

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

CASE NO: 2020/32777

In the application of:

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

Third applicant for admission  
*as amicus curiae*

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

Fourth applicant for admission  
*as amicus curiae*

**THE UNITED NATIONS SPECIAL  
RAPPORTEUR 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*

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**HEADS OF ARGUMENT IN THE APPLICATION FOR ADMISSION OF THE  
PROSPECTIVE AMICI CURIAE**

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## INTRODUCTION

- 1 This is an application to admit three UN Special Rapporteurs and two UN working groups as *amici curiae* in the certification proceedings before this Court.
  
- 2 The applicants for admission as *amici curiae* are:
  - 2.1 the United Nations Special Rapporteur on Toxics and Human Rights;
  - 2.2 the United Nations Special Rapporteur on Extreme Poverty and Human Rights;
  - 2.3 the United Nations Special Rapporteur on the Rights of Persons with Disabilities;
  - 2.4 the United Nations Working Group on Business and Human Rights;  
and
  - 2.5 the United Nations Working Group on Discrimination against Women and Girls.
  
- 3 UN Special Rapporteurs and UN working groups form part of the special procedures system of the UN. They comprise independent experts, appointed by the UN Human Rights Council, with the mandate to monitor, advise and publicly report on human rights from a thematic or country-specific

perspective.<sup>1</sup> In these heads of argument, we shall refer to these bodies as either “the prospective *amici*” or “the Special Procedures”.

- 4 Each of the prospective *amici* seeking admission in these proceedings has a mandate that is directly relevant to these proceedings. If admitted, the prospective *amici* will make submissions regarding the impact that Anglo’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 – has for the Court’s assessment of whether it is in the interests of justice for the class action to be certified.<sup>2</sup>
- 5 In accordance with this Court’s directives dated 1 June 2022, these heads of argument are filed in support of the Special Procedures’ application for admission as *amici curiae*. In the event that the Special Procedures are admitted as *amici curiae*, they will, in accordance with this Court’s directives, file their written submissions in the main proceedings by 24 November 2022.
- 6 The intended submissions will, we 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.<sup>3</sup>
- 7 Moreover, the intended submissions are brought from a unique and important perspective in these proceedings: that of the independent experts specifically

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<sup>1</sup> FA para 12.

<sup>2</sup> The Guiding Principles are annexure MO7 to the FA.

<sup>3</sup> FA para 13.

appointed by the UN Human Rights Council to monitor, advise and publicly report on human rights issues, such as those the applicants for certification have experienced. The prospective *amici* are able to offer real assistance to the Court as *amici*, and should, we submit, be so admitted.<sup>4</sup>

- 8 In what follows, we address the following issues in turn:
- 8.1 The requirements for admission as an *amicus curiae*;
  - 8.2 The procedural requirements;
  - 8.3 The prospective amici's interest in the proceedings;
  - 8.4 The prospective amici's intended submissions; and
  - 8.5 The admission of evidence.

## REQUIREMENTS FOR ADMISSION AS AMICUS CURIAE

- 9 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 on or interest in the matter before the Court.<sup>5</sup>

- 10 The Constitutional Court has explained the role of an *amicus* as follows:

*“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*

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<sup>4</sup> FA para 13.

<sup>5</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at 27H–28B.

*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.”<sup>6</sup>*

- 11 Though *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.<sup>7</sup>
  
- 12 The prospective *amici curiae* bring their application in terms of Uniform Rule 16A. It requires of a party seeking admission as an *amicus curiae* that it:
  - 12.1 seeks the written consent of the parties, and, in the absence of such consent, applies to court for admission;<sup>8</sup>
  
  - 12.2 has an interest in the proceedings;<sup>9</sup> and
  
  - 12.3 will make submissions that are relevant, will assist the court, and are different from those of the other parties.<sup>10</sup>
  
- 13 We submit that all of these requirements are met. We address each in turn.

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<sup>6</sup> *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5.

<sup>7</sup> *Children’s Institute v Presiding Officer, Children’s Court, Krugersdorp* 2013 (2) SA 620 (CC) at 626A–C and 631H–632B.

<sup>8</sup> Uniform Rule 16A(2) and 16A(5).

<sup>9</sup> Uniform Rule 16A(6)(a).

<sup>10</sup> Uniform Rule 16A(6)(b).

## PROCEDURAL REQUIREMENTS

- 14 The prospective *amici* sought the parties' consent to their admission.<sup>11</sup> The applicants consented;<sup>12</sup> Anglo did not.<sup>13</sup>
- 15 Therefore, the prospective *amici* bring this application in accordance with the requirements of Uniform Rule 16A(5).

## INTEREST IN THE PROCEEDINGS

- 16 The prospective *amici* have a clear interest in the subject matter of this application.
- 17 As is clear from the papers already filed in this matter:
- 17.1 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.
- 17.2 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.

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<sup>11</sup> FA paras 16-21; annexures MO2 and MO3.

<sup>12</sup> Annexure MO4.

<sup>13</sup> Annexure MO5.

- 17.3 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.
- 18 The application raises issues of constitutional and international significance, which fall squarely within the respective mandates of each of the prospective *amici*. In particular:
- 18.1 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.<sup>14</sup> 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.
- 18.2 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.<sup>15</sup> 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.

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<sup>14</sup> FA para 26.1; annexure MO1.1.

<sup>15</sup> FA para 26.2; annexure MO1.3.



- 18.3 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.<sup>16</sup> Among the proposed classes are persons whose injuries have resulted in disability.
- 18.4 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 and to exchange and promote good practices and lessons learned on the implementation of the Guiding Principles.<sup>17</sup> In this matter, the proposed classes seek access to court to pursue 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 their business operations.<sup>18</sup>
- 18.5 The UN Working Group on Discrimination against Women and Girls has a mandate to eliminate all forms of discrimination against women and girls.<sup>19</sup> The proposed classes comprise children, including girls,

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<sup>16</sup> FA para 26.3; annexure MO1.2.

<sup>17</sup> FA para 26.4; annexure MO1.4.

<sup>18</sup> FA para 26.4.

<sup>19</sup> FA para 26.5; annexure MO1.5.

and women of child-bearing age, who have suffered injury and harm as a result of exposure to lead pollution in Kabwe.

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

20 That the prospective *amici* 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.

20.1 First, UN 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 prospective *amici* have already done so, in relation to Kabwe.<sup>20</sup>

20.2 As Anglo notes in its answering affidavit, in May 2021, two of the prospective *amici* – 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.

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<sup>20</sup> FA para 28.1.

20.3 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.”*

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

20.5 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.<sup>21</sup>

21 Therefore, we submit that the prospective *amicus*'s interest in the present proceedings is substantial. It is against this background that the prospective *amici* wish to make submissions in the certification proceedings as *amici curiae*.

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<sup>21</sup> FA para 28.5. The report is available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/004/48/PDF/G2200448.pdf?OpenElement>

## THE INTENDED SUBMISSIONS

- 22 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.
- 23 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.
- 24 We set out a brief summary of the submissions below.
- 24.1 Anglo has publicly and repeatedly professed its commitment to the Guiding Principles. It has done so through its internal policies and procedures, through the publication of official reports, and through public statements and correspondence.<sup>22</sup>
- 24.2 The Guiding Principles commit Anglo to, amongst other things, respect the rule of law and address adverse human rights impacts which it, through its business endeavours, may have caused.<sup>23</sup>
- 24.3 In this matter, the applicants seek access to court to pursue a remedy for injuries they allege they suffered as a result of Anglo's business

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<sup>22</sup> FA paras 32 to 36; annexures MO8 to MO22.

<sup>23</sup> Principle 11; principle 22.

activities. They use the procedural mechanism of a class action to seek to vindicate their rights.

24.4 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.<sup>24</sup>

24.5 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.

24.6 Anglo has elected to oppose – and to throw its considerable resources into that opposition, seemingly in an effort to cut the litigation off before it begins.

24.7 If Anglo succeeds in its opposition, the result will be that the prospective class members are denied any access to justice 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.<sup>25</sup> It opposes certification of the

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<sup>24</sup> The Constitutional Court in *Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC) at paras 34 – 37 made clear that the overriding consideration for certification is the interests of justice.

<sup>25</sup> RA at p 001-7760 para 490; Ndulo p 001-3900 to 001-3907; Gibson p 001-3944, paras 15-16.

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.

24.8 But this approach to the certification is entirely incompatible with Anglo's professed commitment to the Guiding Principles.

24.9 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, Anglo 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.

24.10 These two elections are fundamentally incompatible with one another.

24.11 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.

24.11.1 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.

24.11.2 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*”).

- 24.11.3 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.
- 24.12 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.
- 24.13 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.

- 25 We submit that the Special Procedures' intended submissions will be of material assistance to the Court. 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.<sup>26</sup> The Special Procedures' intended submissions go to the heart of this issue.
- 26 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

- 27 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. It is self-evidently in the interests of justice that the Special Procedures be granted leave to adduce such evidence:

27.1 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.

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<sup>26</sup> *Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC) at paras 34 – 37.



27.2 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.

27.3 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**

28 For all of these reasons, we submit that the prospective *amici* have satisfied the requirements for admission as *amici curiae*.

**KATE HOFMEYR SC**

**MICHAEL MBIKIWA**

**INGRID CLOETE**

Counsel for the prospective *amici curiae*

Chambers, Sandton

28 October 2022

## LIST OF AUTHORITIES

### **South African case law**

*Children's Institute v Presiding Officer, Children's Court, Krugersdorp* 2013 (2) SA 620 (CC)

*Hoffmann v South African Airways* 2001 (1) SA 1 (CC)

*In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC)

*Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC)

### **International instruments**

Guiding Principles on Business and Human Rights, 2011