IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/32777

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 *amicus curiae*
THE SOUTHERN AFRICA 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*

FILING NOTICE

PLEASE TAKE NOTICE that the third to seventh *amici curiae* hereby file their heads of argument and practice note in the application to certify the class in the above matter.

DATED AT JOHANNESBURG ON THIS 6th DAY OF DECEMBER 2022.

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THIRD TO SEVENTH AMICI CURIAE'S HEADS OF ARGUMENT

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INTRODUCTION

1 In *Mukaddam*, the Constitutional Court enjoined courts to "*embrace class actions as one of the tools available to litigants for placing disputes before them*".[1]

2 This highlights the central purpose of class action litigation: to enable claimants to have access to courts who otherwise would not. As Cameron JA (as he then was) explained in *Ngxuza*, section 38 of the Constitution provides expressly for class actions precisely because so many are "*in a 'poor position to seek legal redress'*".[2]

3 The would-be class members in this matter are just such claimants. Though each prospective class member would be entitled to pursue an individual claim against Anglo in a South African court, they lack the resources to do so. Without a class action, they will not be able to pursue their claims against Anglo. This much is common cause.[3]

4 Yet, Anglo maintains that it would not be in the interests of justice to certify the class action. It has not only opposed the certification, but has done so vociferously. Anglo has devoted considerable resources to its opposition, seemingly in an effort to cut the litigation off before it begins.

5 Anglo made an election to oppose the certification proceedings. It made this election knowing and accepting that, if it succeeds in its opposition, the result will be that prospective class members will have no prospect of advancing their case for a remedy before a court of law.

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1 *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) ("***Mukaddam***") at para 38.

2 Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA) para 6.

3 RA at p 001-7760 para 490; Ndulo p 001-3900 to 001-3907; Gibson p 001-3944, paras 15-16.

6 But Anglo also made a prior election. It chose to commit itself to the UN Guiding Principles on Business and Human Rights.[4]

7 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.[5]

8 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.[6] They specifically emphasise the importance of access to remedies for business-related human rights impacts.

9 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 activities. They seek to use the procedural mechanism of a class action to approach the court to vindicate their rights. And Anglo seeks to prevent them from doing so.

10 We submit that Anglo's two elections place it in an intractably conflicted position. On the one hand, it has elected to commit itself to a set of principles that enjoin it to cooperate in processes (such as court processes) geared at remediating the human rights effects in which it may have been involved. On the other hand, it has elected to oppose the very proceedings that are necessary to enable those affected by

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4 FA at p 001-28 para 38; FA at p 001-68 paras 132 -133; Annexure ZMX5 at p 001-509. The Guiding Principles on Business and Human Rights are available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

5 FA at p 001-28 para 38; FA at p 001-68 paras 132 -133; Annexure ZMX5 at p 001-509; FA (amicus application) para 22.1. In the judgment on admission of amici at p000-15 para 27, the Court found that it was common cause that Anglo committed itself to the Guiding Principles both publicly and internally.

6 Principle 11; principle 22 at Amici Applications p 086-156 and 086-167.

Anglo's business operations, to approach a court to obtain a remedy. These two elections are incompatible with one another.

11 That Anglo has placed itself in this position is a relevant factor for the court to consider when it assesses where the interests of justice lie.

12 The third to seventh *amici curiae* were admitted to this case pursuant to a judgment of this court handed down on 25 November 2022. They comprise two United Nations Working Groups and three United Nations Special Rapporteurs, and they are all Special Procedures of the United Nations Human Rights Council. We shall refer to them as "the UN Special Procedures" in these heads of argument.

13 As we shall show below, the interests of justice test for certification is flexible. Our law already recognises that certain litigants have heightened duties when they litigate and that a litigant's conduct can be relevant to the discretionary decisions a court makes during the course of a trial.

14 The UN Special Procedures contend that when this court comes to decide whether the interests of justice favour certification of this class action, it is both appropriate and necessary for the court to take into account the fact that Anglo is itself acting inconsistently with its own professed commitments to human rights in business, when it opposes this class action.

15 Unless this class action is certified, the prospective class members will be denied access to justice. This in itself would be an injustice. But the injustice is compounded – the knife twisted – where that denial of access to justice is the result of the efforts of a party, Anglo, which publicly professes to be committed to access to justice.

16 The heads of argument are structured as follows:

16.1 First, we set out the interests of justice test for certifying a class action.

16.2 Second, we explain how Anglo's own conduct impacts on that interests of justice test.

16.3 Third, we deal with the retrospectivity of the UN Guiding Principles.

THE INTERESTS OF JUSTICE TEST

Class actions, certification and the interests of justice

17 The class action mechanism is, in the words of the Constitutional Court, a "tool"[7] to empower those vulnerable members of society who, as a result of their circumstances, might otherwise not be able to exercise their right of access to courts, to do so.

18 In *Nkala*, the Full Court explained the purpose of the class action procedure as follows:

> *"[33] To sum up, a class action represents a paradigmatic shift in the South African legal process. It is a process that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group or 'class' against one or more defendants. The process is utilised to allow parties and the court to manage a litigation that would be unmanageable or uneconomical if each plaintiff were to bring his/her claim individually. It is normally instituted by a representative on behalf of the relevant class of plaintiffs. The class-action process is part of the equity-developed law and is designed to cover situations where the parties, particularly plaintiffs, are so numerous that it would be almost impossible to bring*

7 *Mukaddam* para 38

them all before the court in one hearing, and where it would not be in the interest of justice for them to come before court individually.

[34] It is not only for the benefit of plaintiffs that the class-action process was conceived; it is also designed to protect a defendant(s) from facing a multiplicity of actions resulting in its having to recast or regurgitate its case against each and every individual plaintiff. Furthermore, it enhances judicial economy by protecting courts from having to consider the same issues and evidence in multiple proceedings, which carries with it the possibility of decisions by different courts on the same issue. On the other hand, a class action allows for a single finding on the issue(s), which finding binds all the plaintiffs and all the defendants."[8] *(emphasis added)*

19 It is in this context that the court's role in certification proceedings should be understood.

20 Certification plays an important role in ensuring that the overarching purpose of the class action procedure – advancing the interests of justice – is met. The purpose of requiring certification is to ensure it is in the interests of justice that the matter proceed by way of class action. As the Constitutional Court explained in *Mukkaddam*, certification should serve "*as an instrument of justice rather than a barrier to it*":

"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

[8] *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ) ("***Nkala***") at paras 33-34.

advance, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it."[9]

21 Certification is thus concerned with advancing the interests of justice. 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.[10]

22 In *Children's Resource Centre Trust*, the Supreme Court of Appeal set out a number of factors that should be weighed in deciding whether to certify a class action.[11] However, as the Constitutional Court made clear in *Mukaddam*, these factors are not prerequisites for the grant of certification.[12] Nor do they comprise an exhaustive list.[13] Rather, they are considerations to be weighed under the overarching principle of what is required by the interests of justice.[14] The court exercises a discretion when it decides whether to certify a class action.[15]

A denial of access to justice without certification

23 An important consideration in the interests of justice assessment is what access to justice class members would enjoy absent certification.

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9 *Mukaddam* at para 38.

10 *Mukaddam* at paras 34 – 37.

11 *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) ("***Children's Resource Centre Trust***"). In Children's Resource Centre Trust, the Supreme Court of Appeal set out the factors that should be weighed in deciding whether to certify a class action. These factors are as follows: the existence of a class identifiable by reference to objective criteria; the proposed class representative is suitable to conduct the action and represent the class; a cause of action raising a triable issue; the right to relief requires the determination of issues of fact or law, or both, common to all members of the class; the relief sought or damages claimed flow from the cause of action and are ascertainable and capable of determination; where damages are claimed, there is a procedure by which to allocate the damages to members of the class, given the composition of the class and the nature of the proposed action; and that a class action is the most appropriate means by which the claims of the class may be determined.

12 *Mukaddam* at para 35.

13 *Mukaddam* at para 47.

14 *De Bruyn v Steinhoff International Holdings NV and Others* 2022 (1) SA 442 (GJ) ("***De Bruyn***") at para 12.

15 *Mukaddam* at para 46. See also *Stellenbosch University Law Clinic and Others v Lifestyle Direct Group International (Pty) Ltd and Others* 2021 JDR 3261 (WCC) paras 24 to 28.

24 In *De Bruyn*, Unterhalter J emphasised that one of the key questions facing a certifying court is what access to justice the potential class members would have absent certification. He held as follows:

> *"I must decide, in the light of all that appears in the record and the extensive submissions that have been made to me, whether certification should be ordered, and if so, on what terms. That is a question of weighing all the issues and deciding, ultimately, what the interests of justice require. When doing so, it is necessary to consider what access to justice class members would enjoy absent certification, and what would be gained and lost, and by whom, if certification is ordered."*[16] *(emphasis added)*

25 This court also recognised in *Nkala* that access to justice was a significant consideration weighing in favour of certification.[17]

25.1 In *Nkala,* mineworkers affected by silicosis and TB sought to recover compensation for occupational injuries suffered at the hands of their employers over the years.

25.2 In that case, the Full Court took into consideration that there was, for most victims of silicosis and TB, no realistic alternative to class action. A class action was the only way the mineworkers would be able to realise their constitutional right of access to court.[18]

25.3 The court held as follows:

> *"[104] We have to assume, for present purposes, that the mining companies violated their constitutional, statutory and common-law rights, as at this stage the mineworkers have made out a prima facie case in this regard. That being so, the vast majority of them who cannot*

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16 *De Bruyn* at para 286.

17 *Nkala* at paras 100-108.

18 *Nkala* at para 100.

sue individually would have to live with the fact that the law, with all its promises, affords them no remedy for the pain and suffering endured while battling the growth of fibrotic forests in their ever depleting lungs. If the legal system is inaccessible to them, then the constitutional gift of a right of access to court is illusory. It is only through access to courts and other independent tribunals that justiciable disputes can lawfully be adjudicated. This makes the right of access to courts one of cardinal importance in our constitutional democracy. If access to court is denied to them because the court refuses to allow them to follow a particular process, such as class action, when no other is available, then the rule of law in our view is ruptured. Access to court is an ingredient in the making of the rule of law.

[105] This court has already addressed the issue of access to court, albeit in a different context, in a judgment concerning an interlocutory dispute between the mineworkers and one group of mining companies, Gold Fields. There is no need to repeat what is said there, save to say that it enjoys the full confidence of the entire court. We know, too, access to courts is fundamental to the survival of our democratic order, as well as for the protection of the Constitution itself. It follows that the court should be very careful not to close its doors in the face of the indigent, the weak and the meek seeking to access justice."[19] *(emphasis added)*

26 The prospective class members in this matter are in a similar position to the *Nkala* applicants. A class action is the only way they would be able to realise their constitutional right of access to court.[20] For them, it is class action or no action at all.

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19 *Nkala* at paras 104 and 105.

20 Section 34 of the Constitution provides that "*everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*".

We submit that any person litigating in a South African court is a bearer of this right, in line with the Constitutional Court's jurisprudence on the meaning of the term "*everyone*" in other rights in the Bill of Rights. See, for instance, *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at paras 26 – 27, where the Constitutional Court held that the word "*everyone*" in the rights contained in sections 12 and 35(2) of the Constitution, covers even persons who are not South African nationals.

The prospective class members are therefore bearers of section 34 rights. We do not understand Anglo to contest this.

27 The Full Court in *Nkala* held that, if access to court is denied to class applicants because the court refuses to allow them to follow the class action process, when no other is available, then the rule of law is ruptured. The court should, it held, "*be very careful not to close its doors in the face of the indigent, the weak and the meek seeking to access justice*." We submit that this reasoning applies equally in this case. It is common cause that no other process is realistically available to the applicants. The court should, therefore, take care not to lock them out of the courtroom by refusing to certify the class action.

Conduct that favours certification

28 In this case, there is an additional factor relevant to the court's interests of justice assessment. It is Anglo's conduct in committing itself to the Guiding Principles, on the one hand, and opposing this application, on the other. We submit that, in circumstances where prospective class members would, but for a class action, be denied access to justice, it is also relevant for the court to consider the respondent's conduct in relation to access to justice. In this case, Anglo's conduct is an additional factor that weighs in favour of certification.

29 Our courts have accepted that a litigant's conduct can be relevant to matter where a court exercises a discretion. For instance:

29.1 A litigant's conduct can be relevant to the manner in which a court exercises its discretion in relation to costs. A court may order punitive costs as a mark of displeasure at a litigant's conduct.[21]

29.2 The manner in which a litigant conducts itself may aggravate the damages suffered by another party. In *Komape*, for instance, the respondent's

[21] See, for example, *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC).

unfeeling attitude was held to have exacerbated the claimants' mental agony and grief, and therefore the damages they suffered.[22]

29.3 A litigant's delay in prosecuting a review, once a review application has been brought, may be fatal to that application, effectively stopping it in its tracks. Even if it is not fatal, it may feature prominently in the court's exercise of its remedial discretion.[23]

30 Therefore, our law already recognises that a litigant's conduct can be relevant to the outcome of proceedings in a variety of ways: it can stop a case in its tracks; it can bear on the court's exercise of its remedial discretion; and it can influence costs and damages.

31 In *Nkala*, one of the early cases to apply the interests of justice considerations set out by the SCA in *Children's Resource Centre Trust,* the Full Court already started to grapple with what the conduct of a respondent opposing certification may mean for the exercise of the court's discretion to certify the class action.

32 Towards the end of the Full Court's judgment, it recorded the frustrations that the mineworkers had experienced in being stonewalled by the respondents throughout the litigation. The court held as follows:

> "*Finally, it bears mentioning that at the hearing the mineworkers, through their counsel, voiced their frustration with the mining companies. They complained about being stonewalled without relent by the mining companies from the beginning, and all the way through this litigation. They*

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[22] *Komape and Others v Minister of Basic Education and Others* 2020 (2) SA 347 (SCA) ("***Komape***") at paras 54-55.

[23] *Mkhwanazi v Minister of Agriculture and Forestry, KwaZulu* 1990 (4) SA 763 (D); *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* (4305/18) [2020] ZAWCHC 164 (20 November 2020) at paras 319 to 328.

> *say that their frustration must be understood in the context of the fact that they are no strangers to the mining companies: they are all former employees, or dependants of former employees, of the mining companies. They allege that the mining companies have placed every possible obstacle to having the matter adjudicated, and that the mining companies have fought this application as vigorously and as aggressively as they possibly could. They have spared neither effort nor resources in doing so. They say that the mining companies have done this, despite the fact that the mining companies are not able to deny that, should this court refuse the certification and the mineworkers be forced to bring individual actions, the result without doubt will sterilise the large majority of the individual claims. They allege that the mining companies' conduct has been obstructive and deliberately undermining of the interests of justice*."[24]

33 In Nkala, the mineworkers argued that the court should take note of this conduct so that the mining companies could reconsider their conduct as the litigation progressed. The mineworkers did not argue that the respondents obstructive conduct was itself relevant to the question whether to certify. But the Full Court nonetheless held that it was a very serious matter for a party to be accused of deliberately undermining the interests of justice.[25] It held that "*conduct that deliberately undermines the cause of justice damages the integrity of the judicial system*."[26]

34 We submit that a litigant's conduct can equally be relevant to the interests of justice inquiry in certification proceedings. Where prospective class members would, without a class action, be denied access to justice, and a respondent opposes certification, we submit that a relevant consideration for the court to take into

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[24] *Nkala* para 226.

[25] *Nkala* para 227.

[26] *Nkala* para 227.

account, when determining where the interests of justice lie, is the respondent's own prior conduct in committing itself to access to justice principles.

35 In the section that follows, we explain how this conduct affects the interests of justice analysis.

ANGLO'S CONDUCT AND THE INTERESTS OF JUSTICE

36 It is common cause that Anglo has publicly and repeatedly professed its commitment to the Guiding Principles.

37 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.[27] Two of the principles are salient.

37.1 The first is principle 11. It falls under section II of the Guiding Principles, which addresses the corporate responsibility to respect human rights. Principle 11 provides:

> *"Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." (emphasis added)*

37.2 The second is principle 22. It is headed "remediation", and provides:

> *"Where business enterprises identify that they have caused or contributed to adverse [human rights] impacts, they should provide for or cooperate in their remediation through legitimate processes."*

[27] Principle 11; principle 22 at Amici Applications p 086-156 and 086-167.

38 The ongoing human rights tragedy in Kabwe is undoubtedly an "*adverse human rights impact*" with which Anglo is, at the very least, "*involved*". Indeed, although Anglo argues that it is not the legal cause of these human rights impacts, it cannot seriously dispute that it has contributed to them, within the meaning of principle 22.

39 This has important consequences. It means that if Anglo is to live up to the commitment it has (very publicly) made, to conduct itself in accordance with the Guiding principles, it must cooperate in the remediation of the situation in Kabwe, through "*legitimate processes*". Those legitimate processes include court processes,[28] such as the proposed class action in this case.

40 Anglo's election to commit itself to the Guiding Principles includes a commitment to support access to justice where human rights impacts have occurred. It also includes the commitment to co-operate in processes designed to establish whether there is culpability for those human rights impacts.

41 Having elected to commit itself to these principles, Anglo must then bear a heightened duty when it considers whether to oppose certification. This is so for the following reasons.

42 The law recognises that, in certain circumstances, litigants attract heightened obligations or responsibilities when litigating because of the position they hold and the obligations they are duty bound to fulfil.

42.1 In *Njongi*, the Constitutional Court recognised that state respondents, because of the constitutional duties they bear, have a heightened obligation

[28] Court processes are recognised in Chapter III of the Guiding Principles as one form of legitimate processes – Amici Applications p 086-168.

to think carefully, and exercise a moral choice when deciding to make one or another election in the course of litigation in which they are involved.[29]

42.2 In that case, the election was whether or not to pursue a defence of prescription. The court held that the respondent was under a duty to make an election to plead prescription, which it had failed to do, instead seeking to raise the issue belatedly (and irregularly) by way of a notice. We quote the relevant portions of the judgment below:

> *"[78] I have already said that the Prescription Act requires the debtor to make a decision as to whether it should avail itself of the defence of prescription. It follows from this that the provincial government had to make a decision whether to plead prescription or not. There are important reasons why courts cannot by themselves take up the issue of prescription. There is an inevitable and, in my view, moral choice to be made in relation to whether a debtor should plead prescription particularly when the debt is due and owing. The legislature has wisely left that choice to the debtor. For it is the debtor who would face the commercial, community and other consequences of that choice.*
>
> *[79] A decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution. It follows that the provincial government too, must take a decision whether to plead prescription to defeat a claim for arrear disability grant payments. This is not a decision for the State Attorney to make. It is an important decision and must not be made lightly. It must be made after appropriate processes have been followed and by a sufficiently responsible person in the provincial government who must take into account all the relevant circumstances. It is the duty of the State to facilitate rather than obstruct access to social security. This will be a fundamental consideration in making the assessment.*
>
> *…*

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

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

42.3 The *Njongi* principle was recently upheld in *AMA Casa Props*, where this Court held that a municipality had a heightened duty "*to address the real issues*" and not lightly to take a technical defence. This Court held as follows:

"In a very useful article, 'The Government as Litigant', the author discusses the model litigant obligations in Australia. The article referred me to Melbourne Steamship Co Ltd v Moorehead [1912] HCA 69 where Griffith CJ stated:

> *'… The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings. I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.'*

I agree with the Honourable Griffith CJ. I am not suggesting that in no case a municipality may adopt a technical defence, but it is not a step to be taken lightly. See too Njongi v MEC, Department of Welfare, Eastern Cape [2008] ZACC 4; 2008 (4) SA 237 (CC) at paras 42; 78-81; and 89-90 with regard to matters a municipality may have to consider before

> *adopting a technical defence. The point is that there is a heightened duty on the municipality to address the real issues raised by (in this case) a ratepayer, honestly, fairly, and properly. It must do right, and it must do it properly. This also means that a municipality in a case such as the one under consideration, must evaluate the matter on receipt of the papers, and decide if the dispute needs to be resolved between the attorneys, or taken to court at significant expense."*[30] *(emphasis added)*

43 We submit that the *Njongi* principle can also be applied to private litigants, in the circumstances of this case. Where private a party chooses to adopt principles that commit it to certain conduct, it attracts heightened obligations in litigation where parties litigate in order to vindicate those principles.

44 When Anglo found itself facing certification proceedings, aimed at enabling the women and children of Kabwe to seek relief for adverse human rights effects that Anglo is alleged to have caused or contributed to, Anglo had a decision to make. It could decide to oppose the certification application, and attempt to stop the case at the doors of court. Or it could decide not to oppose certification, and instead to defend the class action on its merits.

45 By committing itself to the Guiding Principles, Anglo bound itself to being involved in the remediation of adverse human rights impacts by court processes. Anglo was not required to commit itself to the principles. It was under no legal duty to do so. It *chose* to subscribe to them. It has told its shareholders, and the public at large, for many many years that it embraces these principles.

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[30] *AMA Casa Props 129 (Pty) Limited v The City of Johannesburg and Others* [2021] ZAGPJHC 661 ("***AMA Casa Props***") at paras 13-14.

46 In doing so, it took on a heightened duty for itself – a duty that it was supposed to honour when it was confronted with this class action certification.

47 But it defied its prior commitment to the Guiding Principles when it threw all its weight behind opposing this certification. It elected to oppose certification of the class action knowing, and accepting, that, if it succeeds in its opposition, the result will be that the prospective class members will have no prospect of advancing their case for a remedy before a court of law.

48 This approach to the certification is entirely incompatible with Anglo's professed commitment to the Guiding Principles.

49 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. These two elections are fundamentally incompatible with one another.

50 The fact that Anglo had a duty to act in a manner consistent with advancing access to justice, and elected to oppose certification in circumstances where successful opposition would result in a wholesale denial of access to justice is a consideration that is relevant to the interests of justice analysis.

51 In *Nkala*, the mineworkers said that the respondents' obstructive conduct deserved censure. In this case, the UN Special Procedures submit that Anglo's defiance of its own commitment to advancing access to justice for human rights impacts should weigh against it in the interests of justice balance for certification.

RETROACTIVITY IS NOT REQUIRED

52 The argument set out above does not depend on the Guiding Principles applying retrospectively.

53 It is not the UN Special Procedures' case that Anglo had obligations to comply with the Guiding Principles at any stage prior to them coming into effect.

54 Rather, the argument is that Anglo has, *since* the Guiding Principles came into effect, made two elections: it has elected to commit itself to the Guiding Principles, and it has elected to oppose the certification of this class action. It is in making that second election that, we submit, Anglo bore a heightened duty.

55 Whether the Guiding Principles have retroactive effect is, therefore, irrelevant to the argument the UN Special Procedures advance.

CONCLUSION

56 The UN Special Procedures make one central submission to the certifying court. It is that a litigant such as Anglo, who has committed itself to advancing access to justice for human rights impacts, attracts a heightened duty when it is faced with litigation to vindicate those very rights.

57 When it shirks that duty, and opposes the certification of a class action that is the only hope to achieve a remedy for victims of human rights violations at a mine that Anglo controlled for almost fifty years, its prior conduct should weigh against it in the interests of justice balance.

58 Just as the Full Court recognised in *Nkala* that respondents in certification proceedings should not obstruct the course of justice, we submit that Anglo's decision in this case to oppose certification after it has publicly committed itself to advancing access to justice should count against its opposition when the court decides whether to certify this class action.

KATE HOFMEYR SC

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Counsel for the third to seventh *amici curiae*

Chambers, Sandton

6 December 2022

LIST OF AUTHORITIES

South African case law

1. AMA Casa Props 129 (Pty) Limited v The City of Johannesburg and Others [2021] ZAGPJHC 661

2. Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others (4305/18) [2020] ZAWCHC 164 (20 November 2020)

3. Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA)

4. De Bruyn v Steinhoff International Holdings NV and Others 2022 (1) SA 442 (GJ)

5. Komape and Others v Minister of Basic Education and Others 2020 (2) SA 347 (SCA)

6. Mkhatshwa and Others v Mkhatshwa and Others 2021 (5) SA 447 (CC)

7. Mkhwanazi v Minister of Agriculture and Forestry, KwaZulu 1990 (4) SA 763 (D)

8. Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (5) SA 89 (CC)

9. Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC)

10. Nkala and Others v Harmony Gold Mining Co Ltd and Others 2016 (5) SA 240 (GJ)

11. Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA)

12. Stellenbosch University Law Clinic and Others v Lifestyle Direct Group International (Pty) Ltd and Others 2021 JDR 3261 (WCC)

International instruments

Guiding Principles on Business and Human Rights, 2011

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/32777

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 *amicus curiae*
THE SOUTHERN AFRICA 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*

THIRD TO SEVENTH *AMICI CURIAE*'S PRACTICE NOTE: CERTIFICATION OF CLASS ACTION

SET DOWN

1 The hearing for the application to certify the class before the Honourable Justice Windell has been set down for the period of 20 January 2023 to 31 January 2023.

2 This is a special motion which was allocated in terms of the Practice Directives and Practice Manual. The Notice of Set Down has been uploaded onto CaseLines as directed by the Deputy Judge President.

NATURE OF APPLICATION AND RELIEF SOUGHT

3 The third to seventh *amici curiae* will seek to assist the above Honourable Court in determining whether to certify the class application brought by the Applicants.

4 The amici's submissions will cover the following:

4.1 The interests of justice test for certifying a class action;

4.2 How Anglo's own conduct impacts on the interests of justice test; and

4.3 The retrospectivity of the UN Guiding Principles on Business and Human Rights.

ISSUES TO BE DETERMINED

5 Whether Anglo American's decision to oppose certification of the class action after it has publicly committed itself to advancing access to justice should count against its opposition when the court decides whether to certify the class action.

DURATION

6 The matter has been set down for eight court days – from 20 to 31 January 2022.

7 The estimated duration of the *amici*'s argument is 1 hour.

URGENCY

8 The matter is not urgent.

PAPERS TO BE READ

9 The papers have been fully indexed and uploaded onto CaseLines.

10 The written submissions from the third to seventh *amici* should be read, together with the papers to which the submissions refer.

11 Anglo American's written submissions responding to the third to seventh amici's submissions should be read, together with the papers to which its submissions refer.

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