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

Case number: 2020/32777

In the appeal between:

[redacted] **KABWE AND OTHERS** Applicants

and

ANGLO AMERICAN SOUTH AFRICA LTD Respondent

ANGLO'S HEADS OF ARGUMENT:
APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

1. In October 2020, the applicants launched this class action certification application. It is a unique and unprecedented claim. The applicants seek to hold Anglo liable half a century after its activities in relation to the Mine ceased, to expansive classes comprised of generations not yet born at the time, on the basis of future knowledge and standards then unknown.

2. On 14 December 2023, after eight days of oral argument and having considered some fifteen thousand pages of evidence and written argument, this Court – in a thorough and reasoned judgment – exercised its discretion to deny certification. In summary, it reasoned as follows:

    2.1. Anglo can only be tested on the basis of what it knew or should have known during the period it is alleged to have been in control of the Mine (between 1925 and 1974, defined by the applicants as the "relevant period").

    2.2. The applicants failed to put up the evidence to establish a *prima facie* case that, during this period, Anglo knew or should have known that lead mining posed a risk to the community living around the Mine at the time – let alone to the entirety of the current Kabwe district, half a century after the end of the relevant period. This Court found that the applicants had failed to advance any evidence of knowledge of harm to an unborn class living in townships yet to be formed to make up the Kabwe district.

    2.3. In order to show that Anglo had acted negligently during the relevant period, they needed to show, at least *prima facie*, what the standard of

reasonableness was during the relevant period, and then show that Anglo fell short on the standard. The applicants failed on both scores.

2.4. The applicants thus failed to make out a triable issue and certification should be refused on this ground alone.

2.5. Anglo put up material facts relating to the Mine's operations by ZCCM post nationalisation, from 1974 until closure in 1994, as well as the failed remediation attempts that continue to this day. This was not addressed by the applicants in the founding papers, nor materially contested by countervailing factual material put up by the applicants in reply. The consequence was that the applicants did not effectively refute the evidence of ZCCM's recent and ongoing reckless conduct, spanning decades.

2.6. In this regard, the applicants cannot meaningfully contest Anglo's evidence that it had no say in the Mine's operations after 1974.

2.7. The applicants failed to make out a *prima facie* case on the facts and an arguable case on the law. The applicants failed to provide the required factual evidence to substantiate a cause of action that presents a triable issue.

2.8. The applicants' case relies almost solely on historical documents written by deceased or otherwise untraceable authors. Having regard to exhaustive searches for documents and significant efforts by the applicants' attorneys to prepare the application over a 17-year period, there was no chance that the evidence presented to the court would

change materially after certification. Insofar as the applicants relied on possible access to documents in "private archives", this suggested recourse was no more than a speculative notion.

2.9. This Court held further that the application suffered from numerous additional, independently fatal flaws. The applicants impermissibly sought to certify an opt-out class made up entirely of foreign *peregrini*. They sought to have certified a district-wide class when their case reached (at best for them) only the so-called "**KMC townships**" around the Mine. And, indisputably, the overwhelming majority of the claims of the women class have prescribed.

3. In the certification application, the applicants were selective. Despite filing documents running into thousands of pages, they ignored (but this Court did not) the entirety of their own evidence, which evidence revealed clearly that their fundamental assertions were simply unsustainable.

4. This Court was entirely correct to dismiss the application. An appeal would have no prospect of success. By way of summary:

4.1. This Court was correct to find that the applicants failed to make out a triable issue. Not only did the applicants' papers fail to make out a *prima facie* case that Anglo is guilty of the tort of negligence – in crucial respects the applicants could never be able to prove liability, even if the matter were to be permitted to proceed to trial.

4.2. Even if it were assumed for the sake of argument that the applicants eked out a triable issue, the interests of justice still would not favour

certification, given their overwhelming problems in respect of prescription, overbreadth, and jurisdiction. Moreover, the applicants all-but conceded that the class action would be unmanageable.

4.3. An appellate court would not be permitted to interfere with this Court's exercise of its certification discretion merely because it would have exercised it differently. It is necessary for this Court to have misdirected itself – to have committed a *"demonstrable blunder"*. This has plainly not occurred.

5. The applicants have burdened this Court with a remarkably long application for leave to appeal (78 pages), but the issues have crystallised over the course of the main hearing, and the fatal deficiencies in the applicants' case can be crisply stated. A failure to respond to each of the many points raised by the applicants must not be construed as a concession.[1]

PRELIMINARY ISSUES

The standard for interference on appeal

6. The dismissal of an application for certification is appealable.[2]

7. However, the freedom of an appellate court to interfere is severely circumscribed. This Court's certification decision - whether the decision to refuse certification

[1] For example, these heads of argument do not address the issue of the remediation relief sought by the applicants. This is no concession. Anglo's position is that this Court's finding in respect of the remediation relief was correct, and it stands by the position stated in its heads of argument in the main hearing (pp 008-239 to 008-268 paras 653 to 724).

[2] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC). See also *DRDGOLD Ltd v Nkala* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) para 7.

was correct - constituted the exercise of a true discretion.[3] With reference to an appeal against a certification decision, the Constitutional Court held in *Mukaddam*, that the question on appeal is not simply whether the decision to refuse certification was correct but whether this Court acted *"judicially in exercising its section 173 discretion, or based the exercise of that discretion on wrong principles of law or a misdirection on material facts."*[4]

8. This is a high bar for the applicants. It would not be sufficient if the appellate court were merely to conclude that it would have exercised its discretion differently[5]. It is necessary, rather, for this Court to have misdirected itself. In other words, this Court's certification decision must have been a *"demonstrable blunder"* or an *"unjustifiable conclusion"*.[6]

9. The applicants do not come close to clearing the high bar of showing a misdirection by this Court, as we explain below. It follows that an appeal would have no prospect of success and leave to appeal must be denied.

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[3] The applicants accept that this Court had a discretion on certification. See Applicants Heads, para 7.

[4] *Mukaddam* paras 42 to 48, particularly para 48. On the nature of discretionary decisions and the standard for interference on appeal generally, see *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 82 to 92.

[5] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

[6] *South African Broadcasting Corporation Limited v National Director Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC) para 41 referred to with approval by the Constitutional Court in *Mukaddam* para 48.

The approach to evidence in certification proceedings

10. The difficulties the applicants face in showing a misdirection is doubtless why they claim, repeatedly, that this Court impermissibly conducted a *"mini trial"* in its consideration of the evidence.[7]

11. They claim that this Court adopted *"an inappropriate approach to the contested factual issues, documentary evidence, and expert evidence"*[8] by *"impermissibly weighing the probabilities, drawing premature inferences, and rejecting expert evidence at certification stage"*.[9]

12. The claim is wrong. It is both a distortion of the careful approach this Court took to the evidence and a misstatement of the rules governing the consideration of evidence at certification stage.

13. The rules governing the assessment of evidence at certification stage are the following:

    13.1. Subject to the next paragraph, a certification court must accept the applicant's evidence at face value and not *"attempt to adjudicate on credibility [or] probabilities"*.[10]

    13.2. The certification court may, however —

[7] See application for leave to appeal paras 4.1, 5.4 and 10.

[8] Application for leave to appeal para 4.1.1.

[9] Application for leave to appeal para 4.1.2.

[10] *Trustees for the Time Being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) para 38 - 40.

13.2.1. assess whether the inferences an applicant draws from the evidence are reasonable, and reject these inferences if they are not;[11] and

13.2.2. consider the evidence of the respondent *"where that evidence is undisputed or indisputable or where it demonstrates that the factual allegations on behalf of the applicant are false or incapable of being established"*, although this is *"not an invitation to weigh the probabilities at the certification stage. It is merely a recognition that the court should not shut its eyes to unchallenged evidence in deciding the certification application"*.[12]

14. This approach to evidence is exactly what this Court recognised and was careful to follow:

14.1. This Court accepted the applicants' evidence at face value. It accepted, for example, that the historical documents the applicants put up were genuine and that the events they describe occurred.

14.2. What this Court did do, however, was interrogate the many inferences the applicants sought to draw from the primary evidence. This is perfectly permissible in certification proceedings. Indeed, it is obligatory. Anything less would be an abdication of the certification court's responsibility to filter out unmeritorious cases.

[11] *Id* para 40.
[12] *Id* para 41.

14.3. This court considered Anglo's evidence, particularly in regard to the events after the end of the relevant period until the closure of the Mine in 1994, and the reckless conduct of ZCCM from 1974 to the present. And this Court correctly observed that this evidence was undisputed or indisputable.[13] Although these facts are obviously relevant, the applicants ignored them entirely in the founding affidavit, which meant that they were raised for the first time by Anglo in its answering affidavit. This Court further recognised that the facts were not materially contested by countervailing factual material put up in reply. By considering those facts, this Court did not turn the certification into a mini-trial. Following *Children's Resource Centre,* they are precisely the kind of facts to which a certification court should not shut its eyes.

14.4. And *Children's Resource Centre* recognises that consideration of undisputed or indisputable facts can have the consequence that the facts alleged by the applicants can be displaced as false or incapable of being established. The consideration of factual matter is not as rigid as on exception (as the applicants argue), which would have the effect of accepting only the applicants' facts as true, without considering the impact of Anglo's undisputed or indisputable facts.

14.5. But, for purposes of leave to appeal, the applicants face an insurmountable hurdle – the failure to establish a triable issue flows

[13] Judgment, para [138]

primarily from their own facts, read with those put up by Anglo which are undisputed or indisputable.

The interests-of-justice standard

15. The overall test for certification is whether it is in the interests of justice to certify the class action.[14]

16. While this is a broad test, its content has crystallised to include the following considerations:

    16.1. First, it is a near-requirement for certification that the applicant make out, in its application papers, a cause of action raising a triable issue. Put differently, it is difficult to imagine how it could ever be in the interests of justice to certify a class action where the applicant appears to have no case to take to trial.[15] To do otherwise would be to *"place a ghost in the machinery of justice"*.[16]

    16.2. Second, even if an applicant makes out a *prima facie* showing of a triable issue, the strength of this showing must be weighed against other factors

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[14] *Mukaddam* above n 2 para 34.

[15] *De Bruyn v Steinhoff International Holdings NV* [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ) para 24:

> *"If, then, a class action is predicated upon a cause of action that is not tenable in law, and there is consequently not a triable issue to take forward to trial, is the class action nevertheless capable of certification? Mukaddam allows that it could be. But that would be so in unusual circumstances, not altogether easy to foresee. If the certification court can and has decided a question of law and concluded that there is no cause of action that supports the class action, then there is no triable issue. If the point of law is novel and has not been authoritatively determined by our highest courts, that may warrant the attention of these courts on appeal from the certification court. But from the vantage point of the certification court, if the point of law is dispositive of the applicant's cause of action, then there is no triable issue to go forward. And that would bear much weight in determining the ultimate question, because, if the certification court decides there is no cause of action, then there is nothing for the trial court to determine. In such circumstances, whatever other virtues the certification application may have, it is difficult to see what would justify certification."*

[16] *Id* para 300.

in the interests-of-justice enquiry. Certification must still be refused if an applicant makes out merely a weak triable issue and if other factors in the interests-of-justice enquiry militate against certification.[17]

16.3. Third, certification is not had for the asking. A certification court must not shy away from disallowing certification where the interests of justice demand this. The Constitutional Court stated this in *Mukaddam*:

> *"[I]t is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may … 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*."[18]

17. The relevance for the applicants' case is this:

17.1. This Court correctly held that the applicants failed to make out a triable issue at all. It follows, for this reason alone, that this Court was correct to refuse certification. Indeed, this Court would have misdirected itself, had it granted certification in any form.

17.2. But even if one were to be generous to the applicants and assume for the sake of argument that they made out a triable case, they could only

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[17] *Id* para 25:

> *"This analysis simply emphasises that in a particular case certain factors relevant to certification may weigh in different ways. Certain factors may weigh with the certification court to incline the decision one way or another. Other factors may be so weighty that the scales tip decisively. Every factor is to be weighed, and none displaces the ultimate exercise of weighing all in the balance to determine where the interests of justice lie. But that does not mean that a factor in a particular case may weigh so heavily that it points clearly to what the interests of justice require."*

[18] *Mukaddam* above n 2 para 38.

have made out an exceedingly weak one. This would not get them over the interests-of-justice line, given the numerous other factors that militate against certification and because it could never be in the interests of justice to permit an unmeritorious case to proceed. This Court considered these other factors in its judgment and which are considered further below.

The role of section 17(1)(a)(ii) of the Superior Courts Act

18. The applicants argue that regardless of whether reasonable prospects of success on appeal exist, *"this is a case in which leave to appeal should be granted independently under section 17(1)*(a)*(ii) of the Superior Courts Act"*,[19] on the basis the certification application raises various legal issues in respect of which there is *"the need for a binding decision of the Supreme Court of Appeal or Constitutional Court"*.[20]

19. But section 17(1)*(a)*(ii) is no independent basis for granting leave to appeal, for at least two reasons:

    19.1. first, the applicants' arguments in respect of the various listed legal issues are bad, as appears below; and

[19] Superior Courts Act 10 of 2013.

[20] Application for leave to appeal paras 90 to 90.8.

19.2. second, section 17(1)*(a)*(ii) is generally insufficient for leave on its own. It should be paired with reasonable prospects of success on appeal.[21] And the applicants' prospects are poor.

THE APPLICANTS FAILED TO MAKE OUT A TRIABLE ISSUE

20. In what follows, we summarise why the applicants failed to make out a triable issue. This is so even if all (and not merely a cherry-picked selection) of their evidence is accepted at face value (which is what this Court did).

The requirements for the tort of negligence

21. The applicants claim under the English tort of negligence (which is part of Zambian law).[22] The requirements for the tort of negligence are stated as follows in *Clerk & Lindsell on Torts*:[23]

> *"(1) The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. …*
>
> *(2) Breach of the duty of care by the defendant, i.e. that there was a failure to measure up to the standard set by law.*
>
> *(3) A causal connection between the defendant's careless conduct and the damage.*

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[21] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA) para 2 (footnotes omitted, emphasis added):

> "*In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold."*

[22] Mwenye SC affidavit p 001-1707 to 001-1708 paras 6.19 to 6.22.

[23] Michael A Jones et al *Clerk and Lindsell on Torts* 23 ed (2022) at para 7-04.

(4) *That the particular kind of damage to the particular claimant is not so unforeseeable as to be remote."*[24]

22. By way of summary, the applicants failed to make out a *prima facie* case in the following respects:

22.1. first, that it was reasonably foreseeable to Anglo during the relevant period that its conduct might harm an unborn class, living in townships yet to be formed to make up the entire Kabwe district, at least fifty years later;

22.2. second, that Anglo breached any duty of care by acting negligently;

22.3. third, that Anglo's conduct caused harm to the current Kabwe district; and

22.4. fourth, that any harm suffered by the current Kabwe community was not too remote on account of ZCCM's indisputably negligent running of the Mine after the relevant period.

23. It bears emphasis at the outset that if the applicants have failed to make out a *prima facie* case in respect of even one of the requirements, they have failed to make out a triable issue – and there would be, as a result, no prospect of success on appeal.

[24] The applicants' Zambian-law expert accepts that these are the requirements for the tort of negligence (Mwenye SC affidavit pp 001-1707 to 001-1708 paras 6.19 to 6.22).

The applicants did not show foreseeability

The place of foreseeability in the tort of negligence

24. Foreseeability is an essential element of the tort of negligence:

    24.1. First, it a crucial factor in determining whether a duty of care exists. Whether a duty of care exists depends (in novel claims)[25] on (a) whether harm to the claimant was foreseeable, (b) proximity of relationship between the claimant and defendant, and (c) whether imposing a duty of care would be fair, just, and reasonable.[26]

    24.2. Second, whether the defendant breached the duty (i.e., whether it acted negligently) depends on the extent to which harm of the type that occurred was foreseeable.[27]

    24.3. Third, whether the kind of damage that occurred to the claimant is remote depends in part on whether it was foreseeable.

25. What is foreseeable depends on *"the state of knowledge which could be attributed to the defendant at the time of the occurrence"*.[28] The test, differently stated, is the actual or constructive knowledge which a reasonable and prudent defendant would have had if he consulted such literature or made such inquiries as were reasonably expected of him at the time.[29]

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[25] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] AC 736 para 27.
[26] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 at 617 to 618.
[27] *Clerk and Lindsell* above n 23 para 7-174.
[28] *Id*
[29] *Wright v Dunlop Rubber Co* (1973) 13 KIR 255.

26. This requirement is particularly important when a case is brought nearly fifty years after the last of the impugned acts and omissions (and nearly a hundred years after the first). Anglo must be tested on the basis of what was known or knowable at the time, and not on the basis of what we know now with the benefit of hindsight and up to a century of scientific progress.

27. It is worth revisiting some of the cases, properly considered by this Court, that illustrate this principle:

    27.1. In *Thompson v Smiths Shiprepairers*,[30] the defendants were only held liable for their failure to protect their employees from deafness through exposure to industrial noise from the time when the dangers of industrial noise became generally known. The court adopted 1963 as the operative date and held that the claimants were not entitled to damages for deafness sustained before then.

    27.2. In *Roe v Minister of Health*,[31] the defendants were not held liable for paralysis suffered by the claimants as a result of the spinal injection (in 1947) of anaesthetic which had become contaminated with disinfectant, given that the possibility of such contamination was not generally known in 1947. As Lord Denning stated: *"We must not look at the 1947 accident with 1954 spectacles"*.[32]

28. Lord Thankerton put the position well (with respect) in *Glasgow Corp v Muir*:[33]

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[30] *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] Q.B. 405.
[31] *Roe v Minister of Health* [1954] 2 QB 66.
[32] *Id* at 84.
[33] *Glasgow Corp v Muir* [1943] AC 448 at 454.

> *"The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened, or that witnesses are prone to express regret, ex post facto, that they did not take some step which it is now realised would definitely have prevented the accident."*

The applicants' case on foreseeability is fatally deficient

29. For the applicants to have made out a *prima facie* case on foreseeability, it was necessary for them to have put up evidence that it was reasonably foreseeable to Anglo, between 1925 and 1974, that the Mine's activities during this period would be dangerous to the entirety of the Kabwe district, up to a century later.

30. They failed to do this. Their evidence on foreseeability and the dangers of lead missed one or more of these elements and thus was misdirected:

    30.1. The expert evidence put up by the applicants as to current knowledge of the dangers of lead exposure – including the evidence of Professors Taylor and Harrison – is misdirected. Showing what we know now is insufficient to prove foreseeability. What needs to be proven is what it was reasonable for Anglo to have known between 1925 and 1974.

    30.2. To the extent that the historical documentary evidence from the relevant period supports knowledge (actual or constructive) of the hazards of lead exposure, it is knowledge of the occupational hazards of lead exposure – i.e., knowledge of hazards to workers in the mining complex. It is not knowledge of dangers to the surrounding community at the time.

30.3. And to the extent that the historical documentary evidence from the relevant period supports knowledge (actual or constructive) of dangers to the surrounding community (and not just to workers in the mine), it does not show knowledge of dangers to the much larger Kabwe district up to fifty years later.

31. Before we consider the historical documents primarily relied upon by the applicants, it is important to note that the applicants' evidence (and the undisputed or indisputable evidence put up by Anglo) positively shows that harm to the current community could not have been foreseeable by Anglo during the relevant period:

31.1. Professor Betterton (the applicants' expert) confirms that it was only in the mid- to late-1970s that the United States Environmental Protection Agency ("**the US-EPA**") issued standards for ambient airborne lead.[34] There is no evidence before this Court that Zambia had any standards for ambient airborne lead during the relevant period.

31.2. Mr George (one of Anglo's experts) confirms that *"environmental standards for industries such as lead smelting did not occur in any widely recognised way until late in the 20th century in the United States. Moreover, these types of standards were not even proposed until 1970, and, even their adoption occurred slowly over the next 30 years"*.[35] The applicants did not meaningfully contest this evidence.[36]

[34] Betterton replying report p 001-9646 para 12.60.
[35] Answering affidavit p 001-2907 para 653.4.
[36] Replying affidavit p 001-7787 para 566.

31.3. In the answering affidavit it was stated that in the USA, environmental lead was ubiquitous as a result of lead in gasoline, which was only removed in the mid-1970s[37] (again, at or after the end of the relevant period). This was not challenged by the applicants.

31.4. If the US-EPA only issued standards for ambient airborne lead in the mid- to late-1970s, and if leaded petrol was ubiquitous until at least this period, how could it have been reasonably foreseeable to Anglo during the relevant period (which ended in the mid-70s) that ambient airborne lead produced by the Mine could be dangerous to the entire community fifty years later?

31.5. Mr George, whose evidence was not contradicted, makes the point clearly:

> *"Even in the USA, it was not until the 1970s that the full impact of lead exposure on the public was brought into clarity. This late recognition of lead as a serious environmental problem was not driven by lead from lead smelters but lead from tetraethyl lead in gasoline (only banned in the USA in 1990 and in parts of Africa in 2005) and lead in paint. These were the triggers for the current lead emission and environmental standards. The Mine cannot be faulted for failing to recognize this trend decades before others*"[38]

31.6. Professor Taylor (the applicants' expert), after considering the literature from the time, is unable to conclude that Anglo was *"mindful of the impacts that the smelter operations might also have had on the*

[37] Answering affidavit p 001-2690 para 57.

[38] Answering affidavit p 001-3398 annexure AA8 para 6.6 (emphasis added).

community". All that was known was *"the issue of lead-rich dust on workers"*.[39]

31.7. Professor Harrison (again, the applicants' expert) makes the fatal admission against the applicants that, by 1974, *"the precise magnitude of the lifetime of lead in soil was not known with the confidence level of the present time"*.[40] So the applicants' expert concedes that there was no specific knowledge of danger to the community fifty years after the end of the relevant period.

31.8. Dr Beck (one of Anglo's experts) notes that before the mid-1960s in the USA, only a BLL of more than 60 µg/dL was considered toxic. In 1971, a BLL of between 15 and 40 µg/dL was considered normal in the USA. In 1977 (shortly after the relevant period), the UK required BLLs to be less than 35 µg/dL in 98% of the population.[41] This evidence was not specifically contested by the applicants.[42] Currently, the mean BLLs in Chowa and Kasanda are 31.7 µg/dL and 32.8 µg/dL respectively.[43] Assuming (with current knowledge) that this constitutes an injury, it could not have been foreseeable during the relevant period.

32. So, the applicants' evidence, supported by Anglo's undisputed or indisputable evidence, positively shows that harm (as contemplated by the applicants) to the

[39] First Taylor report p 001-1751 (underlining added).
[40] Harrison affidavit p 001-2656 para 25.
[41] Beck report p 001-3539; answering affidavit p 001-2903 para 643.
[42] See replying affidavit pp 001-7785 to 001-7786 para 563.
[43] Sharma report p 001-3273.

current community was not reasonably foreseeable even at the end of the relevant period.

33. We turn briefly to consider the documents the applicants placed most heavy reliance on to show foreseeability. Read fairly and as a whole, they do not. The applicants' reliance on many of these documents has been selective, sparse and contradictory, and correctly recognised by this Court to be so[44] and insufficient to establish foreseeability:

33.1. The 1893 Australian report (what the applicants call *"the Broken Hill report"*):[45]

33.1.1. The applicants put up no evidence that this report came to Anglo's attention when Anglo was only formed in 1917 or that Anglo should have had regard to it. It was incumbent on them to do so, given that the report was published long before the advent of modern forms of communication.

33.1.2. The report deals primarily with the effect of leaded emissions in the form of flue dust on workers and residents 548 metres from the (Australian) mine.[46] By contrast, the closest community to the Mine in 1975 was Kasanda, which was 2 200 metres away.[47] And, importantly, the finding was that there was no direct

[44] Judgment, paras [117] to [122] (Broken Hill), paras [124] to [125] (Routledge Farms), para [126] (Dr van Blommenstein memo), paras [127] to [128] (Dr. Lawrence, Prof. Lane and Mr King, Dr. Clark), and para [129] (the applicants' flip-flop on smelter stacks first being too low and then too high).

[45] Founding affidavit ZMX2 p 001-191.

[46] 1893 report p 001-213 para 12.

[47] Clark thesis p 001-382.

evidence that fumes (which travel greater distances than flue dust) "*actually exerts poisonous influence"* – bearing in mind that this is exactly the form of dispersal relied upon by the applicants in this case. This Court correctly found that there is no evidence in the report that fumes dispersed through the stacks cause harm to the general population, and that communities beyond 548m from the Mine were not considered to be at risk of harm. This report is no support for the applicants' foreseeability case.

33.1.3. The report says nothing about how long lead remains in the soil or the extent to which it might be dangerous fifty years after being emitted.

33.2. The 1925 South Royal Commission Report on Plumbism:[48] This report investigated the occupational risks of lead exposure in the town of Port Pirie. The applicants concede that *"no efforts were made to take air, water and soil samples in the surrounding community"*.[49]

33.3. The 1933 report on lead poisoning at Mount Isa in Queensland Australia:[50]

33.3.1. The applicants again concede that the report "*focused on the risks of occupational exposure to lead in the lead mining and smelting industries"*.[51]

[48] Founding affidavit ZMX58 p 001-1052.
[49] Founding affidavit p 001-75 para 144.1.
[50] Founding affidavit ZMX60 p 001-1083.
[51] Founding affidavit p 001-77 para 146 (underlining added).

33.3.2. The applicants, moreover, make no effort to state why Anglo or the Mine should have had knowledge of the report.

33.4. The 1947 report of Dr van Blommenstein:[52] Dr van Blommenstein was Anglo's chief medical officer at the time. Again, his report only deals with dangers to workers, and not the broader community.[53] It says nothing about lead remaining in the soil outside the Mine for 50 years or more. This Court was correct in criticising the applicants for contending that the Mine or Anglo should have been aware of harm to the community when Dr van Blommenstein was dealing only with the Mine's knowledge of harm to workers at the time.

33.5. The 1966 Routledge Farm documents:[54] The applicants refer to internal correspondence showing that a farmer had made a claim against the Mine for pollution of his farm arising from an alleged seepage from the Mine's tailings dam. But the document does not refer to lead, says nothing about dangers to the communities around the Mine from airborne lead, and certainly says nothing of dangers to future communities fifty years later.

33.6. Dr Lawrence's statement:[55] The applicants ignore that Dr Lawrence opined that "*the Mine was run very efficiently*" in 1969 and the early 1970s.[56] He tested blood samples of children living in the near vicinity of

[52] Founding affidavit p 001-1164 ZMX 67 and ZMX68.
[53] See in particular p 001-1165.
[54] Replying affidavit p 001-7909 ZMX97.
[55] Lawrence affidavit 16 December 2020 pp 001-2633 – 001-2639.
[56] Lawrence affidavit 16 December 2020 para 9 p 001-2551.

the Kabwe Mine and not in the broader community or Kabwe district generally. Within a month of learning of the risks to the then-present community in 1970, the Mine sprang into action, carried out extensive testing, commissioned a report from and adopted measures proposed by Prof Lane and Mr King, including replacing 448 houses *"in the bad area"* near the Mine.[57] Dr Lawrence says nothing about the threat of lead in the soil to children in the entire historical Kabwe district, to still to be born children nearly half a century later.

33.7. Dr Clark's thesis (1975):[58] Dr Clark's thesis was published a year after the end of the relevant period (in 1975) – so, it cannot be used to create actual or constructive knowledge on the part of Anglo. In any event, Dr Clark does not speak to knowledge of lead remaining in the environment for fifty years or more, and so cannot be used to impute reasonable foreseeability of harm to future communities in the entire Kabwe district.

33.8. The applicants flip-flopped on the issue of smelter stack heights – a central pillar in both the contradictory dispersal theses advanced by the applicants. First the theory of harm and foreseeability was that the stack heights of the smelters were too low, and deposited plumes on nearby residences. When that case was met by Anglo in its answering affidavit, the reply was that they were too high and deposited plumes on communities far away. We deal with this issue below when we consider causation, but point out that this Court's analysis of the applicants'

[57] Annexure ZMX76 pp 001-1195 to 001-1199.

[58] Founding affidavit p 001-357 ZMX3.

contradictory positions is accurate and the shifting positions demonstrate a muddled case of whether it was foreseeable by Anglo that the Mine's smelter stacks were too low, or too high[59].

The applicants did not show negligence / breach of duty

34. We focus on two reasons why the applicants failed to make out a *prima facie* case that Anglo acted negligently.

35. First, the applicants failed to set out a standard of conduct prevailing at the time. Specifically, they failed to show what the prevailing practice and conduct of similarly situated lead mines over the relevant period were and to specify how the Mine's conduct (which they attribute to Anglo) materially deviated from that prevailing practice or conduct. The applicants invited this Court to embark on an impossible enquiry to determine whether Anglo had breached an unknown standard.

36. The applicants argue that it was not necessary for them to have set out a prevailing standard.[60] In their Heads they go as far as saying it was actually Anglo's burden to plead and prove the standard as part of its "defence". They are wrong. As explained above, what is foreseeable depends on "*the state of knowledge which could be attributed to the defendant at the time of the occurrence*".[61] The nature of the standards then prevailing is a crucial element

[59] Judgment para [129].

[60] Application for leave to appeal paras 38.4 to 38.6. [61] *Clerk and Lindsell* above n 23, para 7-174.

of the knowledge that can be attributed to Anglo at the time. This is squarely the applicants' burden.

37. The point is illustrated by the case of *Thompson v Smiths Shiprepairers*,[62] where the court was only willing to find negligence from the date that the Ministry of Labour issued official guidance relating to the dangers of industrial noise (1963). In the words of the court:

> "*All this being so, I conclude that the year 1963 marked the dividing line between a reasonable (if not consciously adopted) policy of following the same line of inaction as other employers in the trade, and a failure to be sufficiently alert and active to measure up to the standards laid down in the reported cases. After the publication of 'Noise and the Worker' there was no excuse for ignorance. Given the availability of Billesholm wool and reasonably effective ear muffs, there was no lack of a remedy. From that point, the defendants, by offering their employees nothing, were in breach of duty at common law.*"[63]

38. Finally, the applicants rely on *Healthcare at Home Limited v The Common Services Agency* to argue that the standard of the reasonable person is *"not established by the evidence of witnesses"* but by application of a *"legal standard by the court."*[64] But *Healthcare* takes the applicants' case no further. What the applicants fail to mention is that the Court made clear that it must be *"informed by evidence of circumstances…of the reasonable man in any particular case."*[65] Ultimately, it was incumbent on the applicants to set out some evidence of the

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[62] *Thompson v Smiths Shiprepairers* above n 30.

[63] *Id* p 895 (008-2879).

[64] *Healthcare at Home Limited (Appellant) v The Common Services Agency (Respondent) (Scotland)* [2014] UKSC 49 at para 1 – 3.

[65] Ibid at para 3.

generally accepted norms and practices, against which Anglo's conduct in question could be assessed. The Court cannot be expected (nor is it required) to divine that standard in a vacuum, hence the applicants' attempt to fill the vacuum with historical factual and expert evidence. The applicants' insurmountable problem is that they ultimately established no standard, neither by their factual evidence nor by their expert evidence. It is that failure which drives the new arguments that the applicants have no burden to identify a standard, and instead a defendant like Anglo has the burden to do so.

39. Second, the applicants failed to show that the emission controls instituted by the Mine – following Anglo's involvement – were inappropriate and unreasonable for the day. On the contrary, the applicants' evidence reveals the following:

39.1. Between 1925 and 1929, only 2% of the lead produced over the lifetime of the Mine was produced. Between 1930 and 1936, no lead was produced. Between 1937 and 1945, less than 1% of the Mine's lifetime lead production took place.[66] This period is *de minimis*.

39.2. Between 1946 and 1952, and 1957 and 1962, the Mine utilised Newnam Hearths. For the first time, air emission control technologies included bag filters and Doyle Impingers to collect dust; and an increase in the stack heights to some 120 feet. The emission control technologies attached to the Newnam Hearth achieved a direct recovery of over 86%, with the majority of the loss to slag (9.7%), which was subsequently treated.[67]

[66] Barlin table 11 p 001-672.
[67] Barlin 001-676 to 001-678.

39.3. The applicants do not allege that the Newnam Hearths were a poor system for the time. Indeed, they appear to accept that the Newnam Hearths were effective at capturing lead dust, stating that the dust collection equipment *"was most likely meant primarily to recover valuable lead containing dust not to protect their workers or the community"*.[68] Of course, the reason for the intention to capture airborne lead is irrelevant – what matters is that there was this intention and result.

39.4. Between 1953 and 1957, the Mine utilised Dwight Lloyd Sintering Machines. Lead recovery from the sinter plant and blast furnace were 95.3% and 94.8% effectively. Dust emissions were captured by an electrostatic precipitator, with a dust loss of only 0.9%.[69] Professor Betterton (the applicants' expert) accepts that the electrostatic precipitator was *"highly efficient, often approaching 99% even for the smallest particles"*.[70]

39.5. In 1962, the Mine installed an Imperial Smelting Furnace, which remained in place until the end of the relevant period in 1974. It is not disputed that the facility (which included various emission controls) was state of the art for the time.[71]

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[68] Betterton report p 001-1623.

[69] Barlin 001-684.

[70] Betterton report p 001-1625.

[71] Answering affidavit p 001-2718 paras 138 to 139; not meaningfully disputed at replying affidavit p 001-7770 to 001-7771 para 524 (inclusive).

The applicants cannot show causation

40. We focus on three primary respects in which the applicants failed to establish *prima facie* causation.

41. The first is the admitted absence of aerosol data for the relevant period:

    41.1. The applicants' theory for the alleged contamination of the Kabwe district is that lead-containing fumes and dust were carried by the wind from the Mine to settle in the soil. Fifty years later, this lead remains in the soil to poison the residents of the entire Kabwe district.[72]

    41.2. Thus, for the applicants to prove their theory of harm, they must be able to put up evidence as to how much lead was in the air during the relevant period. But it is common cause that there is no aerosol data available to quantify the dust emitted into the environment over the relevant period (except for the aerosol data gathered by Dr Clark in 1973 and 1974).[73] This does not get better at trial.

    41.3. This lack of aerosol data is why the applicants put up Professor Betterton's AERMOD modelling in reply, in an attempt to show that

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[72] Founding affidavit p 001-46 to 001-50 paras 76 to 80.9.

[73] Taylor report p 001-1764:

> "*The proportionality of the contamination is addressed by examination of the production over time, which in Question 2.2, shows that the company and its subsidiaries were responsible for 65.53% of the total lead produced (528,333 tons) up until 1974 (covering the years 1925 and 1974 (inclusive). The amount produced from 1925 to 1963 (inclusive) that is attributable to the company is 34.61% (279,023 tons). On the information available, this seems to be the only reasonable way to attribute the contamination to different time periods. It is entirely reasonable to assume that mining and smelting processes and associated emissions varied over time, with the likelihood that processing became more efficient throughout the 20th century. Suitable other proxy data e.g. aerosol measurement data is not available to make such an assessment, hence reliance on production rates as a proxy is the most reasonable alternative*" (underlining added).

"wind-borne emissions from the mine/smelter <u>could potentially</u> reach the entire district".[74]

41.4. But the attempt merely draws attention to the lack of aerosol data during the relevant period, given that Professor Betterton openly admits that the aerosol lead concentration figures in his modelling are *"fictitious"*.[75] The attempt is also utterly worthless at showing causation, given that Professor Betterton admits that his AERMOD modelling cannot itself be used to come to any sort of firm conclusion as to the extent to which the Mine could have polluted the entire district.[76]

41.5. In short, the applicants' theory is that lead went from the Mine, into the air, then into the soil, to be absorbed by the residents of Kabwe 50 years later. But they admit that they cannot prove how much lead went into the air, how far it travelled and at what concentrations. It follows that they cannot prove causation.

42. The second reason the applicants cannot establish factual causation is because they make a flawed assumption that there is a linear relationship between lead production and lead pollution.

42.1. Because of the absence of aerosol data, the applicants had to make the erroneous assumption that there was a linear relationship between the amount of lead produced and the amount of pollution caused. The applicants argue that 66% of the lead produced by the Mine occurred

[74] Betterton replying report p 001-9606 para 9.1.6 (underlining added).
[75] Betterton replying report p 001-9606 para 9.1.5.
[76] Betterton third report p 006-517 para 7.4.

between 1924 and 1974, and they extrapolate that 66% of the pollution occurred during the same period. However, production figures are patently inappropriate measures for lead pollution for precisely the reason recognised by the applicants' own expert, Professor Taylor – there is *"the likelihood that processing became more efficient throughout the 20th century"*.[77]

42.2. Moreover, the flaw in this assumption is that it also ignores crucial facts:

42.2.1. In the period *prior* to Anglo's involvement with the Mine (prior to 1925), there were high emissions that were completely uncontrolled. This meant "*prodigious amounts of lead fumes and dust into the environment*", as conceded by the applicants' expert, Professor Betterton. [78] Though only 12% of lead was produced in this period prior to Anglo's involvement with the Mine because there were absolutely no emissions controls, the lead produced during this period is likely to be a key source of lead pollution that was not properly considered.

42.2.2. The Mine's smelting and operational processes changed over its lifespan, with each wave of upgrades introducing emissions controls that were state-of-the-art, appropriate, and reasonable for the day. Periods of high production also coincided with periods when significant air emissions controls were in place.

[77] Taylor; p 001-1764.

[78] Betterton; p 001 – 1624 – 001 – 1625.

42.2.3. ZCCM's conduct between the period 1974 and 1994 which – based on ZCCM's own records – caused extraordinary pollution to the environment in Kabwe.

42.3. The applicants' case on factual causation depends on the Court accepting an assumption that is fundamentally logically flawed. One of the applicants' experts, Professor Betterton, sought to distance himself from this assumption, and Professor Harrison "*conceded*" euphemistically that it was an "*inexact measure*." This assumption—that lead production is a proxy for lead pollution—provides no basis for establishing factual causation.

43. The third reason why the applicants cannot make out a case for factual causation is that the applicants have flip-flopped on a key part of their theory of harm.

43.1. In their founding papers, the applicants' case was that it was the low height of the Mine's smelter stacks (around 12 m),[79] paired with a fumigating and looping plume from the smelter, which delivered lead particles to the ground where it could be deposited in the soil of the KMC townships.[80] In the applicants' words:

43.1.1. *"the low height of the Kabwe smelter stacks would have been an essential element in this [pollutive] process"*;[81] and

[79] Betterton first report p 001-1626.

[80] Founding affidavit pp 001-46 to 001-47 paras 76 to 77.

[81] Founding affidavit p 001-47 para 78.

43.1.2. *"the smelter stack was built too low to function adequately under the prevailing weather conditions, resulting in the fumigation of local township areas"*.[82]

43.2. In answer, Anglo pointed out that the applicants were wrong about the stack heights. In 1946, the stack height was increased to 120 ft (36 m) for the Newnam bag filter,[83] and again increased in 1962 to 200 ft (61 m) for the ISF/ sinter plant.[84]

43.3. So then, in reply, the applicants made the following about-turn:

43.3.1. Short smelter stacks – less than 20 m – did <u>not</u> result in widespread contamination in Kabwe. Instead, short smelter stacks would only have an impact in the immediate vicinity of the Mine *"too close to impact heavily upon closest residential areas"*.[85] The contradiction between this statement and the statement quoted in paragraph 43.1.2 is stark and quite brazen.

43.3.2. Rather, <u>tall</u> smelter stacks were the cause for contamination in Kabwe, not short ones, following Professor Betterton's AERMOD modelling.[86]

43.4. The fact that a core element of the applicants' theory of harm (how lead was transported from the smelter stacks through the air to the

[82] Founding affidavit p 001-107 para 224.3.

[83] Answering affidavit p 001-3102 para 1190.2.

[84] Answering affidavit p 001-3102 para 1190.3.

[85] Replying affidavit p 001-7664 para 190.2.

[86] Betterton replying report p 001-9618 para 11.2.1.

community) is mutually destructive between the founding and replying papers, is an additional reason that the applicants have failed to make out a prima *facie case* on causation.

The applicants failed to engage with remoteness

44. After the relevant period, when ZCCM took over the Mine, it – by its own admission – *"ran down"* the Mine (as this Court recognised).[87] By 1984, ambient lead levels – as recorded in Kasanda – were 800% higher than the safety limit set by the World Health Organisation. The ambient levels subsided later that year, but rose again in 1985 when the precipitator at the ISF/sinter plant became non-operational.[88]

45. In 1989, ZCCM accepted that it was culpable for lead pollution around the Mine. A handwritten note on minutes of a 1989 meeting of its environmental task force recorded:

> "How culpable are we? Legal standing/view. Complainants. Advisable to settle out of court. So far only one case. Death certificate – care must be taken. We are culpable from operations point of view. Nature of operations / serious situation / potential is there. Precipitators – why did we run down the Plant for long. Problem is there even when the sinter plant is closed. 20-30 years hence. Dumps. Dust."[89]

46. Also in 1989, the minutes of a ZCCM environmental task force meeting recorded the following under the topic "Death/Damage Through Lead Poisoning":

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[87] High Court judgment para 101.
[88] Answering affidavit p 001-2746 para 209.
[89] Answering affidavit p 001-2757 para 241; annexure AA32 p 001-4444 to 001-4449.

"After some lengthy discussion on whether or not the division was culpable on the question of lead poisoning, the meeting resolved that if a complainant brought a legal claim it would be most logical to settle the matter out of court."[90]

47. In a 1996 memo, ZCCM frankly acknowledged that the period between 1989 and 1991 was likely the worst period of lead pollution in the history of the Mine:

"In 1984 Ambient lead levels, as recorded from the sampling point at Kasanda, were 800% higher than the 0.02 ug/cubic meters safety limit set by the World Health Organisation. The Ambient levels subsided later that year but rose again in 1985 when the Electrostatic Precipitator at the Sinter Plant became non-operational but continued to be used to convey fumes to the main stack. The collapse of the base of the Electrostatic Precipitator in 10 January 1989 and its subsequent removal and non-replacement from the discharge circuit, significantly increased the discharge of fumes further and at lower height levels. This meant high concentrations of lead being projected and setting into the mine townships.

Hence the period between 1989 – 1991 (for which sufficient data was located) most likely represents the worst period of lead pollution, in the history of the Kabwe Mine, and is marked by an increase in blood lead levels of 20 – 100% from the 1983 levels, for the age group of 0 – 5 years old in Chowa and Kasanda."[91] (emphasis added)

48. ZCCM's admitted mismanagement of the Mine negates any liability on the part of Anglo, because (a) it is a reason that the current pollution of the area was not reasonably foreseeable by Anglo and (b) it constitutes a *novus actus*

[90] Answering affidavit p 001-2760 para 244; annexure AA34 p 001-4452.
[91] Answering affidavit pp 001-2760 to 001-2761 para 253.

interveniens, meaning that any harm suffered by members of the proposed classes is too remote from Anglo's actions and omissions.

49. The applicants failed properly to engage with ZCCM's obvious and acknowledged liability.[92] This is an independently sufficient reason that the applicants failed to make out a triable issue. But even if one were to ignore this reason altogether, the applicants clearly have not established a triable case for the reasons set out above.

Miscellaneous issues in respect of a triable issue

The *"concession"* by Mr Gibson

50. The applicants repeatedly claim that Anglo's English-law expert, Gibson KC, conceded that the applicants had made out a triable issue, and that Anglo has impermissibly sought to depart from this concession.[93]

51. But there is no concession, for at least four reasons:

    51.1. First, read in context, the relevant statement by Mr Gibson is merely that the draft particulars of claim plead a duty of care in the context of parent-company liability that would be cognisable under English law.[94] It is not a concession *"that the cause of action in the particulars of claim was not excipiable and that the evidence presented a real issue to be tried in*

[92] For a full response to the applicants' arguments in respect of ZCCM's liability, see Anglo's main heads of argument pp 008-186 to 008-192 paras 509 to 521. Contrary to the applicant's assertion that Anglo remained an active minority shareholder after 1974 (applicants' Heads para 53.8) the evidence shows that Anglo's role was very limited. See Holmes first affidavit pp 001-7103 to 001-7105 Holmes second affidavit pp 006-103 to 006-110.

[93] Application for leave to appeal paras 7.2, 11.5, 28.4, and 36.1.

[94] The statement is at p 001-3946 para 23, and the broader context is pp 001-3942 to 001-3946 paras 10 to 23.

respect of all claims" (to quote the most expansive version of this argument in the application for leave to appeal).[95]

51.2. Second, Mr Gibson only considered the draft particulars of claim, the body of the founding affidavit, and the expert reports of Hermer QC (the applicants' English-law expert) and Mwenye SC (their Zambian-law expert).[96] He did not consider the entirety of the applicants' founding papers and annexures, and so cannot be read to make a concession as to whether the founding papers, together with the entirety of the supporting evidence advanced by the applicants, read with all Anglo's evidence, make out a triable issue.

51.3. Third, it is absurd to claim that a statement by Mr Gibson, based on allegations in a draft pleading and part of only the applicants' case, bound Anglo to a concession that there is a triable issue, given that Anglo's papers contain thousands of pages of evidence and argument to the effect that there is none.

51.4. Fourth, it is for this Court to determine as a conclusion of law whether a party has established the existence of a triable issue – not for any witness. This means that this Court, rightly, did not fetter its discretion and focus only on the narrow issue that Mr Gibson was asked to opine on – whether there might be a duty of care premised on parent company liability – but went further to also consider *inter alia* whether the applicants have satisfied the knowledge requirement for purposes of

[95] Application for leave to appeal para 7.2.

[96] Gibson affidavit p 001-3942 para 7.

saddling Anglo with a duty of care. Evidently, the applicants failed to satisfy this crucial element, which Mr Gibson did not opine on. In any event, on a legal issue this Court must interrogate the evidence and inferences put up and come to its own conclusion, in the exercise of its discretion. This is what this Court did.

The evidence will not get better at trial

52. The applicants' evidence on a triable issue will not get better at trial.

53. *First*, significant parts of the material facts put up by Anglo remain undisputed or are indisputable. For example, the facts pertaining to the operation of the Mine from 1974 until its closure in 1994 and the failed attempts at remediation, which endure to the present day, were put forward by Anglo and left uncontested by the applicants. The applicants have not challenged in any meaningful way the evidence of ZCCM's recent and reckless conduct over decades.

54. *Second*, it will be virtually impossible to locate relevant witnesses at an appropriately senior level still alive and with memories intact, when the shortest period in issue is 50 years ago, and the longest stretches back 100 years. Oral evidence is not going to supplement the existing historical record to any appreciable degree.

55. *Third*, Anglo has repeatedly informed the applicants that it is not in possession of the historical documents in issue in the certification application.[97] It did so in 2006 when the applicants' representatives filed a Promotion of Access to

[97] FA (Extension application) p 004 – 3 – 004 – 74 read with 004 – 369 – 004 – 370.

Information Act ("**PAIA**") seeking *inter alia* documents relating to "*the medical, technical and engineering services provided in respect of the Broken Hill/ Kabwe lead/zinc mine in Zambia from 1929 to 1972*."[98]

56. It did so again in the Extension application before this Court, explaining why it was so heavily reliant on ZCCM's Ndola archives and other public archives to prepare its answer to this application.[99] The detail was contained in the founding affidavit, deposed to by Anglo's attorney in this matter, and a confirmatory affidavit was deposed to by Queen Phililе Mhlongo, employed by Anglo in the capacity of legal principal in the Group Legal South Africa department.[100]

57. In 2006, pursuant to the PAIA request, Anglo informed the applicants' representatives that the records it sought relating to the Mine were not in the possession or under the control of AASA.[101] This is because Anglo American (Central Africa) Limited, a Zambian registered company, had been liquidated on 12 August 2005, and any documents that may still be in existence were, as far as it was aware, with the liquidator in Zambia.[102]

58. Upon receipt of the certification application, Anglo (again) took various steps to see what document might be available internally.[103] It contacted various internal departments concerning information related to the Mine's operations, including its technical library, data analytics, tax department, company secretariat and

[98] FA (Extension application) p 004 – 15 para 25.2.

[99] FA (Extension application) p 004 – 3 – 004 – 74.

[100] Confirmatory affidavit p 004-369 – 004-370.

[101] FA (Extension application) p 004 – 15 para 25.3. See also NA4 004-94 – 004-95.

[102] FA (Extension application) p 004 – 16 para 26.1.

[103] FA (Extension application) pp 004-34 – 004-35 paras 72 – 75.

group shared services. These enquiries did not yield the necessary information for Anglo to prepare its answer to the certification application.[104]

59. The documents relevant to this application span over a century, and the entities through which Anglo was involved with the Mine were liquidated more than a decade prior to this certification application. The applicants' representatives have known since they undertook their initial investigations into the feasibility of this potential litigation that Anglo was not in possession of the records they sought in relation to the operations of the Mine.

60. The applicants have seemingly accepted that Anglo may not have additional documents to discover in general, as in their replying affidavit, they note their concern about the "apparent lack of documents that Anglo has been able to locate in its own archives in South Africa and in private archives that hold records of its directors and senior leadership."[105] The applicants have now pinned their hopes on so-called *"private archives"* that may become available to them in pre-trial discovery.[106]

61. But the applicants have only motioned towards these documents in the vaguest of terms – never stating under oath what the documents are or which "private archives" they are in.[107] This is pure speculation, insufficient to ground certification.

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[104] FA (Extension application) p 004-34 paras 74.

[105] RA p 001 – 7763 para 499.

[106] Founding affidavit p 001-31 para 49.

[107] The applicants referred in argument to the Brenthurst Library in Parktown, Johannesburg. This is insufficient. First, it was necessary for them to do so under oath, so that Anglo could respond under oath. Second, the Brenthurst library contains Africana (i.e., *"books, artefacts, and other collectors' items connected with Africa, especially southern Africa"* (Oxford University Press *Oxford Dictionary of English*

62. The applicants have already made an exceedingly thorough search for documentary evidence. They spent seventeen years preparing the application. They utilised resources in South Africa, Zambia, Australia and the UK.[108] There is no reason to believe that new material documentary evidence will be unearthed some fifty years after the end of the relevant period. The certification court is in as good a position as a trial court to read these documents and to divine their meaning.

Conclusion

63. This Court correctly (with respect) found that the applicants had failed to make out a triable issue. It follows that it was correct to reject certification for this reason alone.

64. It bears emphasis that even if there is a reasonable prospect that an appellate court might weigh the evidence differently, this would not mean that this Court misdirected itself. Even if there is a reasonable prospect that an appellate court would do so, it would still not be permitted to interfere, and there would still be no prospect of success on appeal.

THE ALTERNATIVE CASE MILITATES AGAINST CERTIFICATION

65. Even if it were assumed, for the sake of argument, that the applicants had made out a triable issue in respect of the tort of negligence, it would be an exceedingly weak one. Other factors in the interests-of-justice enquiry would have to militate

("Africana") [iOS])). It is not going to contain archival evidence of Anglo's alleged negligence arising from services it offered to a mine in Zambia fifty years ago. See the Brenthurst library website at www.brenthurst.org.za.

[108] Founding affidavit p 001-1210 para 5; p 001-142 para 317.1.

strongly in favour of certification for certification to be granted. But, as this Court recognised (with respect correctly), the other factors in the interests-of-justice enquiry militate against certification. We briefly review those factors in this section.

The claims of the women class have largely prescribed[109]

66. In argument, the applicants made the following crucial (and correct) concessions:

66.1. first, that South African prescription law *"has generally been characterised as substantive in nature"* and, if this is so, there is a "'gap' 'in the law' *as neither the procedural Zambian law nor the substantive South African law automatically applies"*;[110] and

66.2. second, if Zambian prescription law applies, most of the claims of the women class have prescribed.[111]

67. These concessions are fatal to the applicants' case on prescription:

67.1. In *"gap"* cases, the Supreme Court of Appeal in *Lloyd's v Price* stipulated that a court *"must take into account policy considerations in determining which legal system has the closest and the most real connection with the legal dispute before it"* and then apply the prescription law of that jurisdiction.[112]

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[109] Anglo's arguments on prescription are at its main heads of argument pp 008-328 to 0008-339 paras 836 to 863.

[110] Marcus SC note p 088-51 paras 8.3.3 to 8.3.4.

[111] Marcus SC note p 088-51 para 8.4.1.

[112] *Society of Lloyd's v Price* [2006] ZASCA 88; 2006 (5) SA 393 (SCA) at para 26.

67.2. In this matter, there is no contest. Patently, the jurisdiction with the *"closest and most real connection"* with this dispute is Zambia. The applicants and every member of the proposed classes reside in Zambia, the cause of action arose in Zambia, and the Mine is in Zambia.[113] Tellingly, the applicants produced the evidence of Zambian legal experts to tell this Court about Zambian law in respect of the merits of the matter.

67.3. It follows (as a consequence of the applicants' concession) that the claims of the women class have largely prescribed.

68. In the application for leave to appeal, the applicants continue to make the argument that it is somehow unconstitutional or against public policy for claims in the women class to have prescribed. The point was bad then and it continues to be bad now. There is nothing objectionable about a claim prescribing, as the Constitutional Court has repeatedly held.[114]

69. The one new argument in the application for leave to appeal is the claim that the Constitutional Court, in *Makate*,[115] *"implicitly rejected the distinction between procedural and substantive prescription provisions"*, that "*The Constitutional Court routinely treats our Prescription Act as a matter of procedural law",* that

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[113] For a full list of the factors linking the case with Zambia, see answering affidavit pp 001-3028 to 001-3029 paras 947 to 947.10.

[114] For example, see *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) para 8:

> *"This court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence."*

[115] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC).

South African prescription law is thus *"a matter of procedure, not substance"*, and so that there is no *"gap"* and South African prescription law applies automatically.[116]

70. Not only is this argument an attempted withdrawal of a concession, but it is also directly against more recent Constitutional Court authority. The Constitutional Court, after *Makate* and in *Pieman's Pantry*,[117] expressly confirmed (following the SCA decision in *Lloyds)* that prescription under the South African Prescription Act[118] is substantive and not procedural:

> *"In this sense, section 191(2) [of the Labour Relations Act] is procedural as opposed to substantive in nature. The difference between procedural and substantive prescription periods was described in Society of Lloyd's, where the Supreme Court of Appeal distinguished between statutes that extinguish a right and those that bar a remedy by imposing a procedural bar on the institution of an action. In this regard, section 191 deals with what may be described as matters of a procedural nature while the Prescription Act deals with what is described as substantive in nature."*[119] (emphasis added)

71. It follows that it cannot seriously be disputed that this Court is correct in finding that the claims of the women class have largely prescribed. This is a factor powerfully militating against certification.

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[116] Application for leave to appeal paras 73 to 73.2, Applicants' Heads of Argument p37, footnote 120.

[117] *Food and Allied Workers Union v Pieman's Pantry (Pty) Limited* [2018] ZACC 7; 2018 (5) BCLR 527 (CC).

[118] Prescription Act 68 of 1969.

[119] *Pieman's Pantry* above n 117 para 184 (emphasis added).

It is impermissible (or at least inappropriate) to certify a class made up entirely of foreign peregrini on an opt-out basis[120]

72. Both proposed classes are made up entirely of foreign *peregrini*. This Court held that it was impermissible, as a jurisdictional matter, to certify on an opt-out basis foreign classes made up entirely of foreign *peregrini*.

73. There is no prospect that an appellate court would hold differently:

73.1. In *De Bruyn*,[121] this Division (per Unterhalter J) stated that it was impermissible to certify a class comprising foreign *peregrini* on an opt-out basis:

> *"[W]hile certification binds incolae, it does not bind peregrini who are not, absent submission, subject to the jurisdiction of this court. This would permit peregrini who are members of the classes in the South African litigation to pursue litigation in multiple jurisdictions. An adverse outcome before the courts in South Africa would not be binding upon peregrini who would be at liberty to seek a different outcome in other jurisdictions. This is unfair, wasteful and potentially oppressive of respondents who would be required to defend the same action in multiple jurisdictions*."[122]

73.2. This conclusion follows from jurisdictional first principles. In ordinary litigation, a foreign peregrine plaintiff submits to the jurisdiction of South

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[120] Anglo's arguments in respect of jurisdiction and foreign *peregrini* are in its main heads of argument pp 008-269 to 008-289 paras 725 to 758.

[121] *De Bruyn* above n 15.

[122] *Id* para 33.

African courts by bringing her action.[123] But there is no submission to jurisdiction by a foreign *peregrinus* who is a member of an opt-out class. She is in the class because she has done nothing – she has simply failed to opt out. It follows that a South African court cannot exercise jurisdiction over her.

73.3. Neither of the South African cases relied upon by the applicants are on-point:

73.3.1. The first is *Ngxuza*.[124] But *Ngxuza* was not about the assertion of jurisdiction over foreign *peregrini*. It was about local *peregrini*.

73.3.2. Moreover, all the class members in *Ngxuza* had a connection with the Eastern Cape, given that the class definition was *"all people in the Eastern Cape Province who were in receipt of disability grants and who had such grants cancelled or suspended between the period 1 March 1996 and the date of this judgment"*.[125] None of the members of the proposed classes in this case has a connection to South Africa.

73.3.3. The second case is *Nkala*.[126] But in *Nkala*, (a) the proposed classes were only partially made up of foreigners, (b) they all had

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[123] *Mediterranean Shipping Co v Speedwell Shipping Co Ltd* 1986 (4) SA 329 (D) at 333G to H:

> "[A] plaintiff always submits to the jurisdiction of the court in which he brings his action and if he is unsuccessful in an action before a foreign court and costs are awarded against him an action can be brought in that court to enforce the judgment for costs."

[124] *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) ("***Ngxuza Eastern Cape***"); *Permanent Secretary, Department Of Welfare, Eastern Cape v Ngxuza* [2001] ZASCA 85; 2001 (4) SA 1184 (SCA).

[125] *Ngxuza Eastern Cape* above n 124 at 630.

[126] *Nkala v Harmony Gold Mining Co Ltd* [2016] ZAGPJHC 97; 2016 (5) SA 240 (GJ).

a connection to South Africa, having worked on South African mines, and (c) crucially, the permissibility of a South African court exercising jurisdiction over foreign *peregrini* was not argued and the court did not consider the issue.

74. But even if it is assumed that there is a reasonable prospect of an appellate court holding that it is not impermissible to certify a class made up entirely of foreign *peregrini*, this was not the only basis on which this Court exercised its discretion not to certify. Apart from being impermissible, this Court also held that it would simply not be in the interests of justice:

> *"If this court were to certify on an opt-out basis, it would result in over a hundred thousand Zambian nationals being bound by the class action without their informed consent, including tens of thousands of children.*
>
> *Precluding the certification of opt-out class actions made up of foreign peregrini furthers the interest of justice in class actions: Firstly, requiring classes made up of foreign peregrini to be opt-in prevents fictitious consent. Secondly, it ensures that any judgment has preclusive effect*."[127]

75. Thus, even if there is a reasonable prospect that an appellate court would hold that it is not impermissible to certify a class made up entirely of foreign *peregrini*, and so that this Court misstated the law when it held that this was impermissible; this would not justify appellate interference. This is because this Court did not base the exercise of its discretion on this understanding of the law, given that it held, in the alternative, that certifying classes made up of foreign *peregrini* would not be in the interests of justice, even if it was not strictly impermissible.

[127] High Court judgment p 084-138 paras 222 and 223.

76. Finally, the applicants contend in their Heads that the Court need not exercise jurisdiction over "the class members themselves" but rather exercises jurisdiction "over the class members' claims."[128] The applicants purport to rely on *Children's Resources Trust* for this proposition. However, *Children's Resource Trust* is no authority for the argument that a court may simply expand its jurisdiction and exercise jurisdiction over the claims of foreign peregrine even if it has no jurisdiction over the foreign peregrine themselves.

77. What the Supreme Court of Appeal held in *Children's Resource Trust* was that a class action is a procedural device that aggregates a number of separate claims in one proceeding. The Court went on to say:

> *"In other words, it permits the aggregation of claims. However, that is not its only function. Of equal or greater importance, as Professor Silver points out, is the fact that the class action is 'a representational device'. It is:*
>
> > *'… a procedural device that expands a court's jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.*
> >
> > *Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake … Class members neither start out as parties nor become parties when a class is certified.*'"[129]

78. In *Children's Resource Trust*, the Court did not purport to abolish well-established principles of jurisdiction, requiring the need for subject matter and

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[128] Applicant Heads para 60.2.

[129] *Children's Resources Trust* para 17.

personal jurisdiction to ensure the effectiveness of the Court's order.[130] In fact, the Court did not address the position of foreign peregrine at all and whether its order would be binding on them. The applicants' reliance on *Children's Resource Trust* is unavailing.

***Geographical overbreadth*[131]**

79. The applicants cannot seriously dispute that district-wide classes would be grossly overbroad:

79.1. The Kabwe district is huge. It occupies an area of almost 1 570 km – the size of the City of Johannesburg.[132] This is one of the reasons why the proposed classes are enormous.

79.2. The factual evidence in the founding papers was (at best for the applicants) to the effect that the Mine polluted the KMC townships immediately around the Mine, and not the entire district. This appears most clearly from paragraph 76 of the founding affidavit:

> *"[W]ind patterns in Kabwe are dominated by winds from an eastern/southeastern direction which, as Prof Betterton points out, aligns with global scale trade wind patterns known since the eighteenth century. Throughout the Mine's operations, these winds carried lead fumes and dust from smelting and mining operations directly over Kasanda and Makululu, with occasional shifts in wind direction, particularly in summer, also carrying emissions to nearby*

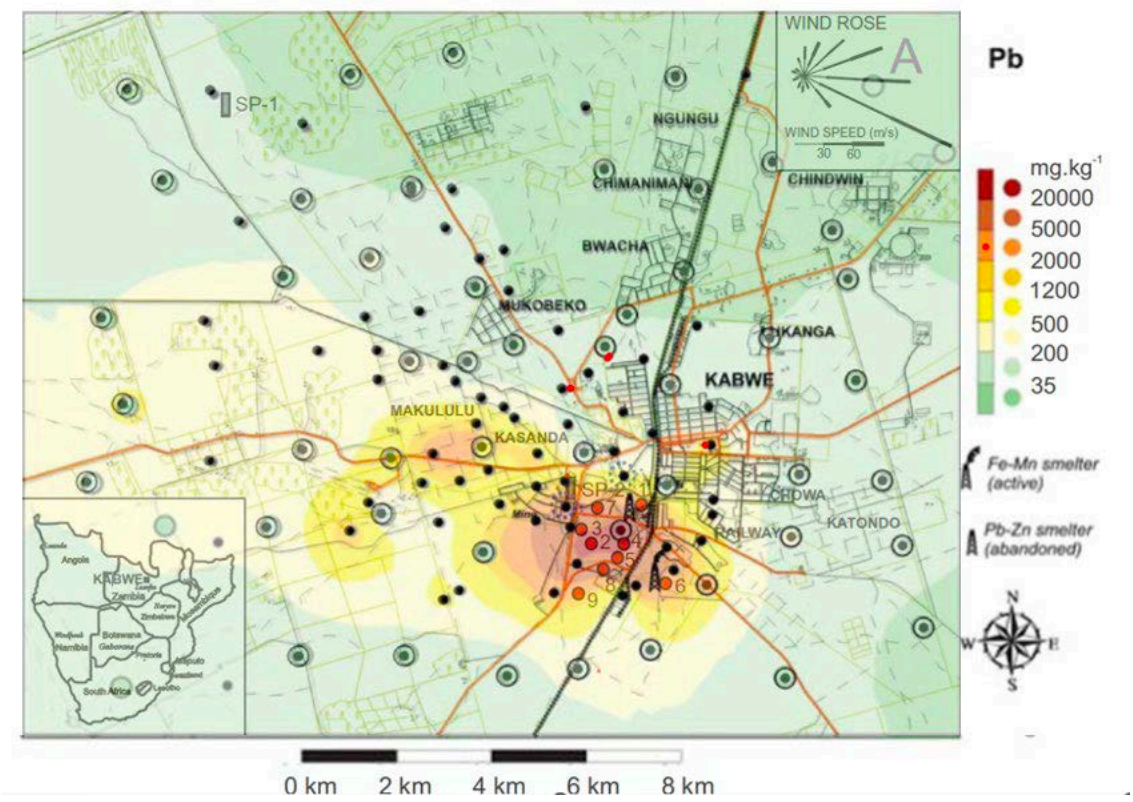
[130] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) at 893E

[131] Anglo's full case on geographical overbreadth is at its main heads of argument pp 008-302 to 008-319 paras 783 to 813.

[132] Answering affidavit p 001-2939 para 747. Not specifically denied at replying affidavit pp 001-7798 to 001-7799 para 602.

Chowa. *Due to the proximity of the townships of Kasanda, Makululu and Chowa to the Mine site*, *this airborne lead and windblown dust would have been deposited in the local environment continuously."*[133]

79.3. This also appears clearly from the Kříbek *"heat map"* (put up by the applicants and which they described in the founding affidavit as *"illustrating a range of high topsoil concentrations … across areas covering Kasanda, Chowa and Makululu"*),[134] which shows how soil pollution in the district closely tracks the Mine:



[133] Founding affidavit p 001-46 para 76.

[134] Founding affidavit p 001-49 para 80.4 (emphasis added).

79.4. A complete exposition of how the founding papers focused on the KMC townships is in Anglo's main heads of argument. That exposition is not repeated here.[135]

79.5. Anglo raised this point in answer.[136] So, in reply, the applicants – for the first time – attempted to make out a case for a district-wide class through Professor Betterton's AERMOD modelling. But, on its own terms, the AERMOD modelling proves nothing, for the reasons summarised in paragraphs 41.3 and 41.4 above and which are fully set out in Anglo's main heads of argument.[137]

80. This Court was well within the scope of its discretion to refuse certification on the basis that the proposed classes were grossly overbroad geographically.

81. It is no answer to say that an appellate court might exercise its discretion differently – by, for example, certifying classes covering the KMC townships only. This is because this Court's refusal to certify was not a misdirection, and so an appellate court cannot interfere merely because it would have exercised its discretion differently.

Other factors in the interests-of-justice enquiry

82. Numerous other factors – largely flowing from the fact that this is a novel and radical claim – strongly militate against it being in the interests of justice to certify:

[135] Anglo's main heads of argument pp 008-303 to 008-307 paras 786 to 789.3.
[136] Answering affidavit pp 001-2939 to 001-2945 paras 746 to 762.
[137] Anglo's main heads of argument pp 008-307 to 008-310 paras 790 to 790.3.2.

82.1. First, as this Court recognised,[138] the applicants all-but conceded that a class action would be unmanageable. Because they seek to have certified (at best for them) grossly overbroad, district-wide classes; the proposed classes would total between 131 000 and 142 000 people. On the applicants' version, it would take ten years merely to take instructions from the class members.

82.2. Second, as this Court also recognised,[139] the class action has almost nothing to do with South Africa: this is a Zambian claim, involving Zambian class members, an alleged tort committed in Zambia, and a Zambian Mine; governed by Zambian law; and funded by overseas litigation funders. It is not in the interests of justice to draw on scarce South African judicial resources to resolve a Zambian dispute and in so doing line the pockets of foreign class-action speculators.

82.3. Third, as this Court once again recognised,[140] every single class member with a claim that has not prescribed sustained his or her alleged injuries long after any involvement by Anglo had ceased:

82.3.1. The oldest applicant was born in 1999[141] – more than 20 years after the end of any involvement by Anglo at the Mine.

[138] High Court judgment para 336.
[139] High Court judgment para 12.
[140] High Court judgment para 339.
[141] She was 21 in October 2020 – founding affidavit p 001-117 para 253.

82.3.2. The oldest possible member of the children class would have been born in 2002 – again, more than 20 years after the end of the relevant period.

82.3.3. The women class contains women born between 1970 and 2002. Only around 12,5% of this class was born before 1974 – and all the claims of this cohort would have prescribed by now.

82.4. Finally, there is a real wrongdoer that class members can sue – ZCCM. ZCCM has all but admitted its liability, as explained above. The applicants cannot dispute that it is possible to bring a large representative action for damages against an environmental wrongdoer in Zambia, because it happened in *Konkola*.[142]

Conclusion

83. Even if it were assumed for the sake of argument that the applicants inched over the line on making out a *prima facie* case on the tort of negligence, which they have not done, it would still not be in the interests of justice to certify.

THE APPLICATION FOR LEAVE TO CROSS-APPEAL

84. Anglo has applied for leave to cross-appeal this Court's refusal[143] of its interlocutory application, dated 18 January 2023, to admit into evidence the further supplementary affidavit of Mr Michael Schottler dated 9 December 2022

[142] *Konkola Copper Mines PLC v Nyasulu* [2015] ZMSC 33 (p 008-4048).
[143] High Court judgment fn 64.

("**the further supplementary affidavit**").[144] This application is conditional on the applicants' application for leave to appeal being granted.[145]

85. There must be no doubt: Anglo's stance is that the application for leave to appeal should be dismissed with costs. But if it is granted, then the application for leave to cross-appeal should be granted too.

86. While the general rule is that only three sets of affidavits are permitted in application proceedings, a court may in its discretion permit the filing of further sets. The courts' attitude is generally permissive, on the basis that the parties should be permitted to have the case adjudicated on the full facts.[146]

87. If an appellate court is to consider the certification application, it would benefit from having the further supplementary affidavit before it, given that the photographs annexed to the further supplementary affidavit are relevant. They show something that reinforces a significant part of Anglo's defence: that there has been a failure to remediate the relevant areas, that people and firms have been permitted to continue mining activities in a way that pollutes the relevant areas, and that this rules out causation and fault on the part of Anglo.[147] Mr Schottler explained what the photographs depict, and they depict matters of common observation that do not require explanation by an expert, or the opinion of an expert.

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[144] The further supplementary affidavit is at pp 001-9903 to 001-9980. The application for its admission is at pp 001-10145 to 001-10152.

[145] The application for leave to cross-appeal is at pp 091-79 to 091-82. The affidavit supporting condonation is at pp 091-83 to 09-85. The applicants have not indicated that they are opposing condonation.

[146] *Dickinson v SA General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628.

[147] Affidavit supporting admission of further supplementary affidavit pp 001-10148 to 001-10152 paras 5 to 6.26.

CONCLUSION

88. The applicants' foreign litigation funders are bankrolling this unique litigation no doubt because they wish to maximise their return. This has likely contributed to the most expansive claim imaginable. Certification would set a precedent which would embolden foreign litigation funders to find other instances in which they can claim mining companies operating in the early to mid-1900s failed to implement scientific knowledge from the 2020s – and then to sue them in South African courts.

89. But expansive, novel claims are difficult to prove. And the applicants have failed to prove this one. This Court was entirely correct to refuse certification, and leave to appeal should be refused with costs, including the costs of two senior and three junior counsel.

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Anglo's counsel

Chambers, Johannesburg and Cape Town
Tuesday, 9 April 2024

TABLE OF AUTHORITIES

Statutes

1. Prescription Act 68 of 1969
2. Superior Courts Act 10 of 2013

Case-law

South African

3. *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA)
4. *De Bruyn v Steinhoff International Holdings NV* [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ)
5. *Dickinson v SA General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A)
6. *DRDGOLD Ltd v Nkala* [2023] ZASCA 9; 2023 (3) SA 461 (SCA)
7. *Food and Allied Workers Union v Pieman's Pantry (Pty) Limited* [2018] ZACC 7; 2018 (5) BCLR 527 (CC)
8. *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC)
9. *Mediterranean Shipping Co v Speedwell Shipping Co Ltd* 1986 (4) SA 329 (D)
10. *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC)
11. *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC)
12. *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E)
13. *Nkala v Harmony Gold Mining Co Ltd* [2016] ZAGPJHC 97; 2016 (5) SA 240 (GJ)
14. *Permanent Secretary, Department Of Welfare, Eastern Cape v Ngxuza* [2001] ZASCA 85; 2001 (4) SA 1184 (SCA)
15. *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC)

16. *Society of Lloyd's v Price* [2006] ZASCA 88; 2006 (5) SA 393 (SCA)
17. *South African Broadcasting Corporation Limited v National Director Public Prosecutions and Others* 2007 (1) SA 523 (CC)
18. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC)
19. *Trustees for the Time Being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2012] ZASCA 182; 2013 (2) SA 213 (SCA)
20. *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation*) 1987 (4) SA 883 (A)

Foreign

21. *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605
22. *Glasgow Corp v Muir* [1943] AC 448
23. *Healthcare at Home Limited (Appellant) v The Common Services Agency (Respondent) (Scotland)* [2014] UKSC 49
24. *Konkola Copper Mines PLC v Nyasulu* [2015] ZMSC 33
25. *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] AC 736
26. *Roe v Minister of Health* [1954] 2 QB 66
27. *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] Q.B. 405
28. *Wright v Dunlop Rubber Co* (1973) 13 KIR 255

Books and articles

29. Michael A Jones et al *Clerk and Lindsell on Torts* 23 ed (2022)
30. Oxford University Press *Oxford Dictionary of English* [iOS]