has an election to make when it is faced with this class action certification application. It can decide to oppose it. Or it can decide not to oppose it, and instead to defend the class action on its merits.
- 40 Anglo has elected to oppose certification – and to throw its considerable resources into that opposition, seemingly in an effort to cut the litigation off before it begins.
- 41 If Anglo succeeds in its opposition, the result will be that the prospective class members are 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. Anglo does not dispute this. It opposes certification of

the class action knowing, and accepting, that, if it succeeds in its opposition, the result will be that the prospective class members will have no prospect of advancing their case for a remedy before a court of law.

42 But this approach to the certification is entirely incompatible with Anglo's professed commitment to the Guiding Principles. Having elected to assent to a set of Guiding Principles that commit it to respecting the rule of law and providing remedies for adverse human rights impacts, it now elects to resist certification of a class action that is designed to provide access to courts to pursue a remedy for the class members.

43 These two elections are fundamentally incompatible with one another.

44 The election to oppose certification, in circumstances where the prospective class members are unable otherwise to pursue their claims, is also fundamentally at odds with section 34 of the Constitution.

44.1 Section 34 of the Constitution applies to any person that litigates in a South African court, and grants such person the right to have their dispute decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

44.2 The right of access to courts is also entrenched in various international law instruments, including Article 14(1) of the International Covenant on Civil and Political Rights of 1996 (which guarantees a "*fair and public hearing by a competent, independent and impartial tribunal established by law*") and Article 7 of the African

Charter on Human and People's Rights (which guarantees the right of "*every individual...to have his cause heard*").

- 44.3 If certification is refused, the prospective class members will be denied the right of access to courts, and will be unable to have their cause heard. They will be denied this right despite it being common cause that South African courts would have jurisdiction over a claim brought by an individual victim of lead poisoning in Kabwe against Anglo.
- 45 If they are admitted as *amici curiae*, the Special Procedures will argue that the conflicted position in which Anglo has put itself, should weigh in the Court's analysis of where the interests of justice lie.
- 46 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. It cannot both claim to be committed to respecting the rule of law and remediating the adverse impacts of its business activities, while at the same time actively resist the certification of a class action in circumstances in which doing so will effectively deny the prospective class members any prospect of litigating their claims.
- 47 I submit that the Special Procedures' intended submissions will be of material assistance to the Court. I am advised that the overarching question for the Court at the certification stage is whether it is in the interests of justice that

the class(es) be certified. The Special Procedures' intended submissions go to the heart of this issue.

- 48 Further, the intended submissions are novel, as no other party or amicus has engaged in the inconsistency between Anglo's public commitment to the Guiding Principles and its opposition to certification in this case.

THE ADMISSION OF EVIDENCE

- 49 In the event that they are admitted as *amici curiae*, the Special Procedures seek this Court's leave to adduce limited evidence regarding Anglo's public commitment to the Guiding Principles as set out in paragraphs 32 to ³⁶ above. It is self-evidently in the interests of justice that the Special Procedures be granted leave to adduce such evidence:

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- 49.1 The evidence that the Special Procedures seek to adduce is, for the most part, composed of public reports and other statements published by Anglo itself. While Anglo may disagree with the Special Procedures about what they seek to make of that evidence, there is unlikely to be any dispute of fact as to the publication and contents of Anglo's own public commitments.

- 49.2 The evidence is directly relevant to (and, indeed, necessary for) the argument that the Special Procedures seek to advance – namely, that Anglo's public commitment to the Guiding Principles is incompatible with its opposition to the certification application.

49.3 The evidence is also directly relevant to the central question that this Court is called upon to determine in this application – namely, whether it is in the interests of justice to certify the class action.

CONCLUSION

50 Therefore, I submit that the Special Procedures have satisfied the requirements for admission as an amicus curiae. I pray for an order admitting the Special Procedures as *amici curiae* and permitting them to present written argument as well as oral argument at the hearing of this matter.

Marcos Orellana

MARCOS ANDRÉS ORELLANA

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at Washington DC on 27 of October 2022, the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

Mwala

COMMISSIONER OF OATHS

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