IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case number: 2020/32777

In the matter between:

VARIOUS PARTIES ON BEHALF OF MINORS	First to twelfth applicants
[redacted]	Thirteenth applicant

and

ANGLO AMERICAN SOUTH AFRICA LTD	Respondent

and

AMNESTY INTERNATIONAL	First *amicus curiae*
THE SOUTHERN AFRICAN LITIGATION CENTRE	Second *amicus curiae*
THE UNITED NATIONS SPECIAL RAPPORTEUR ON TOXICS AND HUMAN RIGHTS	Third *amicus curiae*
THE UNITED NATIONS SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS	Fourth *amicus curiae*
THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES	Fifth *amicus curiae*
THE UNITED NATIONS WORKING GROUP ON BUSINESS AND HUMAN RIGHTS	Sixth *amicus curiae*
THE UNITED NATIONS WORKING GROUP ON DISCRIMINATION AGAINST WOMEN AND GIRLS	Seventh *amicus curiae*

RESPONDENT'S HEADS IN RESPONSE TO THE *AMICI CURIAE*

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I. INTRODUCTION

1. Two sets of *amici curiae* have been admitted by this Court.

    1.1. the first and second *amici curiae* ("*Amnesty and SALC*"); and

    1.2. the third to seventh *amici curiae* (who we refer to for convenience as "*the Special Procedures*").

2. In what follows we address the arguments advanced by each of them. We respectfully submit that neither set of *amici* submissions makes any material difference to the true issues before the Court and the task of this Court in resolving them.

II. RESPONSE TO AMNESTY AND SALC

3. Amnesty and SALC make submissions on the application of South African constitutional law and international law as they relate to the duties of the South African State and of Anglo.

4. Our response to Amnesty and SALC's submissions may be summarised as follows:

    4.1. First, Amnesty and SALC attempt impermissibly to lead evidence in their heads of argument. These aspects of their submissions should be ignored.

    4.2. Second, Amnesty and SALC cannot rely on South African constitutional law and international law to determine the parties' substantive rights and obligations. It is common cause that Zambian tort law applies. It follows

that only Zambian law is relevant to determining whether Anglo is liable at all and, if so, to what extent.

4.3. Third, in considering Anglo's legal duties:

4.3.1. Amnesty and SALC have not proven that the international instruments on which they rely are part of Zambian law.

4.3.2. The international instruments in any event do not apply retrospectively and most are moreover not law.

4.3.3. Some of the rules proposed to be applied are, moreover, patently bad.

4.3.4. The South African Bill of Rights does not apply retrospectively or extraterritorially, and so cannot support certification.

4.4. Fourth, in considering the South African State's constitutional and international law obligations:

4.4.1. The specific norms and law cited by Amnesty and SALC do not find application on the facts, are irrelevant, and are otherwise unhelpful to deciding whether or not to certify in this case.

4.4.2. A denial of certification does not offend the right to a remedy or access to justice, either on principle or on the facts.

(i) Efforts to lead inadmissible evidence

5. Amnesty and SALC sought only to make legal submissions as *amici curiae*.[1] They nonetheless attempt to introduce numerous propositions of fact in their heads of argument. These include the following:

5.1. Evidence from UN Special Rapporteurs that categorises Kabwe as a *"sacrifice zone"*, and describes the nature of an *"environmental health crisis"* in Kabwe and its impact on local communities.[2]

5.2. Amnesty's research on —

5.2.1. *"institutional, political, practical … barriers"* to corporate accountability and redress for human rights abuses;[3]

5.2.2. the conduct of other multinational companies' use of ownership structures, including Amnesty's research on the *"Bhopal industrial disaster"* in India;[4] and

5.2.3. why *"victims and survivors of corporate harm"* may choose not to litigate their claims in domestic courts.[5]

5.3. An array of references to news articles and internet publications.[6]

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[1] Amnesty / SALC NoM p 049-1.

[2] Amnesty / SALC HoA paras 5 to 6 p 049-129.

[3] Amnesty / SALC HoA paras 37 to 38 p 049-139.

[4] Amnesty / SALC HoA para 7 p 049-129.

[5] Amnesty / SALC HoA para 102 p 049-160.

[6] See for example Amnesty / SALC HoA footnote 6 p 049-131, fn 80 to 81 p 049-146, fn 86 p 049-147, fn 103 p 049-151, fn 147 to 148 p 049-161, fn 149 and 151 p 049-162.

5.4. Evidence on the content of Zambian procedural law, the Zambian justice system, the availability of litigation funding in Zambia, and the role of expert evidence in Zambian courts.[7]

6. These are propositions of fact, not legal submissions. They have not been placed in evidence under oath, and Anglo has not had an opportunity to respond to them.

7. In *Children's Institute*, the Constitutional Court held that the admissibility of evidence by an *amicus* is strictly circumscribed; leave will be granted to an *amicus* to lead evidence only where the interests of justice supports it.[8] While Rule 16A does not prohibit an *amicus* from introducing evidence, *"whether and to what extent"* it may do so remains in the court's discretion.[9]

8. Amnesty and SALC did not seek the parties' consent, nor did they seek or obtain leave from the Court to lead evidence. Amnesty and SALC did not seek admission as *amici* on the basis that they would lead new evidence. Anglo acceded to their admission on the basis that they would not be leading new evidence. It follows that it would not be in the interests of justice for the new evidence to be admitted.

9. The propositions of fact in their heads of argument (including those listed above) should accordingly be ignored.

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[7] Amnesty / SALC HoA paras 108 to 113 pp 049-162 to 149-163.

[8] *Children's Institute v Presiding Officer, Children's Court, Krugersdorp,* 2013 (2) SA 620 (CC) para 32.

[9] *Children's Institute v Presiding Officer, Children's Court, Krugersdorp* 2013 (2) SA 620 (CC) para 39.

(ii) The application of international law

10. Amnesty and SALC rely extensively on international law, arguing (or at least implying) that Anglo and this Court are bound by international-law rules in the determination of this matter.[10]

11. To the extent that the argument relates to the substantive law governing the dispute, Amnesty and SALC are incorrect:

    11.1. It is common cause that the substantive law governing the dispute is the Zambian law of torts.[11]

    11.2. In litigation in South African courts, foreign law is a matter of fact that must be proven by the parties relying on it.[12]

    11.3. Amnesty and SALC have not proven (or even attempted to argue) that international law is law in Zambia, and so this Court cannot include international law as part of the substantive law governing the dispute.

12. It is thus not necessary for this Court even to consider Amnesty and SALC's countless references to various international-law instruments. Amnesty and SALC have not proven that these instruments form part of Zambian law, and so they cannot determine the parties' substantive rights and obligations.

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[10] Amnesty / SALC HoA paras 19 to 22 pp 049-133 to 049-134.

[11] Draft POC para 19 p 001-156; AA para 947.4 p 001-3028.

[12] *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (AD) at 294.

13. In an attempt to justify the application of international-law principles, Amnesty and SALC rely on various provisions of the South African Constitution, including —

13.1. section 39(1)*(b)*, which requires a South African court to consider international law when interpreting the (South African) Bill of Rights;

13.2. section 233, which requires a South African court to interpret legislation to be consistent with international law when reasonably possible; and

13.3. section 232, which makes customary international law directly applicable in South Africa if it is not inconsistent with the (South African) Constitution and (South African) legislation.[13]

14. All of this is misplaced:

14.1. The South African Constitution is not part of Zambian law. It thus cannot be used to import international-law obligations into the substantive law governing the dispute.

14.2. It is notable that the Zambian Constitution contains no provision like the provisions of the South African Constitution referred to above.[14] This Court thus cannot assume that international law applies in Zambian

[13] Amnesty / SALC HoA paras 19 to 22 pp 049-133 to 049-134.

[14] Article 7 of the Constitution of Zambia (Amendment) Act 2 of 2006 provides:

"The Laws of Zambia consist of —

(a) this Constitution;

(b) laws enacted by Parliament;

(c) statutory instruments;

(d) Zambian customary law which is consistent with this Constitution; and

(e) the laws and statutes which apply or extend to Zambia, as prescribed."

municipal law like it does in South Africa. Indeed, different countries adopt a wide range of approaches to how international law applies in their domestic legal system and what steps are needed to make it apply.[15]

14.3. Even if, for the sake of argument, all of this were left aside, none of the specific provisions of the South African Constitution relied upon are capable of application:

14.3.1. Section 39(1)*(b)* cannot apply because the South African Bill of Rights is not applicable (more on this below).

14.3.2. Section 233 is irrelevant because the substantive law governing the dispute is largely the Zambian common law of torts, and not legislation.

14.3.3. Section 232 cannot apply because it deals with whether customary international law is law <u>in South Africa</u> – not in Zambia.

[15] John Dugard et al *Dugard's International Law: A South African Perspective* 5 ed (2019) 57 to 58: There are generally two approaches to the relationship between international law and municipal law– monist and dualist. Monist systems apply rules of international law directly without any act of adoption by courts or transformation by the legislature. Dualist systems in general only apply international law in domestic courts if it is adopted or transformed into local law by legislation.

(iii) Anglo's international-law obligations

Amnesty and SALC have not proven that their international-law instruments are part of Zambian law

15. Amnesty and SALC argue that various international-law instruments impose obligations on Anglo that are relevant to its alleged liability.[16] But these arguments fail for the reasons set out above.

16. This was affirmed by the judgment of Maier-Frawley J in this very matter, in which Human Rights Watch's application for admission as an *amicus curiae* was dismissed.[17] There, this Court considered whether the UN Guiding Principles on Business and Human Rights[18] ("*the UN Guiding Principles*") were relevant to the Court's consideration of Anglo's alleged duty of care.

    16.1. The Court held that the test for Anglo's alleged liability "*is a matter of Zambian law, to be found in Zambian sources of law*".[19]

    16.2. It held further that "*one does not prove the test for duty of care in Zambian law by reference to the [UN Guiding Principles], unless those are part of Zambian law, which [Human Rights Watch] does not assert*."[20]

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[16] Amnesty / SALC HoA paras 64 to 76 pp 049-148 to 049-152.

[17] Maier-Frawley J judgment p 000-1.

[18] United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* A/HRC/17/31 (21 March 2011).

[19] Maier-Frawley J judgment para 35 p 000-19.

[20] Maier-Frawley J judgment para 35 p 000-19.

16.3. Similarly here, Amnesty and SALC do not assert that the international instruments on which they rely are a part of Zambian law, nor could they, for the reasons we give above.

17. It is thus not necessary at all for this Court to consider the contents of Amnesty and SALC's international-law instruments. But even on a closer look, these instruments cannot influence Anglo's alleged liability, for the reasons that follow.

The international instruments all post-date the relevant period

18. Many of the instruments relied upon by Amnesty and SALC were promulgated well after the relevant period, which ended in 1974.[21] None purport to apply retrospectively. It follows that they are not relevant to Anglo's alleged obligations during the relevant period, or to its alleged liability.

19. Specifically:

19.1. Amnesty and SALC rely heavily on the UN Guiding Principles.[22] But these were only approved by the UN Human Rights Council in 2011, almost 40 years after the end of the relevant period.

19.2. Amnesty and SALC also rely on a report by the UN Special Rapporteur on Toxics, entitled *Report on toxics and children's rights*[23] and published in 2016.

[21] FA para 81 p 001-51.

[22] Amnesty / SALC HoA paras 65 to 72 pp 049-148 to 049-150.

[23] Report on toxics and children's rights, A/HRC/33/41 (2 August 2016). Amnesty / SALC HoA para 67 fn 91 p 049-149.

19.3. They rely on a further report by the UN Special Rapporteur on Toxics (what they call *"the Report on Good Practices"*)[24] published in 2017.[25]

19.4. They rely on what they call *"the Report on Access to Effective Remedies"*, published by the UN Working Group on Business and Human Rights[26] in 2017.[27]

19.5. They rely on a report of the UN Working Group on Business and Human Rights entitled *"the Report on the Gender dimensions of the Guiding Principles on Business and Human Rights"*,[28] published in 2019.[29]

19.6. They rely further on *Children's Rights and Business Principles* published by the UN Children's Fund and the UN Global Compact[30] in 2012.[31]

20. Put simply, Anglo's alleged obligations before 1974 cannot be determined (or even affected) by international instruments published in the 2010s. This is a further reason why the international instruments on which Amnesty and SALC rely are irrelevant to Anglo's alleged liability – and thus to whether certification should be granted.

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[24] Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Guidelines for Good Practices, A/HRC/36/41 (20 July 2017).

[25] Amnesty / SALC HoA para 74 p 049-150.

[26] UN Working Group on Business and Human Rights *Report on human rights and transnational corporations and other business enterprises* (18 July 2017), A/72/162

[27] Amnesty / SALC HoA paras 70 to 72 p 049-150.

[28] UN Working Group on Business and Human Rights, Report on the Gender dimensions of the Guiding Principles on Business and Human Rights, A/HRC/41/43 (23 May 2019).

[29] Amnesty / SALC HoA para 72 p 049-150.

[30] UNICEF, UN Global Compact and Save the Children, *Children's Rights and Business Principles* (2012).

[31] Amnesty/SACL HoA para 73 p 049-150.

Many of the international instruments are not law

21. Many of the international instruments on which Amnesty and SALC rely do not constitute international law. The sources of international law, set out in article 38(1) of the Statute of the International Court of Justice, are —

    21.1. international treaties;

    21.2. customary international law;

    21.3. the *'general principles of law recognised by civilised nations'*; and

    21.4. judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of international law.[32]

22. The international instruments on which Amnesty and SALC overwhelmingly rely do not come from these sources. They are thus not law and are incapable of determining Anglo's alleged obligations during the relevant period.[33]

23. It is notable that the primary instrument relied upon by Amnesty and SALC – the UN Guiding Principles – itself makes clear that it has no legal status, providing as follows:

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[32] United Nations, *Statute of the International Court of Justice*, 18 April 1946. Exceptionally, international law may come from other sources (see John Dugard et al *Dugard's International Law: A South African Perspective* 5 ed (2019) 28 to 29) but Amnesty and SALC do not claim that any of the instruments they rely on come from any of these residual sources.

[33] It is possible that Amnesty and SALC intend to rely on the various international instruments as authoritative interpretations of genuine international-law obligations. But if this were so, it would have been necessary for them to clearly link each proposition in the relevant international instrument with the provision of international law of which it is an interpretation, and to justify that interpretation. Amnesty and SALC have done none of this – they merely point to a laundry list of propositions in the various international instruments and assume they are binding law.

> "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[34]

24. It follows that, while Anglo now applies the Guiding Principles to its business, those Guiding Principles cannot determine or affect Anglo's legal liability – especially for conduct that allegedly took place half a century ago.

In any event, the arguments are untenable

25. In addition to being entirely inapplicable, many of the arguments that Amnesty and SALC derive from their international instruments are, with respect, patently untenable. We offer the following examples.

26. The first such argument is the following (we quote from Amnesty and SALC's heads of argument):

> "It is clear that *'causality between the activities of a company and the adverse impact is not a factor in determining the scope of [a company's responsibility]'*" [35]

27. For this extraordinary proposition, the applicants cite the *"frequently-asked questions"* document for the UN Guiding Principles ("the Guiding Principles FAQ").[36]

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[34] UN Guiding Principles p 1.

[35] Amnesty / SALC HoA para 69 p 049-149.

[36] Office of the United Nations High Commissioner for Human Rights, Frequently Asked Questions about the Guiding Principles on Business and Human Rights, HR/PUB/14/3 (2914), Question 32, p 32.

28. As a description of the law that must determine the dispute, the statement is clearly incorrect. It is common cause that Anglo's alleged liability is controlled by the Zambian law of torts,[37] and it is common cause that causation is a requirement for tortious liability in Zambia.[38]

29. As a moral or policy proposition, it can be rejected out of hand. It cannot be that a company is responsible (tortiously or otherwise) for *"adverse impacts"* that it has not caused. If this were true, the applicants could have sued any company based in South Africa that had any vague connection to the Mine.

30. Finally, the proposition does not reflect what the Guiding Principles FAQ actually says. Amnesty and SALC's quotation is misleading. We quote the relevant portion of the FAQ in full:

> "If a company causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. If it contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. If a human rights impact is directly linked to its operations, products or services through a business relationship, it should seek to prevent or mitigate such an impact even if it has not contributed to it.
>
> The term *"direct link"* refers to the linkage between the harm and the company's products, services and operations through another company (the business relationship). Causality between the activities of a company

[37] Draft POC para 19 p 001-156; AA para 947.4 p 001-3028.

[38] Draft PoC paras 52 to 58 pp 001-181 to 001-187; FA paras 218 to 238 pp 001-105 to 001-111; Mwenye expert report paras 6.19 to 6.22 pp 001-1707 to 001-1708.

and the adverse impact is not a factor in determining the scope of application of this part of the Guiding Principles."[39]

31. The quoted portion does not mean that causality is not a requirement for tortious liability. In context, it simply means that if a company's operations, products or services cause harm through another company, then Part III of the Guiding Principles are applicable – although, to be clear, the Guiding Principles do not bind anyone, as is explained above.

32. In this case, any potential parent-company liability on the part of Anglo, and the need for causation to be present, will not be determined by the UN Guiding Principles. It will be determined in accordance with Zambian tort law, the content of which is fully set out in the parties' main heads of argument:

    32.1. According to the applicants, Zambian law would incorporate English law on parent-company liability. It is not in dispute that the English law of parent-company liability requires a parent company independently to satisfy all of the requirements of tortious liability, including causation.[40]

    32.2. Anglo's case is that Zambian law does not currently provide for parent-company liability, that Zambian law would have to be developed to do so (including so as to incorporate English law on this subject), and that it would not be in the interests of justice for this Court to develop Zambian law.[41]

[39] Guiding Principles FAQ pp 31 to 32 (underlining added).

[40] Applicants HoA paras 314 to 320 pp 007-140 to 007-144; Anglo HoA para 70 pp 008-24 to 008-25.

[41] Anglo HoA para 42.5 p 008-17; AA paras 950 to 953.7 pp 001-3033 to 001-3036.

32.3. But regardless, causation will be a requirement for any alleged tortious liability on the part of Anglo. A *prima facie* showing on the part of the applicants in this respect is necessary for certification.

33. The second specific argument Amnesty and SALC attempt to derive from their international-law instruments is the proposition that Anglo has a *"responsibility to remediate adverse human rights impacts associated with the operations of the Mine"*.[42]

34. Once again, whether Anglo has a responsibility to remediate will not be determined by the UN Guiding Principles, or any of the other international instruments on which Amnesty and SALC rely. It will be determined by application of Zambian law.

35. In section 5 of Anglo's main heads, we explain in full why remediation relief in any form is clearly incompetent under Zambian law.[43] We do not repeat that explanation here.

(iv) Anglo's ostensible obligations under the South African Bill of Rights

36. Amnesty and SALC argue that Anglo's conduct in respect of the Mine during the relevant period (i.e., between 1925 and 1974) *"might constitute an infringement"* of various rights in the South African Bill of Rights,[44] that this undergirds the applicants' right to an *"effective remedy"* under sections 34 and 38 of the South

[42] Amnesty / SALC HoA para 7 p 049-129.

[43] Summary at Anglo HoA pp 008-29 to 008-30 paras 82 to 85; and full argument at Anglo HoA pp 008-239 to 008-268 paras 653 to 724.

[44] Amnesty / SALC HoA paras 77 to 98 pp 049-152 to 049-158.

African Constitution,[45] and (presumably) that this somehow supports certification.

37. This argument is wrong for two independent reasons:

37.1. first, the South African Bill of Rights does not apply retrospectively, and the relevant period ended around thirty years before the enactment of the South African Interim Constitution; and

37.2. secondly, non-South African citizens who are not physically in South Africa are not bearers of any of the rights in the South African Bill of Rights and so, Anglo cannot owe any obligations to them under that Bill of Rights.

The South African Bill of Rights does not apply retrospectively

38. It is settled that the South African Bill of Rights does not apply retrospectively. As stated by Currie and De Waal:

> "The rule that the Constitution does not apply retrospectively affects challenges to violations of human rights that occurred before the commencement of the Constitution. Put another way, the rule means that a litigant can only seek constitutional relief for a violation of human rights by conduct that occurred after commencement."[46]

[45] Amnesty / SALC HoA paras 32 to 35 pp 049-138 to 049-139.

[46] Iain Currie and Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 53 (underlining added), citing *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC) para 6 (underlining also added):

> "The search and seizure in terms of section 6 of the Act, the arrest of the applicant, the disclosure of documents seized to the accountants under section 7 of the Act, the preparation of their report in which such documents were used and the formulation and service of the indictment in the criminal proceedings all took place prior to the Constitution coming into force. And it is those acts which the applicant seeks to impugn by virtue of their alleged infringement of rights afforded to him by Chapter 3. … [N]one of the events of which the applicant complains can be said to

39. The South African Interim Constitution came into effect in 1994. The complained-of acts or omissions allegedly on the part of Anglo took place between 1925 and 1974 – at least twenty years earlier. Patently, the South African Bill of Rights can play no role in the determination of Anglo's alleged legal liability in this matter.

The South African Bill of Rights does not apply extraterritorially

40. Amnesty and SALC argue that the South African Constitutional Court has *"left the door open"* for the extraterritorial application of the South African Bill of Rights to Anglo's conduct in Zambia.[47]

41. They are wrong. The majority judgment of the Constitutional Court in *Kaunda* could not have been clearer:

> "Extraterritoriality: The constitutional text
>
> The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject-matter of s 7(2). To begin with two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African State to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders. Does s 7(2) contemplate that the State's obligation to South Africans under that section is more extensive than its

constitute a breach of any of his rights under the Constitution. Such rights had not yet come into existence when the events took place. Nor did – nor could – the subsequent advent of the Constitution, by affording rights and freedoms which had not existed before, render unlawful actions that were lawful at the time at which they were taken."

[47] Amnesty / SALC HoA paras 93 to 97 pp 049-157 to 049-158.

obligation to foreigners, and attaches to them when they are in foreign countries?

Section 7(1) refers to the Bill of Rights as the

> 'cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders."[48]

42. Thus, Zambians that are in Zambia are not the bearers of South African constitutional rights. It follows that Anglo cannot owe them obligations under the South African Bill of Rights.

43. The applicants rely heavily on paragraph 45 of *Kaunda* as support for their argument. But they take it out of context and thus misunderstand it. We quote paragraphs 44 and 45 in full (footnotes in original):

> "[44] There may be special circumstances where the laws of a State are applicable to nationals beyond the State's borders, but only if the application of the law does not interfere with the sovereignty of other States.[31] For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign State and its officials meet not only the requirements of the foreign State's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with

[48] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 36 to 37 (heading underlined in original, other underlining added, paragraph numbers removed). More recently, see *Walus v Minister of Justice and Correctional Services* [2022] ZACC 39 para 96 (underlining added):

> "Indeed, [the drafters of the South African Constitution] drafted a Bill of Rights which conferred fundamental rights even upon visitors to our country so that, upon entry into our country, they begin to enjoy the benefits and protections of our Bill of Rights."

the principle of State sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this.

[45] During argument hypothetical questions were raised relating to South African officials abroad, to South African companies doing business beyond our borders, to the government itself engaging in commercial ventures through State-owned companies with bases in foreign countries, and to what the State's obligations might be in such circumstances. There is a difference between an extraterritorial infringement of a constitutional right by an organ of State bound under s 8(1) of the Constitution, or by persons bound under s 8(2) of the Constitution, in circumstances which do not infringe the sovereignty of a foreign State, and an obligation on our government to take action in a foreign State that interferes directly or indirectly with the sovereignty of that State. Claims that fall in the former category raise problems with which it is not necessary to deal now.[32] They may, however, be justiciable in our courts, and nothing in this judgment should be construed as excluding that possibility."[49]

44. In context, paragraph 45 of *Kaunda* is not authority for the proposition that foreigners not in South African can be bearers of rights under the South African Bill of Rights. It is authority for a different (and significantly more limited) proposition:

44.1. The proposition is this: there <u>may be special circumstances</u> in which a <u>South African national</u> could call on the protection of the South African Bill of Rights when he or she is in a foreign country (including, perhaps, against South African corporations through section 8(2) of the South

[49] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 44 to 45.

African Constitution), but only if the application of the South African Bill of Rights would not interfere with the sovereignty of that country.

44.2. That the proposition is limited to South African nationals is clear from the preceding paragraph 44, which refers to *"nationals"* of the home state. It is also clear from the facts of *Kaunda*, which related to South African nationals, incarcerated in Zimbabwe, who sought the protection of the South African Bill of Rights against prosecution and imprisonment for an alleged conspiracy to stage a coup in Equatorial Guinea.

45. So, the applicants and potential class members cannot invoke the South African Bill of Rights through paragraph 45 of the *Kaunda* for two independent reasons:

45.1. First, they are not South African nationals and they are not in South Africa. They are foreigners in a foreign country.

45.2. Secondly, the application of the South African Bill of Rights to this dispute would infringe Zambia's sovereignty. Anglo's alleged conduct during the relevant period must be measured against the Zambian law that was applicable during that period, not South African constitutional law from at least 20 years later.

45.3. It is worth quoting footnote 31 of paragraph 44 of *Kaunda*, which contains an example offered by the Constitutional Court of *'special circumstances'* not infringing on the sovereignty of the foreign state that could justify the extraterritorial application of the South African Bill of Rights to South Africans abroad:

> "Where there are formal agreements or informal acts of co-operation between States which sanction the one State's exercise of jurisdiction in the territory of the other, questions of sovereignty do not arise and thus nationals affected by their State's action in a foreign territory may conceivably invoke the protection of their Constitution".

45.4. There is no *"formal agreement'* or *'informal act of co-operation"* between South African and Zambia that would justify the application of the South African Bill of Rights to Zambians in Zambia, or anything like it. There are no special circumstances justifying the application of South African law in Zambia.

46. It must not be forgotten that Zambia has its own Bill of Rights.[50] While the Zambian Bill of Rights does not apply to this dispute either, given that the Zambian Constitution was enacted in 1991, it illustrates how the cavalier application of the South African Bill of Rights to this dispute would infringe Zambia's sovereignty. It is Zambian human rights that apply in Zambia – not South African ones.

[50] Zambia's Constitution of 1991, Part III, articles 11 to 32.

(v) South Africa and the Court's international-law and constitutional obligations

The argument has no bearing on the facts of this case

47. Amnesty and SALC provide a lengthy excursus of international law and constitutional principles on the right to a remedy and access to justice relating to the duties of the South African State and this Court.

48. Much of the argument is, with respect, simply irrelevant. For example:

    48.1. Amnesty and SALC argue that the application *"raises key questions regarding this Court's jurisdiction"*.[51] They dedicate several pages of argument to the issue of States' exercise of extraterritorial jurisdiction.[52]

    48.2. This is irrelevant. Anglo accepts that this Court has jurisdiction in respect of the certification proceedings (it disputes that this Court would have jurisdiction over class members if the proposed classes were certified on an opt-out basis).[53] There is no dispute as to the Court's jurisdiction in the manner framed by Amnesty and SALC.

    48.3. Amnesty and SALC set out several principles dealing with the substantive components of the right to a remedy. They argue, for example, that States have duties to promote children's recovery and social reintegration,[54] to provide reparations to end gender

[51] Amnesty / SALC HoA para 7 p 049-129.

[52] Amnesty / SALC HoA paras 55 to 63 pp 049-145 to 049-148. See also paras 61 to 62 pp 049-147 to 049-148.

[53] Anglo HoA paras 725 to 758 pp 008-269 to 008-289.

[54] Amnesty / SALC HoA para 25 p 049-136.

discrimination against women,[55] and that when the legal process establishes an infringement of an entrenched right it is essential that the right be effectively vindicated.[56]

48.4. But this application is not about determining substantive remedies at all. This Court is not even required to determine whether a rights infringement has occurred that may require a remedy.

48.5. Amnesty and SALC repeat the refrain that the State has a duty to *"prevent business-related human rights abuses by business enterprises"*.[57]

48.6. But this is not in issue. This case concerns Anglo's conduct with respect to the Mine as an investor and technical advisor between 1925 and 1974.[58] The State's duty to regulate Anglo's conduct and to prevent human rights abuses in the future is irrelevant.

48.7. Amnesty and SALC argue that States must ensure "*judicial … steps … are gender transformative*".[59] They do not say in what manner the grant or denial of certification in this case will be gender transformative. There is simply no factual basis to argue that gender transformation is implicated in the issues before the Court.

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[55] Amnesty / SALC HoA para 26 p 049-136.

[56] Amnesty / SALC HoA para 25 pp 049-138 to 049-139 in reference to *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

[57] Amnesty / SALC HoA para 44 pp 049-141 to 049-142; para 41 p 049-149; para 45 p 049-142; para 50 p 049-143, para 51 p 049-144.

[58] FA para 81 p 001-51.

[59] Amnesty / SALC HoA para 42 p 049-141.

48.8. Amnesty and SALC argue, in reference to *Vedanta*,[60] that the failure of a company to live up to its public commitment may present the breach of a duty.[61] In making the argument, Amnesty and SALC fail to appreciate the historical nature of the proposed action. There is no evidence of any *"public commitment"* by Anglo during the relevant period of 1925 to 1974 on which evidence of a duty of care is hinged.[62]

48.9. Amnesty and SALC argue repeatedly that States must reduce "*systemic obstacles*" to access to justice *"including the burden of proof and causation"*.[63]

48.10. But this is not a matter for consideration by the certification Court. In any event, the Court will apply the Zambian law as a matter of fact to be proven by the party relying on it.[64] It would be wholly inappropriate and in conflict with established principles of private international law for a South African Court to develop Zambian tort law to soften requirements of causation or lower the burden of proof.[65]

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[60] *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.

[61] Amnesty / SALC HoA para 60 p 049-147.

[62] FA para 81 p 001-51.

[63] Amnesty / SALC HoA paras 100 to 101 p 049-159. See also Amnesty / SALC HoA para 43 p 049-141.

[64] *Standard Bank of South Africa v Ocean Commodities Inc* 1983 (1) SA 276 (AD) p 294.

[65] See the English case of *Yukos Capital Sarl v OJSC Oil Co Rosneft* [2014] 2 C/L.C. 162 at para 30 where the Court held it was inappropriate for an English Court to anticipate the trajectory of developing law in Russia.

48.11. Amnesty and SALC argue that the *"denial of recognition of a class on the basis of national origin"* is an infringement of the right to equality before the law and non-discrimination.[66]

48.12. There is no contention in this case that the Court should deny certification because of the applicants' national origin. Anglo argues instead that:

48.12.1. The location of the proposed classes demonstrates that the proposed opt-out and notification processes are contrary to the interests of justice;

48.12.2. The opt-out nature of the class means that this Court would not have jurisdiction over class members, who are all foreign *peregrini*;

48.12.3. The proposed classes' circumstances and location in Zambia are relevant to conflicts of interests inherent in the funding arrangements.

48.13. The submissions of Amnesty and SALC on this score are therefore simply unhelpful.

49. It is worth pointing out that the Guiding Principles – the primary international-law instrument relied upon by Amnesty and SALC – provide that the international-law obligation of a State is to protect against human-rights abuses that happen only <u>within that State's territory</u>:

[66] Amnesty / SALC HoA para 106 p 049-161 and para 118 p 049-165.

49.1. The Guiding Principles expressly provide that the responsibility of States is to *"protect against human rights abuse within their territory and/or jurisdiction by third parties"*[67] and to *"take appropriate steps to ensure … that when [human-rights abuses] occur within their territory and/or jurisdiction those affected have access to effective remedy"*.[68]

49.2. The Guiding Principles provide further that *"[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction"*.[69]

50. The Guiding Principles simply do not support the proposition that the South African courts have the obligation to prevent South African companies from causing human-rights violations abroad. They support, instead, the proposition that this is the obligation of the host State where such abuses are said to occur. Of course, South African companies should not violate human rights abroad and in this case, Anglo denies that it has. But, whatever the outcome of that debate, the Guiding Principles simply do not assist the Court in resolving it.

The right to a remedy and access to justice do not require certification of this case

51. What remains are Amnesty and SALC's propositions of international and constitutional norms as they relate to procedural components of the right to a remedy, and access to justice. The highwater mark of Amnesty and SALC's

[67] UN Guiding Principles principle 1 (our underlining).

[68] UN Guiding Principles principle 25 (our underlining).

[69] UN Guiding Principles principle 2 commentary.

argument here is effectively that the Court should certify the class action because:

51.1. it can be difficult to hold corporate entities accountable for rights violations; and

51.2. the rights to a remedy and access to courts generally militate in favour of certification.

52. The argument is fundamentally flawed.

53. Under the South African Constitution, the section-34 right of access to courts is *"a right to have disputes resolved (a) by the application of law in (b) a fair (c) public hearing before (d) a court or (e) where appropriate an independent and impartial tribunal"*.[70] It is, colloquially, a right to a fair shot at obtaining legally cognisable relief from a court or tribunal.

54. The right does <u>not</u> include the following:

54.1. It is not a right to obtain your preferred relief from a court, or even a right to a *"correct"* decision.[71]

54.2. It is not generally a right to access the court or forum of your preference.[72] As a result, being non-suited on the basis of jurisdiction, for example, is not a limitation of the right.[73]

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[70] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) para 211.

[71] *Lane and Fey NNO v Dabelstein* 2001 (2) SA 1187 (CC) para 4.

[72] *South African Human Rights Commission v Standard Bank of South Africa Ltd* [2022] ZACC 43 para 31 in reference to *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) para 28.

[73] *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC) para 4.

54.3. A screening procedure that prevents the progression of unmeritorious matters through the courts is not a violation of the right.[74]

55. Correctly understood, the certification procedure (including, in appropriate cases, the denial of certification) furthers the right of access to courts and access to justice. It does not limit these rights:

55.1. The primary function of certification is to prevent unmeritorious or unmanageable class actions from moving to trial, and so to prevent them from pointlessly consuming court resources and oppressing respondents.

55.2. A refusal to certify may advance remedial justice. If the Court were to refuse certification of a class action having poor prospects of success or which is demonstrably unlikely to be litigated successfully to completion, this protects the potential class members' claims from being made *res judicata* by a fruitless claim pursued on their behalf.

55.3. Thus, when a court concludes that certification is not in the interests of justice and dismisses the certification application, it simply says to the applicants – you do not have permission to bind an entire class to this particular claim, in this court, at this time, and in this form. This does not violate the rights to a remedy, to access to courts or diminish access to justice. It furthers these rights.

[74] *Besserglik v Minister of Trade Industry and Tourism* 1996 (4) SA 331 (CC) para 10.

55.4. The point is not up for debate. In *Mukaddam*, the Constitutional Court placed certification at the heart of section 34 of the South African Constitution:

> "For a proper determination of these novel issues, it is necessary to commence with an outline of relevant constitutional and other legal provisions. Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government. But the guarantee in section 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised. …
>
> Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State.
>
> …
>
> 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 advance, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it."[75]

[75] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) paras 28, 29 and 38 (paragraph numbers removed).

55.5. And in *De Bruyn*, Unterhalter J vividly described how certifying an unmeritorious case would undermine the justice system:

> "In these circumstances, whatever the other virtues of the class action, without a cause of action, the application for certification must fail. The matter may be framed as one of weight: the absence of a cause of action weighs too heavily to permit of certification. It is also a matter of logic. 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."[76]

56. What follows from the above is that the rights to a remedy, access to courts and access to justice are simply not relevant to what this Court is tasked with doing.

56.1. This Court must determine whether certification is in the interests of justice. This depends on, among other things, whether the applicants have made out a triable case, whether the proposed class definitions are appropriate, whether the proposed funding arrangements are appropriate, and so on.

56.2. If this Court grants certification, the applicants can have no cause for complaint. If it dismisses certification (or grants certification on narrower grounds than sought), this Court will have furthered the right of access to courts and access to justice, because it will have prevented an unmeritorious case from proceeding through the courts. Either way, the

[76] *De Bruyn v Steinhoff International Holdings NV* 2022 (1) SA 442 (GJ) para 300 (underlining added).

applicants will have had a fair shot at presenting their case to this Court. This is their right – it is not a right to a preferred result.

56.3. It follows that the Amnesty and SALC's submissions on the rights to a remedy and to access to justice do not factor into this Court's reasoning in determining certification. What this Court must consider is the merits of the certification application and the interests of justice. Whichever way this Court decides, the right of access to courts will have been realised.

57. Insofar as relevance may be drawn from the access-to-justice principles cited by Amnesty and SALC, some of these militate against certification on the facts of this case. For example:

57.1. Amnesty and SALC argue that effective remedies must be "*adapted for vulnerable groups, such as children, taking into account their special needs, risks and evolving development and capacities*."[77] They submit further that the UN Convention on the Rights of the Child requires that children must be given an opportunity to be heard in judicial proceedings.[78]

57.2. There are several indications that the proposed class action does not accommodate potential child class members' participation in the proceedings, taking into account their evolving capacities. The proposed notice and opt-out processes fail to ensure that the tens of thousands of potential class members that are children will understand what they are

[77] Amnesty / SALC HoA para 31 p 049-138.

[78] Amnesty / SALC HoA para 25 p 049-136.

being expected to opt out of, or that they obtain the necessary assistance to make an informed decision.[79] Notwithstanding the special duties placed on legal representatives acting on contingency for parents or guardians representing children, the applicants have failed to demonstrate how the full and effective participation of child class members will be facilitated.[80]

57.3. Amnesty and SALC argue further that the right to a remedy requires that there must be access to a *"procedure capable of ending or repairing the effects of the abuses [the claimants] endured"*.[81]

57.4. In this case, the applicants have not shown that the remediation relief claimed is practicably or legally possible and they have failed to demonstrate the determinability or allocability of remediation damages in the form that it is claimed.[82] The class action is therefore not a procedure that is demonstrated to be capable of ending or repairing the effects of the alleged harm.

58. Ultimately, the submissions are simply unhelpful to this Court's decision on whether or not to certify the proposed class action.

III. RESPONSE TO THE SPECIAL PROCEDURES

59. The Special Procedures make essentially two arguments:

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[79] Anglo HoA para 744.3 to 744.3.3 pp 008-279 to 008-280; para 746 p 008283.

[80] Anglo HoA para 971 p 008-384.

[81] Amnesty / SALC HoA para 30 p 049-137.

[82] Anglo HoA paras 83 to 85 p 008-29.

59.1. first, that Anglo has publicly committed itself to the UN Guiding Principles, for Anglo to oppose is inconsistent with this commitment, and so that this Court should certify; and

59.2. secondly, that Anglo's opposition is inconsistent with section 34 of the South African Constitution and the principle of access to justice.

60. Before each argument is dealt with specifically, we point out that both arguments frame the question before this Court incorrectly and misunderstand the function of the Court in a certification enquiry. A court faced with a certification enquiry is playing a critical role laid down by our highest courts. It must decide *"where the interests of lies in a particular case"*[83] taking into account the absence of presence of the following open-ended list of elements:

"° *the existence of a class identifiable by objective criteria;*

° *a cause of action raising a triable issue;*

° *that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;*

° *that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;*

° *that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;*

° *that the proposed representative is suitable to be permitted to conduct the action and represent the class;*

[83] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) para 35.

- *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.*"[84]

61. Critically, this court would have to make the determination of whether to certify or not in any case, regardless of whether or not Anglo opposed certification.

62. The question before this Court is whether it is in the interests of justice to certify and, if so, on what terms.

    62.1. That question turns on the overall interests of justice enquiry, including the factors laid down in *Children's Resource Centre*.

    62.2. The question is not whether Anglo should or should not be opposing. Nor is it a debate about somehow criticising or even punishing Anglo for opposing. Yet that is the debate that the Special Procedures seek to draw the court into it.

63. In any event, as we argue below, Anglo's opposition does not contravene the UN Guiding Principles or section 34 of the Constitution.

(i) The UN Guiding Principles argument

64. The first argument of the Special Procedures (what we call "*the UN Guiding Principles argument"*) can fairly be summarised as follows:

[84] *Trustees for the time being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 26.

64.1. Anglo has publicly committed itself to the UN Guiding Principles in various official documents and non-official communications;[85]

64.2. the UN 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"*;[86]

64.3. for Anglo to oppose certification is inconsistent with these commitments;[87] and

64.4. this is a factor that militates in favour of it being in the interests of justice to certify.

65. The primary reason that this argument is bad (other than that it frames the enquiry incorrectly, as explained above) is that Anglo's opposition is in no way inconsistent with the UN Guiding Principles.

65.1. An important part of Anglo's case is that Anglo has not caused class members any harm – that it has, to paraphrase the Special Procedures, not caused any *"adverse human-rights impacts"*. Anglo's opposition thus cannot be inconsistent with an obligation to *"address"* such impacts under the UN Guiding Principles.

65.2. The Special Procedures' argument is essentially that Anglo's opposition is somehow illegitimate or *mala fide* because Anglo has definitely, tortiously caused harm to the members of the proposed classes. But this

[85] Special Procedures FA paras 34 to 35.3 pp 086-19 to 086-23.

[86] Special Procedures admission HoA para 24.2 p 086-387.

[87] Special Procedures FA p 086-25 paras 42 to 43.

begs the critical question. One of the issues that this Court must decide in determining certification is whether the applicants make a *prima facie* showing that Anglo did tortiously cause harm to class members. Anglo directly disputes that it did. The Special Procedures cannot assume against Anglo on this score and then use it as an argument for certification.

65.3. The Special Procedure's argument is moreover undermined by their (entirely correct) concession that Anglo may defend itself at the trial.[88] But if this is correct – and it plainly is – why can Anglo not defend itself on the merits at certification and show that there is not even a proper triable case justifying the granting of certification?

66. The second and third reasons this argument is bad have been set out above in detail above in respect of Amnesty and SALC:

66.1. the Guiding Principles were published in 2011 and they do not purport to apply retrospectively; and

66.2. the Guiding Principles themselves confirm that they have no legal status.

(ii) The section-34 argument

67. The second argument of the Special Procedures ("*the section-34 argument*") can be summarised as follows:

[88] Special Procedures HoA para 44 p 086-1058.

67.1. denying certification would preclude class members from pursuing their claims; and

67.2. this would violate their right of access to courts under section 34 of the South African Constitution and would deny them access to justice.

68. The argument is unsustainable. It misconstrues both (a) the content of the right of access to courts and the meaning of access to justice and (b) the function of certification. We have dealt with these issues above in reference to Amnesty and SALC's submissions. In short, the denial of certification cannot violate the right of access to courts because certification is a mechanism through which the right is realised, regardless of whether certification is granted or denied.

69. It is, in the first instance, misleading for the Special Procedures to claim that it is *"common cause"*[89] that the class members will be unable to pursue any remedy absent class certification.

69.1. First, the argument is divorced from the facts of this case and, indeed, the grounds on which Anglo opposes the application. Anglo raises *bona fide* defences to a speculative claim against it arising between some 50 and 100 years ago. It opposes certification of an extraordinarily broad claim, for relief which is in many respects unascertainable, in circumstances where there is no *prima facie* proof of the elements required to succeed in that claim, which is proposed to be pursued on an opt-out basis. Even if it were true that the classes can only afford to

[89] Special Procedures HoA para 3 p 086-1043.

litigate a claim in the form of a class action, it does not follow that this particular class action should be certified.

69.2. Second, it is not for Anglo, as a defendant, to advise the applicants on alternative strategies for the proposed classes to fund and pursue claims against it.

69.3. Third, Anglo has raised repeatedly that there exist meaningful avenues for redress for the community against Zambia Consolidated Copper Mines Limited ("ZCCM").[90] In this regard, the prospective classes are certainly not in a similar position to the applicants in *Nkala*, as the Special Procedures contend.[91]

69.4. In fact, it was two United Nations Special Rapporteurs who in May 2021 wrote to the Zambian government asking it to provide information on the Zambian State's remediation plans, its regulation of artisanal mining, and the measures it was taking to regulate, monitor and scrutinise Jubilee Metals amongst others.[92] The Special Rapporteurs also wrote to Jubilee Metals requesting information on its activities.[93] They further wrote to the South African government asking what steps it has taken to ensure Jubilee Metal's compliance with human rights obligations and to ensure their cooperation with *"legitimate remedial processes"*.[94]

[90] AA paras 33 – 34 p 001-2682.

[91] *Nkala v Harmony Gold Mining Co Ltd* 2016 (5) SA 240 (GJ).

[92] AA para 5 p 001-6906.

[93] AA p 001-6910.

[94] AA paras 2 and 4 p 001-6921.

69.5. The Special Procedures are therefore aware that legitimate claims lie against ZCCM (and possibly Jubilee Metals). They cannot now claim that refusing certification of this particular class action will close the door on any remedy for the community.

70. In any event, it is worth pointing out that prospective members of the proposed classes who are not named applicants are not recipients of the South African section-34 right of access to courts:

70.1. They are non-South Africans who are not in South Africa. As explained above, they are not the bearers of any rights under the South African Bill of Rights – including the section-34 right of access to (South African) courts.

70.2. The Special Procedures argue that *"[s]ection 34 of the [South African] Constitution applies to any person that litigates in a South African court"*.[95]

70.3. This may be correct in respect of the applicants. They have briefed attorneys to bring the certification application in South Africa and are parties to the certification application.

70.4. But it is not correct in respect of the tens of thousands of potential class members who are not applicants. Prior to certification, they are not parties to the litigation and are not before this Court. Most of them do not

[95] Special Procedures admission HoA para 44.1 p 086-25.

even know about the litigation. As foreigners in a foreign land, they are not bearers of the South African section-34 right of access to courts.

(iii) The reliance on Njongi is misplaced

71. The Special Procedures refer to *Njongi*[96] to argue that Anglo – like the State – has special duties in litigation not to obstruct access to justice by virtue of its acceptance of the Guiding Principles. The Special Procedures argue that Anglo's choice to oppose certification is relevant to the interests of justice test.

72. Assuming *arguendo* that Anglo's opposition contravenes the Guiding Principles, and assuming the denial of certification infringes section 34 of the Constitution (both of which are denied), the comparison of Anglo's opposition to the State's conduct in *Njongi* is in any event misplaced.

    72.1. A State litigant's choice to oppose prescription (as in *Njongi*) is wholly distinguishable from a defendant's choice to oppose certification.

    72.2. As the Constitutional Court explained:

> "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

[96] *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC).

choice to the debtor. For it is the debtor who would face the commercial, community and other consequences of that choice."[97]

72.3. A court cannot consider prescription *mero motu*. The litigant's conduct in this regard, in choosing whether or not to assert a prescription defence, is consequential to whether or not the substantive claim proceeds.

72.4. In contrast, this Court must always determine whether the interests of justice support certification – regardless of whether or not Anglo opposes it. Unlike the assertion of prescription, therefore, it is not Anglo's opposition that stands as a barrier to certification proceeding.

72.5. There is no *"moral choice"* that Anglo makes in this regard – its decision to oppose does not non-suit a certification applicant in the way that a decision to rely on prescription may do. It is only ever the interests of justice that stands in the way of certification.

72.6. Unlike where a court upholds a defence of prescription, the denial of certification in any event does not extinguish the underlying claim.

72.7. More importantly, however, the State's *"moral choice"* to raise prescription in *Njongi* did not go to the merits of the Court's decision on whether or not the defence should be upheld. The State's election to raise prescription was considered by the Constitutional Court in assessing the question of costs.[98] It is absurd to contend, as the Special

[97] *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) para 78.

[98] *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) para 91.

Procedures do, that Anglo should somehow be sanctioned for its opposition through the grant of certification.

72.8. The context in which the State's reliance on prescription was considered in *Njongi* is also wholly distinguishable from the circumstances in which Anglo has opposed this application.

72.9. The State's decision to rely on prescription appeared to have been made lightly, without proper processes being following by a "*sufficiently responsible person*" taking into account all of the relevant circumstances.[99] Affidavits provided by the State failed to explain the full circumstances of its reliance on prescription. Relevant circumstances included that the State had a substantive duty to facilitate access to social security under the Constitution. Moreover, there had been previous litigation which had determined that the State's termination of social grants was unlawful.

72.10. What underlay the Court's disdain for the State's conduct in *Njongi* was its thoughtless reliance on a technical objection to non-suit what was indisputably a valid claim.

72.11. Anglo, in contrast, has thoughtfully and in detail opposed an extraordinary certification application on its merits as it is entitled to do in exercising its own right to access to justice.

72.12. Crucially, the bedrock of Anglo's opposition is that certification should be denied <u>because the applicants' claim is fundamentally bad</u> (for numerous

[99] *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) para 79.

reasons). Anglo's position is far removed from the State's in *Njongi*, where it opposed on the basis of prescription despite the fact that the applicants' claim was otherwise good.

72.13. Indeed, it would be irresponsible for Anglo not to oppose certification – because it would then be permitting a bad claim to proceed to trial, wasting scarce court resources.

73. Further to *Njongi*, the Special Procedures give three examples of how they say *"a litigant's conduct can be relevant to a matter where a court exercises a discretion"*.[100] All of their examples are wholly distinguishable.

73.1. First, the Special Procedures refer to the Court's exercise of discretion in relation to costs.

73.2. Second, the Special Procedures say that a party's conduct can aggravate damages, citing the example of the State's uncaring attitude towards the gruesome death of a child exacerbating a claim for damages for mental agony and grief by their family.[101]

73.3. Third, the Special Procedures say that a litigant's delay in prosecuting a review may preclude its determination of the review or influence the court's decision on remedy.[102]

[100] Special Procedures HoA para 29 p 086-1051.

[101] In reference to *Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA) at paras 54 – 55.

[102] In reference to *Mkhwanazi v Minister of Agriculture and Forestry, KwaZulu* 1990 (4) SA 763 (D) and *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2020] ZAWCHC 164 paras 319 – 328.

74. None of these examples equates with the extraordinary proposition that the Special Procedures advance – that is to say, *"because a defendant opposes the substantive relief sought, the relief should be granted"*. Even if the proposition is softened, its absurdity remains – that is to say, *"if the Court is on the fence about whether or not to grant the relief, the fact that it is opposed means it should be granted"*.

75. The proposition is at odds with the adversarial system of litigation applied in South Africa. It is particularly troubling in certification proceedings precisely because the certification process aims to protect not only the defendant from oppression but also the court itself and the proposed class:

    75.1. A defendant's opposition to certification assists the Court to ventilate problems that it might otherwise be persuaded to accept on the applicants' mere say-so. Even where certification is granted, a defendant's opposition may enlighten the Court to, for example, require more stringent notification criteria, force changes to unjust funding models, or tailor the class definition. This furthers the interests of justice.

    75.2. The Special Procedures' argument – if adopted – dissuades defendants from the legitimate exercise of their right to oppose litigation brought against them. This is fundamentally at odds with the adversarial legal system and a threat to the meaningful adjudication of the interests of justice test.

76. Moreover, in each of the examples cited by the Special Procedures, the litigant's conduct is relevant to the merits of the claim. Costs can in part be determined by a litigant's conduct in the litigation. A plaintiff's damages may be aggravated by

the callous conduct of a defendant. And delay can inactivate an administrative-law claim. Whether Anglo opposes or not has nothing to do with whether it is in the interests of justice to certify.

(iv) Conclusion on the Special Procedures' submissions

77. The Special Procedures start their submissions in reference to the Constitutional Court's enjoinder in *Mukaddam* for courts to embrace class actions as "*one of the tools available to litigants*".[103] The rest of the dicta – which they fail to quote – says that courts must retain control over class actions because they may in some cases be "*oppressive*" and "*inconsistent with the interests of justice*".[104]

78. The Special Procedures' argument misapprehends the purpose of certification, the rights on which they rely, and the very basis of Anglo's opposition in this case. It should not be endorsed.

IV. CONCLUSION

79. Anglo persists in its prayer that the certification application should be dismissed with costs.

80. The arguments raised by the amici do not unsettle Anglo's position. Anglo does not seek costs against the amici.

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[103] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) para 38.

[104] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) para 38.

STEVEN BUDLENDER SC
LWANDILE SISILANA
DANIE SMIT
PIET OLIVIER
ANNABEL RAW

Respondent's counsel

Chambers, Johannesburg and Cape Town
15 December 2022

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