IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2020/32777

In the matter between:

KABWE AND OTHERS Applicants

and

ANGLO AMERICAN SOUTH AFRICA LIMITED Respondent

APPLICANTS' HEADS OF ARGUMENT: LEAVE TO APPEAL

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INTRODUCTION

1 This is an application for leave to appeal to the Supreme Court of Appeal against the judgment and order of this Court, handed down on 15 December 2023, refusing certification of a class action on behalf of children and women who are victims of lead poisoning in Kabwe, Zambia.

2 The applicants have filed a detailed notice of application for leave to appeal.[1] They stand by all grounds set out there. In what follows, we address the primary grounds, grouped into five topics:

2.1 First, triability;

2.2 Second, the exclusion of opt-out class actions for foreigners;

2.3 Third, the class definition;

2.4 Fourth, remediation as a head of damages;

2.5 Fifth, manageability of the class and the interests of justice.

3 Before addressing these grounds, we begin with the test for leave to appeal and the nine critical findings made by this Court which, alone, provide compelling reasons for granting leave to the SCA.

APPEALABILITY AND THE TEST FOR LEAVE

4 There can be no question that this Court's order is appealable. While the granting of certification is not appealable,[2] the refusal of certification is appealable as it "*finally*

[1] Notice of application for leave to appeal pp 091-4 – 78.
[2] *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) at paras 31 – 41.

dispose[s] of the question whether the appellants could institute such an action on behalf of the proposed class".[3]

5 Accordingly, the applicants seek leave to appeal to the SCA, alternatively, the full court, on both grounds in section 17(1)(a) of the Superior Courts Act: "(i) *the appeal would have a reasonable prospect of success*"; or "(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

6 The debate about whether the Superior Courts Act postulates a higher test for leave to appeal has been settled. The Supreme Court of Appeal has held that:

> *The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.*[4]

7 While this Court has a discretion on certification, an appeal court will be at large to intervene if this Court "*based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts*".[5] As the grounds that follow demonstrate, there are more than reasonable prospects of success on this test.

8 But that is not the only basis for granting leave. As the SCA has explained, even "*[if] the court is unpersuaded of the prospects of success [on appeal], it must still enquire into whether there is a compelling reason to entertain the appeal.*"[6] Those compelling

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[3] *Children's Resource Centre Trust v Pioneer Foods* 2013 (2) SA 213 (SCA) at para 25 ("CRC Trust"). See also *Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC) at 26.
[4] *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10.
[5] *Mukaddam* id at para 48, citing *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 41.
[6] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2.

reasons may include "*an important question of law or a discrete issue of public importance that will have an effect on future disputes.*"[7]

THE COMPELLING REASONS FOR LEAVE

9 This Court made nine findings of law and fact that have far-reaching implications, for the prospective class members, future damages claims for environmental pollution, and our nascent class action regime. These findings, alone, provide compelling reasons for leave.

10 First, this Court accepted that there are sufficient common issues for class-wide determination[8] and that a class action in South Africa is the "*only realistic and appropriate method*" for the class members, the majority of whom are children, to resolve their claims against Anglo.[9]

11 Given these findings, this Court's refusal of certification has a profound impact on the class members' section 34 constitutional right of access to court and the section 28(2) best interests of the child principle. But this Court's judgment made no reference to the binding section 28(2) principles in its final assessment of the interests of justice. Whether this Court's refusal was consistent with these constitutional rights therefore warrants appellate consideration.

12 Second, this Court concluded that despite almost 14,000 pages of evidence, spanning events over a century, and the evidence of no less than 18 experts (10 for the applicants and 8 for the respondents), "*there is nothing for the trial court to*

[7] Ibid.
[8] Judgment p 084-70 paras 34-43.
[9] Judgment p 084-72 para 43.

determine",[10] the certification court is "*in as good a position as the trial court*" to resolve these complex factual disputes,[11] and "*there is no chance that the evidence presented to court will change materially after certification*".[12]

13 This approach to triability has significant implications for future class action proceedings, which requires the SCA to determine:

13.1 Whether this is consistent with the interlocutory character of certification and the principles of access to justice underpinning the class action regime.

13.2 Whether it is permissible to allow a defendant, like Anglo, to turn class action certification proceedings into a "mini trial", demanding that the certification court place itself in the position of a trial court on material factual disputes.

13.3 Whether this approach will have a chilling effect on future certification proceedings, incentivising deep-pocketed defendants, like Anglo, to use certification as a shield against accountability for historical wrongdoing.

14 Third, this Court elevated its assessment of triability to a condition precedent for certification, which it regarded as "*intrinsically fatal*" with the result that there were "*no other factors justifying certification of the class*".[13] This is inconsistent with the Constitutional Court's judgment in *Mukkadam,*[14] which confirms that triability is but one factor among others in assessing the interests of justice, which must be

[10] Judgment p 084-115 para 159.
[11] Judgment p 084-107 para 137.
[12] Judgment p 084-106 para 134.
[13] Judgment p 084-115 para 159.
[14] *Mukaddam* at para 34 – 41.

considered holistically, and that none of these factors should be elevated to "*conditions precedent or a jurisdictional fact*".[15]

15 Fourth, this Court concluded that *"an intergenerational duty of care is untenable"*[16] and would set a "*grave precedent*" that must be rejected.[17] This finding potentially forecloses the class members' claims and all future claims seeking to hold wrongdoers liable for historical pollution.

16 Fifth, this Court held that foreign-domiciled litigants are barred from engaging in opt-out class actions in our courts,[18] endorsing a previous *obiter* finding in *De Bruyn*.[19] This is inconsistent with the certification order granted by the Full Court in *Nkala*, which permitted an opt-out class action to the benefit of tens of thousands of foreign-domiciled mineworkers.[20] It is also inconsistent with the SCA's judgment in *Ngxuza*.[21] These divergent judgments on the issue require appellate resolution.

17 Sixth, in rejecting the class definition, this Court formulated a new, onerous test for overbreadth, requiring that the applicant must "*establish a prima facie case … with regard to the entire class*"[22] and formulate a class definition that includes "*only those with a triable claim against the prospective defendant*".[23] This is directly in conflict

[15] Ibid at para 35.
[16] Judgment p 084-115 para 157.
[17] Judgment p 084-179 para 339.
[18] Judgment p 084-138 para 224.
[19] *De Bruyn v Steinhoff International Holdings N.V. and Others* [2020] ZAGPJHC 145 (26 June 2020) at para 120 ("De Bruyn").
[20] *Nkala and Others v Harmony Gold Mining Company Limited and Others* 2016 (5) SA 240 (GJ).
[21] *Permanent Secretary, Department of Welfare, Eastern Cape, And Another v Ngxuza And Others* 2001 (4) SA 1184 (SCA) ("*Ngxuza*").
[22] Judgment p 084-141 para 232.
[23] Judgment p 084-154 para 270.

with the tests formulated by the SCA in *CRC Trust*[24] and by the Full Court in *Nkala*,[25] which assess overbreadth by reference to sufficient common issues.

18 Seventh, this Court exercised a choice – not an obligation – to apply the Zambian Limitation Law, thus barring all claims by women of child-bearing age who suffered injuries before 20 October 2017, even where they had no knowledge of a claim.[26] The questions of whether it was appropriate to exercise this choice, at certification stage, and whether this choice is a justified limitation of the section 34 right of access to Court, require appellate determination.

19 Eighth, this Court held that the repeated drawing of blood from children and infants cannot establish actionable injury, rejecting the uncontested expert evidence of one of the world's leading clinical toxicologists.[27]

20 Ninth, this Court rejected the possibility of remediation of environmental pollution as one of many heads of damages and, in doing so, incorrectly treated this as a ground for refusing certification in totality.

21 These are all compelling reasons for granting leave, regardless of this Court's views on the prospects. Nevertheless, there are strong prospects of success on appeal, as we now turn to demonstrate.

[24] *CRC Trust* at para 31.
[25] *Nkala and Others v Harmony Gold Mining Company Limited and Others* 2016 (5) SA 240 (GJ) at paras 94 -97.
[26] Judgment pp 084-155 – 164 paras 273 – 293.
[27] Judgment p 084-177 para 333.

FIRST GROUND: TRIABILITY

22 This Court correctly held that the assessment of triability is not an invitation to determine the merits or to weigh the probabilities.[28] It sets a low bar, requiring: first, that there is tenable case on the law; and second, that there is a "*prima facie*" case on the facts.[29]

23 Despite accepting these principles, this Court proceeded to adopt Anglo's version of the contested law and evidence. Anglo's approach impermissibly weighed probabilities, cherry-picked the documentary evidence, disregarded the expert evidence, and made legal errors.

24 In doing so, Anglo led this Court into six errors of law and misdirections of fact.

First: Wrong test for legal tenability

25 In concluding that there is no legally tenable basis for the claim, this Court:

25.1 Failed to apply the correct test for excipiability, by not adopting the assumption of truth; and

25.2 Disregarded the expert evidence on the relevant foreign law.

26 This Court correctly held that the legal tenability of a claim, at certification stage, depends on whether it would survive an exception.[30]

27 However, the Court overlooked the critical principle that an exception must be decided by assuming the truth of the facts pleaded by the applicant. As the Constitutional Court

[28] *CRC Trust* at paras 39 to 41. Judgment p 43 para 112 – 116.
[29] Ibid.
[30] *CRC Trust* at para 35.

explained in *Mineral Sands*,[31] "*[i]n adjudicating an exception, the facts pleaded by the [plaintiff] must all be accepted as true*."

28 Anglo did not once allege, nor did any of the four foreign law experts conclude, that the applicants' draft pleadings are excipiable on that test.

29 Nevertheless, this Court disregarded the assumption of truth, basing its rejection of legal tenability on a host of conclusive factual findings on disputed issues, including the foreseeability of harm and causation.

30 In doing so the Court further disregarded the expert evidence on the content of the relevant foreign law. Anglo's own English law expert, Mr Gibson KC, studied the pleadings and confirmed that "*the duty of care alleged in the draft [particulars of claim] together with its supporting affidavit raises a 'real issue' to be tried*".[32] He further confirmed that the remaining questions to be determined depended on the facts and the evidence.

31 It was not open to Anglo, or the Court, at certification stage, to second-guess this expert evidence. The content of relevant foreign law is, after all, a question of fact, which must be proven by expert evidence.[33] If Anglo wished to disavow the conclusions of its own expert, it had to lead further expert evidence, but it failed to do so.

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[31] *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others 2023* (2) SA 68 (CC) at para 41.
[32] Affidavit of Mr Gibson QC p 001-3946 para 23.
[33] *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396-397; *The Asphalt Venture: Windrush Intercontinental SA and another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA) at paras 30 – 33.

32 The combined effect of these misdirections was most evident in this Court's rejections of the UK Supreme Court's judgments in *Vedanta* and *Okpabi* as being distinguishable on the facts because this case involves intergenerational harms.[34]

32.1 Both English law experts, Mr Hermer KC[35] and Mr Gibson KC,[36] were in agreement that the principles in *Okpabi* and *Vedanta* apply and provide a legally tenable basis for the pleaded duty of care.

32.2 Moreover, Mr Mwenye SC's uncontradicted evidence was that Zambian courts would treat these judgments as highly persuasive authority on the question of the duty of care.[37]

32.3 None of the experts concluded that the factual question of foreseeability of harm to future generations of Kabwe residents renders the applicants' claim distinguishable from *Okpabi* and *Vedanta*, let alone excipiable.

32.4 Yet this Court came to the opposite conclusion on this foreign law, with no expert evidence to support its conclusions.

32.5 In doing so, this Court impermissibly dispensed with the assumption of truth by making factual findings that the harms to Kabwe residents were not reasonably foreseeable. In doing so, it entirely overlooked the applicants' draft particulars of claim[38] and founding affidavit,[39] which squarely pleaded reasonable foreseeability of harms to current generations of Kabwe residents.

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[34] Judgment p 084-112 para 150.
[35] Hermer 2020 p 001-2284ff (Issue 1); Hermer 2022 p 001-9702ff.
[36] Affidavit of Mr Gibson QC p 001-3946 para 23.
[37] Mwenye 2020 p 001-1710 para 6.28; Mwenye 2022 p 001-9692 para 5.2.
[38] POC Annexure ZMX 1 p 001-170 – 171 at para 44.
[39] FA p 001-93 - 95 paras 184 – 188.

Second: Overlooking critical evidence from 1969 - 1974

33 This Court concluded that the case was "factually hopeless" based on a selective assessment of four sets of documents, taken from a record of 14,000 pages, disregarding all documentary and expert evidence to the contrary.

34 The errors in that assessment are detailed in the notice of application for leave to appeal. It is unnecessary, for the purposes of this application, to reargue these issues. What is most significant is the evidence that this Court did not address.

35 As this Court correctly observed at the hearing, the applicants need only demonstrate that Anglo was negligent at any time during its 50 year involvement in the Mine's affairs, from 1925 to 1974, to establish a *prima facie* case of negligence.

36 But this Court did not address, for instance, the critical evidence of Anglo's negligence from 1969 to 1974, which the applicants covered extensively in the papers and in argument:

36.1 In 1969, the young mine doctor, Dr Lawrence, who had recently arrived in Kabwe, observed that children were already dying and falling sick from lead poisoning. His single-handed testing of children revealed extreme blood lead levels, injuries and deaths caused by lead poisoning. Dr Lawrence was so concerned about his findings that he delivered his report to the Mine's Chief Medical Officer in person, at her home on a Saturday, because he believed that the matter was so serious that it could not wait until the next working day.[40] He

[40] Lawrence p 001-2637 para 25; p 001-2634 para 6a.

could not understand why no one had thought to conduct this testing before.[41] Anglo has offered no explanation for that failure.

36.2 On receiving Dr Lawrence's findings, Anglo and the Mine commissioned Professor Lane and Dr King in 1970 to conduct a study and to provide their recommendations. While their report has not yet been disclosed, we know from contemporaneous correspondence that Professor Lane and Dr King made serious findings and strong recommendations:[42]

36.2.1 They found that the surrounding townships were severely contaminated with lead, posing a severe danger.

36.2.2 They specifically advised that residents of the surrounding townships be relocated, given this danger.

36.2.3 Alternatively, they advised Anglo and the Mine to replace all topsoil, recognising that the soil was laced with poisonous lead.

36.3 But Anglo and the Mine chose to reject these recommendations:

36.3.1 A note from July 1970, marked "Urgent and Confidential", acknowledged Professor Lane's recommendation that the townships be moved but rebuffed the proposal, saying that it "*would be far too expensive*" and asked Professor Lane to "*please think again*."[43]

[41] Dr Lawrence's affidavit p 001-2633 at p 001-2636 paras 17 and 36.
[42] Applicants' heads of argument p 007-93 – 95 paras 193 – 195. FA p 001-90 para 179; Annexure ZMX 76 p 001-1195; RA p 001-7622 para 92.2; Annexure ZMX107 p 001-7972; Annexure ZMX 107 p 001-7972.
[43] RA p 001-7622 para 92.2; Annexure ZMX107 p 001-7972.

36.3.2 The proposal to remove and replace the topsoil was rejected out of hand as being *"impracticable*" and likely to "*lead to potential panic*".[44]

36.3.3 In the end, Anglo only relocated an estimated 3000 of its workers and their families to Chowa, leaving behind more than 8000 workers and their families in the most contaminated areas.[45]

36.3.4 Thousands of other residents remained, who were not employed by the Mine.[46] Anglo made no attempt to assist these residents – describing them as the "squatter problem".[47]

36.4 Then, in 1971, prompted by the deaths of eight Kabwe children from suspected lead poisoning, Dr A.R.L Clark, a doctor on the Mine, followed on Dr Lawrence's investigation with an MSc thesis under the supervision of the London School of Hygiene and Tropical Medicine. Between 1971 and 1974, Dr Clark surveyed the BLLs of children in Kabwe and found these to be up to 20 times the limit set by the US Center for Disease Control at the time.[48]

37 This evidence establishes more than a *prima facie* case of Anglo's actual and constructive foresight of the harm and its resulting negligence, that requires an answer at trial:

[44] Ibid; Annexure ZMX105 p 001-7969.
[45] Clark thesis pp 001-381 - 382 para 1.
[46] Ibid, Clark recorded several thousand other residents remaining in the area.
[47] Annexure ZMX 76 p 001-1195; p 001-1198 para 6.
[48] ZMX3 p 001-408 - 412 figure 3^3, 3^4, 3^5 RA p 001-26 para 31.

37.1 Anglo knew, as a matter of fact, by 1970 at the very latest, that it had a massive environmental disaster on its hands, that was causing children to die from brain damage.

37.2 The levels of lead pollution and resulting lead poisoning were extreme, even by the lax standards of the day. This was no “hindsight bias”.

37.3 Anglo knew that the lead contamination was in the soil and that it would not go away, hence the recommendations that all residents had to be moved or all topsoil replaced.

37.4 But Anglo ought reasonably to have known of the danger far earlier, had it conducted even the most rudimentary investigations, using readily available methods, and basic commonsense.

37.5 Already by the 1950s, the persistence and stability of lead in the soil was established.[49] Lead’s properties as a heavy, stable element have also been known for thousands of years.

37.6 There was no lack of prior warning. Anglo and the Mine, knew, as a fact that the surrounding areas were blanketed in fumes and dust and that lead had contaminated surrounding farms, as detailed in the contemporaneous reports from the 1920s onwards.[50]

37.7 By 1970, Anglo could no longer turn a blind eye to the danger and was advised on necessary steps to protect residents.

[49] Harrison report cited FA p 001-94 para 186.
[50] As summarised in the Applicants’ HOA p 007-150 - 152 para 335.

37.8 But Anglo has offered no explanation for its failure to properly implement Professor Lane and Dr King's recommendations.

37.9 Having failed to implement these recommendations, there is no evidence that Anglo made any attempt to notify or warn the communities and authorities of the lethal danger, of which it had full knowledge.

37.10 There is no evidence that Anglo conducted further investigations and ongoing monitoring to assess the danger to residents.

37.11 There is no evidence that Anglo made any alterations to its smelting operations in response to these reports.

37.12 There is no evidence that Anglo took proper steps to investigate and monitor the extent of the danger to the remaining residents.

38 On this evidence, there is ample basis for the SCA to conclude that (i) at a minimum the period from 1969 to 1974 was sufficient to establish a *prima facie* case of negligence at certification; and (ii) Anglo must answer to this evidence at trial, including making full discovery.

Third: Foresight of harm to future generations

39 The Court further erred and was misdirected in holding that the applicants failed to present *prima facie* evidence that the harms of lead pollution to present-day Kabwe residents were foreseeable.[51]

[51] Judgment p 084-105 – 106 paras 130 – 133; p 084-109 para 140.

40 The relevant evidence was addressed in detail in the papers and in argument. For present purposes, we highlight three critical points.

41 First, there was no basis for the Court, at certification stage, to reject Professor Harrison's expert evidence on the state of scientific knowledge, from the 1950s onwards, on the durability and long-term hazard of lead in soils.[52] Anglo presented no expert evidence of its own to contradict Professor Harrison's evidence on the state of scientific knowledge.

42 Second, Anglo was not an armchair observer, wholly reliant on scientific studies. If Anglo had any doubt about the long-term dangers posed by lead pollution in the environment, it had ample means and more than 50 years to monitor and study those long-term effects in Kabwe, from 1925 to 1974. To the extent that Anglo remained ignorant of the long-term environmental dangers of lead pollution in the Kabwe environment, it had no reasonable excuse for such ignorance.

43 Third, Anglo's subjective knowledge of the scientific evidence and its own investigations and studies of the persistent dangers of lead pollution are matters that can only be determined through discovery of Anglo's internal records and research during the relevant period.

Fourth: Alleged hindsight bias and "prevailing standards"

44 The Court was further misdirected by Anglo in holding that the applicants had failed to identify the "*prevailing standards*" and were guilty of "*hindsight bias*" by applying "*modern standards*".

[52] Harrison report cited FA p 001-94 para 186.

45 First, at the level of fact, the contemporaneous reports and recommendations by Anglo's own experts - including reports from Dr Van Blommestein, Dr Lawrence, Dr Clark, and Professor Lane and Dr King - show that Anglo had specific knowledge of the dangers of lead pollution in Kabwe. It was advised on appropriate measures to prevent and mitigate those dangers, but it refused to implement those measures fully. This is ample *prima facie* evidence that Anglo failed to adhere to the standards deemed applicable by its own experts at the relevant time.

46 Second, at the level of law, the test for negligence – judged by the standard of the reasonable person – is an objective legal standard, that does not depend on evidence of how others acted. In *Healthcare at Home Limited v The Common Services Agency,*[53] Lord Reed explained that the "*reasonable person*" is a legal fiction, that merely describes a "*legal standard applied by the court*". It follows that "*[t]he behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court.*"[54]

47 Third, there is no onus on a plaintiff, in English or Zambian law, to articulate any "prevailing standards" to succeed in a claim for negligence. None of the foreign law experts supported such an onus. This is because negligence is a fact- and context-dependent inquiry.

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

48 Instead, in *Thompson v Smith Shiprepairers (North Shields) Ltd*,[55] the court explained that while a defendant may invoke compliance with "prevailing standards" as a consideration in assessing negligence, this is not a conclusive defence.[56]

48.1 A defendant cannot be exonerated merely by showing that others were "just as negligent" at the time.[57]

48.2 Moreover, such a defence cannot succeed where "*common sense or newer knowledge*" shows that the prevailing standard "*is clearly bad*", and where a party "*has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions.*"[58]

48.3 A defendant would also have to demonstrate that those "prevailing standards" operated in "*like circumstances*", to justify its reliance on those standards.[59]

49 Anglo has presented no evidence, at certification stage, to support such a defence of reliance on prevailing standards:

49.1 It has not articulated the "prevailing standards" that it claims to have complied with.

49.2 It has failed to show that those standards operated in "like circumstances" to the Kabwe Mine.[60]

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[55] *Thompson v Smith Shiprepairers (North Shields) Ltd* [1984] 1 All ER 881 at 889 [Caselines p 008-2875], citing *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] 1 All ER 385, [1956] AC 552.
[56] *Thompson* ibid.
[57] *Thompson* ibid.
[58] Thompson ibid, citing Swanwick J in *Stokes v GKN (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 at 1783.
[59] *Morris* ibid at p 402 (Lord Cohen) at 402.
[60] FA p 001-45 para 74; Annexure ZMX13 p 001-708.

49.3 It has not demonstrated that those "prevailing standards" were, in fact, reasonable and reasonably mitigated the harm.

49.4 It has offered no explanation as to why it continued to rely on those standards, despite knowing, from at least 1970, that children were dying from lead poisoning and that it had an environmental catastrophe on its hands.

Fifth: ZCCM

50 The Court found that ZCCM's alleged negligence after 1974 was uncontested, absolves Anglo of liability, and may amount to a *novus actus interveniens*.[61] This is again a factual finding, on heavily disputed evidence, that cannot be sustained at certification stage.

51 On the material contribution test for causation, ZCCM's alleged conduct could only absolve Anglo of liability if: a) ZCCM's contribution to lead pollution in the Kabwe District after 1974 was so severe that it rendered Anglo's 50-year contribution *de minimis*; or b) ZCCM's conduct was an independent, unforeseeable intervening event that entirely broke the chain of causation.

52 Anglo made out no such case. And its own English law expert, Mr Gibson KC, again emphasised that the "*[t]he causative potency of these intervening acts and omissions, as well as their unreasonableness and foreseeability, are matters for factual and expert evidence.*"[62]

[61] Judgment p 084-110 para 144.
[62] Gibson p 001-3973 para 104.

53 The applicants made out more than a *prima facie* case that ZCCM's alleged negligence could not absolve Anglo of liability:

53.1 First, the Kabwe environment was already severely polluted under Anglo's watch, resulting in extensive contamination and deaths by the 1970s.[63] Anglo accepts that such contamination would still be present today.[64]

53.2 Second, Anglo's 50-year involvement in the Mine corresponded with over 66% of lead production during the Mine's lifetime. By contrast, the period from 1974 to 1994 accounted for little over 22% of lead production.[65] Only 7% was produced during the period from 1985 to 1994,[66] which Anglo alleges was the worst period of ZCCM's negligence. Anglo's contribution to lead pollution was not *de minimis*.

53.3 Third, Anglo's efforts to highlight ZCCM's alleged negligence reflect on its own negligence. The applicants demonstrated that ZCCM's alleged negligence was a continuation of a pattern of negligence already seen under Anglo's watch.[67] For example:

53.3.1 The alleged breakdowns in emission controls after 1974 reflect the persistent pattern of breakdowns and the absence of effective emission controls that were already occurring before 1974, characterised by the "Broken Hill attitude".[68]

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[63] See, for example, Clark's thesis Annexure ZMX 3 p 001-357.
[64] AA p 001-2707 para 103.
[65] AA p 001-2730, para 176.
[66] FA p 001-105 – 106 paras 221 – 222; Annexure ZMX 79 p 001-1206.
[67] Applicants' heads p 007-80 para 171, summarising the evidence.
[68] Applicants' heads pp 007-201 paras 452ff.

53.3.2 The alleged negligent operation of the Waelz kilns, using slag with a lead content of over 7.5%, was the product of Anglo's own plans and designs for the operation of these kilns developed before 1974.[69]

53.4 Fourth, Anglo's argument proceeds from the fallacy that the duty to clean up more than 90 years of lead contamination only arose in 1994, when the Mine was closed. The Applicants' case is that Anglo had the uncontroversial duty in tort law, throughout the period of its control, to clean up lead pollution and to protect the surrounding community. That duty was confirmed by the recommendations of Prof Lane and Dr King in 1970, which Anglo elected to ignore.

53.5 Fifth, the Applicants further plead that between 1925 and 1974 Anglo was duty-bound to advise and instruct the Mine to cease smelting and dumping at the premises, and to relocate those operations, if necessary, to protect the surrounding communities. If the trial court agrees that Anglo had such a duty, then complaints about ZCCM's omissions after 1974 are of little moment.

53.6 Sixth, ZCCM's alleged negligent conduct, and the ongoing problem of lead poisoning, cannot be classified as unforeseeable intervening events that broke the chain of causation. They mirrored Anglo's own inaction and negligence in failing to conduct remediation efforts when it was advised to do so in the early 1970s.

[69] Applicants' heads p 007-201 para 451. Barlin p 001-705 FA Annexure ZMX 11; RA p 001-7647 para 152.

53.7 Seventh, if Anglo had handed over the Mine to ZCCM with systems in place that had ensured that the Kabwe population was protected from lead pollution, it is likely that ZCCM would have continued to implement those systems and the Kabwe population would have continued to be protected from lead pollution.

53.8 Eighth, Anglo remained an active minority shareholder in ZCCM from 1974 until at least 2000, with directors on the ZCCM board. The evidence further suggests that Anglo played a leading role in the privatisation of ZCCM operations which, Anglo now suggests, deprived ZCCM of the skills and resources to conduct effective remediation at the Mine. The actions of a company over which Anglo continued to exercise significant power, and from which it continued to derive profits, cannot be classed as a *novus actus interveniens*.

Sixth: "The case will not get better at trial"

54 It was a further misdirection for this Court, at certification, to determine extensive factual disputes, to hold that the case "*will not get better at trial*",[70] and to conclude that "*there is no chance that the evidence presented to court will change materially after certification*".[71]

55 We highlight three fundamental errors in this approach.

56 First, this impermissibly turns interlocutory certification proceedings into a full dress-rehearsal for trial, with all the access to justice implications that were addressed fully

[70] Judgment p 084-110 para 143.
[71] Judgment p 084-106 para 134.

in argument. In *Okpabi*,[72] the UK Supreme Court warned of the dangers of "*conducting a mini-trial"* in interlocutory proceedings, such as this, as it inevitably involves a court *"making inappropriate determinations in relation to the documentary evidence"* as the court *"effectively [has] to conclude that the prospect of there being further relevant evidence on disclosure could and should be discounted".*

57 Second, this Court incorrectly held that it is *"in as good a position as the trial court"* to determine disputes over the historical evidence, because it suggested that expert evidence can be of no assistance in interpreting documents.[73] But in doing so, this Court ignored the fact that the disputes between the parties relate to the inferences to be drawn from the historical evidence. These are not disputes over the mere interpretation of words. Such inferences can only be made with assistance of expert evidence, as the experts "*by reason of their special knowledge and skill … are better qualified to draw inferences than the trier of fact*."[74]

58 Third, there was no basis for this Court to pre-empt the outcome of the discovery, subpoena and trial processes, in circumstances where:

58.1 Anglo has itself conceded that critical, triable issues, including its degree of involvement in and control of the Mine's operations, can only be properly ventilated and addressed at trial.[75] In its answering affidavit, Anglo further

[72] *Okpabi v Shell* [2021] UKSC 3 at para 26.
[73] Judgment p 084-107 para 137.
[74] *PricewaterhouseCoopers Inc & Others v National Potato Cooperative Ltd & Another* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) at para 97; *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370G-H.
[75] AA p 001-3071 para 1079: "*the determination of the 'de facto control' issue … is not an issue that is capable of determination at certification stage."*

complained that it had not had sufficient time to obtain further, relevant documents, which it listed in detail.[76]

58.2 There is no affidavit from any Anglo employee stating, under oath, that it has no further relevant documents in its possession or control; explaining what has happened to its company archives and internal records, if they are no longer in its possession; and identifying who is in possession of the relevant internal company records, correspondence, and documents.

58.3 Reports by mine archivists and researchers, which Anglo itself relied upon, confirm that relevant records from the Mine and ZCCM were transferred to Anglo's private archives in Johannesburg, which are closed to the public.[77] For example, one archivist records that:[78]

> *"In the case of [Rhodesian Anglo American] … its parent company, AAC [Anglo], has historical records and information in their library in Johannesburg, South Africa. Researchers have been unable to access its documents freely because AAC is still active, and like the majority of active corporations, AAC determines who can access their records."*

SECOND GROUND: OPT-OUT PROCEEDINGS

59 The Court erred in concluding that it would be inappropriate to certify the class action on an opt-out basis, because it involves a class of foreigners.[79] There are five primary errors in this approach.

60 First, the Court mischaracterised the issue as being one of jurisdiction, casting the applicants' submission as being that *"… this court can exercise jurisdiction over*

[76] AA p 001-3042 para 959ff.
[77] Mr Tough's article p 003-2072; Mr Munene's article p 004-115.
[78] Mr Munene article p 004-115.
[79] Judgment p 83 para 224.

foreign peregrine class members on an opt-out basis, simply on the fiction that they received notice and decided to take no action …".[80]

60.1 But the Court's jurisdiction was never in doubt. Anglo correctly conceded that this Court has jurisdiction because it is domiciled here.[81]

60.2 Certification is a procedural mechanism by which a court may exercise its pre-existing jurisdiction over class members' claims,[82] not the class members themselves. The class members do not become parties to the litigation.[83]

61 Second, the Court erred by granting an order that is directly in conflict with the full court's order in *Nkala* and in attempting to distinguish *Nkala* from the present matter.

61.1 The effect of this Court's judgment is that *Nkala* was wrongly decided and that thousands of foreign migrant workers ought not to have benefitted from the opt-out class action and resulting settlement. That is a startling conclusion, which warrants appellate consideration.

61.2 The Court in *Nkala* appreciated that the majority of the class members were foreign migrant mineworkers. The court nonetheless assumed jurisdiction over the foreign putative plaintiffs and (with obvious relevance to the present case) certified the opt-out class action *inter alia* because those foreign plaintiffs would have no access to justice absent certification of the class action.[84]

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[80] Judgment pp 69-70 para 190.
[81] AA p 001-3137 para 1327.
[82] *CRC Trust* at para 17.
[83] *CRC Trust* at para 17.
[84] *Nkala* at paras 100 to 103.

61.3 This Court declined to follow *Nkala* because the jurisdictional point was not argued by the parties and the Court did not consider the issue.[85]

61.4 This Court justified the distinction on the basis that the classes in *Nkala* were only partially made up of foreigners. But, for the purposes of jurisdiction, there is no difference between classes partly or entirely comprising *peregrini*.

61.5 Moreover, the fact that the foreign domiciled class members in *Nkala* once had some connection with South Africa is not a basis of distinction. If the only way to assert jurisdiction over peregrine class members is by requiring their express opt-in, it makes no difference whether the foreign-domiciled class members once resided in South Africa.

62 Third, the Court erred by failing to apply the principles in the SCA's judgment in *Ngxuza* to the present case.

62.1 In *Ngxuza,*[86] the SCA dealt with a class action involving local *peregrini* and held that a proper opt-out class action procedure would be sufficient to found jurisdiction over local *peregrini* on the conventional jurisdictional principles, with appropriate tailoring to give effect to the fundamental right of access to court in the context of class actions. The SCA concluded that:

> *[24] There can in my view be no doubt that the Constitution requires that, once an applicant has established a jurisdictional basis for his or her own suit, the fact that extra-jurisdictional applicants are sought to be included in the class cannot impede the progress of the action."*

[85] Judgment p 73 para 196.
[86] *Ngxuza* at paras 22 – 24.

62.2 Under the common law *continentia causae* principle, once the High Court had jurisdiction over a part of a cause of action in a matter or over one defendant/respondent who resided within its area of jurisdiction, it was given jurisdiction over the whole of the matter.[87]

62.3 The effect of the SCA's judgment in *Ngxuza* was to extend the *continentia causae* principle to entitle the Court to adjudicate claims of peregrine plaintiffs, where the High Court would otherwise lack jurisdiction and to do so within the context of a class action.

62.4 Instead of finding that *Ngxuza* is binding, the Court sought to distinguish it. We submit that the bases upon which the Court sought to distinguish *Ngxuza* were mistaken.

62.4.1 First, the Court found that *Ngxuza* is distinguishable because the class members in *Ngxuza* were local *peregrini*, whom South African law treats differently to foreign *peregrini*.[88] The principles expressed in *Ngxuza*, with respect, apply regardless of whether the class members are *incolae* or *peregrini*. This is so because all that was required is for the applicants to demonstrate a jurisdictional basis for their own suit.[89] The very ratio of *Ngxuza* was to establish principles for jurisdiction in respect of plaintiffs in class actions. This distinction of *Ngxuza* also ignores the SCA's endorsement of *Phillips v Schutts*[90] which expressly

[87] Section 21(2) of the Superior Courts Act 10 of 2013 now enshrines the *causae continentia* principle.
[88] Judgment: p72, para 194.
[89] *Ngxuza* at para 24.
[90] *Phillips Petroleum Co v Schutts et al* 472 US 797 (1985).

dealt with foreign *peregrini* in US law, to affirm that all that is required to obtain jurisdiction over opt-out plaintiffs is adequate notice provision.

62.4.2 Second, while the concept of local *peregrini* has been done away with, this is no basis to distinguish *Ngxuza* as the Court did.[91] This is so because *Ngxuza* was determined and decided when that distinction existed.

62.4.3 Third, the Court mistakenly read *Ngxuza* to mean that *"… the court's personal jurisdiction over the incolae justified the assumption of personal jurisdiction over the local peregrine …"*[92]. However, paragraphs 22, 24, and 25 of Ngxuza indicate that the SCA was referring not to personal jurisdiction over the *incolae* plaintiffs but to territorial jurisdiction over their suits by virtue of the defendant's domicile or the cause of action.

62.4.4 Fourth, the Court concluded that *Ngxuza* is distinguishable because the local peregrine class members there had a connection with the Eastern Cape while the applicants' classes only connection to South Africa was that Anglo is domiciled here.[93] The local peregrine class members in *Ngxuza* had no connection with the Eastern Cape High Court and its territorial jurisdiction.

[91] Judgment: p72, para 194.
[92] Judgment: p72, para 195.
[93] Judgment: pp72-73, para 196.

63 Fourth, the Court should not have adopted and confirmed the *obiter* remarks in *De Bruyn*,[94] for three reasons:

63.1 First, *De Bruyn* was clearly inconsistent with *Ngxuza* and did not follow the "*jurisdictional first principles*"[95] described in *Ngxuza*.

63.2 Further, *De Bruyn* unreflexively grafted the principles applicable to *peregrine* defendants in non-class litigation to plaintiffs in class litigation. *De Bruyn* proceeds from the premise that in ordinary litigation, plaintiffs always submit to the jurisdiction in which they bring their claims. It then mirrors this as a requirement for class actions by saying it necessarily follows that class members must also submit. But it does not necessarily follow, especially because class members are not parties to the litigation. *Phillips v Schutts* explained why these persons are different — *Ngxuza* expressly adopted this explanation as part of its *ratio*. Consequently, *De Bruyn* and this Court erred in departing from *Ngxuza*.

63.3 Second, *De Bruyn* is premised on the assertion that certification binds *incolae* but not *peregrini*.[96] There is no authority for this proposition, and none was cited in *De Bruyn*. *De Bruyn* is also based on the proposition that the certification binds persons and not their claims. The indication from Froneman J's judgment in *Ngxuza HC* is that certification actually binds the claim within the jurisdiction.

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[94] Judgment: pp77-83, paras 207-224.
[95] Judgment: p82, para 218.
[96] *De Bruyn* at para 32 read with Judgment: p78, para 210 in which the court endorses the dictum in *De Bruyn.*

63.4 Third, *De Bruyn* was premised on the contention that submission to jurisdiction is necessary to satisfy the doctrine of effectiveness.[97] *De Bruyn* misconstrued the doctrine of effectiveness by conflating it with submission to jurisdiction — contrary again to the Appellate Division's ratio in *Barclays*.[98]

63.5 Fourth, *De Bruyn* is plainly distinguishable on the facts:

63.5.1 The plaintiffs in *De Bruyn* did not risk a real denial of access to justice if the class was not certified, whereas it is undeniable that the applicants in Kabwe face that risk.

63.5.2 Unlike in *De Bruyn*, this Court accepted that the class members here have no practical possibility of suing in Zambia, so there is no possibility of multiple suits or jurisdictional arbitrage.

64 Fifth, the Court placed incorrect reliance on foreign law in supporting its conclusions:[99]

64.1 The Court relied on the position in the United Kingdom and in the European Union which expressly legislate a requirement that *peregrini* opt-in. In doing so, the Court overlooked the fact that the United Kingdom's Competition Act and the European Union's directive on representative actions in consumer protection litigation both deal with specific contexts where there exists a real risk of parallel litigations arising in different jurisdictions.

64.2 In respect of the position in the United States: the Court also erred in its reading of *Phillips v Schutts* and by elevating Prof Basset's article over it:

[97] De Bruyn at paras 36-38.
[98] Barclays National Bank Limited v Thompson 1985 (3) SA 778 (A) at 796D-F.
[99] Compare Judgment at paras 197-206 with para 217.

64.2.1 The Court overlooked the fact that the SCA completely embraced the principles set out in *Phillips v Schutts* in its judgment in *Ngxuza* as part of its ratio. Consequently, those principles are binding.[100]

64.2.2 The Court wrongly concluded that *Phillips* did not involve foreign peregrine plaintiffs.

64.2.3 The Court misread *Phillips v Schutts* as requiring, in effect, that minimal due process protections can only be achieved by the stringent first class postal notice provisions set out therein. In fact, the judgment in *Phillips v Schutts* only requires "*… best practicable notice, reasonably calculated, under all circumstances, to appraise the interested parties of the pendency of the action and afford them an opportunity to present their objections …*".

64.2.4 Simply put, Prof Basset's views are not law even in the United States.

64.3 The Court also rejected the approach in Canadian law.[101] The Court, with respect, misread *Airia Brands* in its observation that the applicants would not meet the real and substantial connection test set out in that case. This was presumably based on Anglo's contention that the real and substantial connection test cannot be met where the cause of action did not arise within the Court's territorial jurisdiction.[102]

[100] Judgment: p76, para 205.
[101] Judgment: p76, para 204.
[102] Anglo HoA, 008-287 to 008-288, para 753.

64.3.1 This assumes that the factors to establish a real and substantial connection are cumulative and not individual. The "real and substantial connection test" was formalised in *Van Breda*.[103]

64.3.2 There are four "presumptive factors," that establish a real and substantial connection: (i) the defendant's domicile within the court's jurisdiction; (ii) the defendant carrying on business within the court's jurisdiction, (iii) the tort was committed in the province, and (iv) a contract connected with the dispute was made in the province.[104]

64.3.3 The presence of any one or more of these factors creates a rebuttable presumption of jurisdiction.[105] At face value, Anglo satisfies at least two of presumptive factors. That is sufficient.

64.4 The Court also failed to consider *Currie*,[106] in which the Ontario Court of Appeal roundly rejected the notion (expressed in Basset's article) that an opt-in procedure is required to bind the claims of peregrini.

64.5 The Court did not consider the Australian approach in *BHP v Implombat,* and the majority decision's adoption of the "claims approach," which again is on all fours with *Ngxuza* and *CRC Trust*. The claims approach proceeds from the notion that a class action is a procedural device, rather than a substantive one. It creates a procedural mechanism by which jurisdiction may be exercised. The actual jurisdiction is sourced from other statutes and common law.[107] The claim

[103] *Club Resorts Limited v Van Breda* [2012] I RCS.
[104] *Van Breda* at para [90].
[105] *Van Breda* at para [80].
[106] *Currie v McDonald's Restaurants of Canada Limited* 2005 Canlii 3360 ONCA at paras 29-30
[107] Id at para 54-55.

is not a right to relief but rather this flows from the facts and circumstances giving rise to the action. The claims have a prior and separate existence from the commencement of the representative device of a class action. Seen this way, Part IVA is a procedural mechanism that allows for the grouping of claims. Absent a class action, the Court cannot bindingly adjudicate the claims of non-party group members unless they bring their own actions. The Court emphasised that what is important is jurisdiction over the respondent, and not each individual class member.

65 In sum, there are more than reasonable prospects that the SCA will conclude that:

65.1 There is no requirement that absent foreign plaintiffs affirmatively opt-in to the class.[108]

65.2 In light of this, the real question is whether the opt-out procedure and proposed notification process is adequate and in the interests of justice.[109]

65.3 By the end of the hearing in this matter, there was no genuine dispute that the proposed notification procedure was adequate. Anglo effectively abandoned all opposition to the proposed process.

65.4 The notice requirements endorsed by the SCA in *Ngxuza* are practically indistinguishable from the notice provisions put forward by the applicants in the present matter.

[108] *Phillips v Schutts*.
[109] *Ngxuza* at para 11; *Phillips v Schutts* at pp 811-2.

65.5 Accordingly, an opt-out process with the proposed notice requirements was adequate and in the interests of justice.

66 Even if the SCA were to conclude that an opt-out basis is somehow inappropriate, it could certify the class action on an opt-in basis, rather than dismissing certification outright, as this Court did.

THIRD GROUND: CLASS DEFINITION

67 There are five material misdirections and errors of principle in this Court's rejection of the proposed class definition.

First: The incorrect test for overbreadth

68 In *CRC Trust*, the SCA held that the breadth of a class definition is tested by the existence of common issues of fact or law that can be conveniently resolved in the interests of all members of the class.[110]

69 This Court correctly held that sufficient commonality had been established, holding that "*Anglo does not seriously deny that there are a variety of anticipated legal and factual issues that are common to all members of the class that can be appropriately resolved in a class action."*[111]

70 That finding of commonality ought to have been the end of the matter. As the Full Court held in *Nkala*,[112] "*once it is found that there are sufficient common issues*

[110] *CRC Trust* at para 31.
[111] Judgment p 084-69 para
[112] *Nkala and Others v Harmony Gold Mining Company Limited and Others* 2016 (5) SA 240 (GJ) at paras 94 -97.

affecting the entire classes that can be determined at one hearing or, if the hearing is split into stages, at the first stage, then it follows as a matter of logic that the class definitions are not overbroad."

71 However, this Court formulated a new test for overbreadth, departing from *CRC Trust* and *Nkala*, holding that an applicant must:

71.1 "*[E]stablish a prima facie case demonstrating its ability to prove those issues with regard to the entire class*";[113] and

71.2 Formulate a class definition that includes "*only those with a triable claim against the prospective defendant*".[114]

72 As we have already noted, the novelty of this test and its inconsistency with the tests favoured in *Nkala* and *CRC Trust* is sufficient grounds for leave to appeal.

73 In any event, there are strong prospects that the SCA would hold that this stringent test for overbreadth is an impermissible departure from existing precedent and sets an incorrectly high barrier to certification, effectively conflating the question of class definition with the assessment of the merits of individual class members' claims.

Second: Geographical scope of class

74 The Court applied its novel test for overbreadth in rejecting the definition encompassing residents of the Kabwe District. In doing so, the Court held that:

[113] Judgment p 084-141 para 232.
[114] Judgment p 084-154 para 270.

74.1 The applicants were required to prove, at certification stage, "*that the Mine poisoned the soil of the entire district throughout the relevant period (and hence produced increased BLLs throughout the district) rather than only the KMC townships*";[115] and

74.2 There was no prima facie evidence of lead contamination beyond the Kasanda, Makululu and Chowa (KMC) townships.[116]

75 The effect of this finding was to exclude tens of thousands of children, registering high BLLs, who live outside of the KMC townships.[117]

76 There are strong prospects that the SCA would find that this was a misdirection on two primary grounds:

76.1 First, the question of the geographical spread of lead pollution from the Mine is a triable issue that cannot be determined at certification, let alone through the narrowing of the class definition.

76.2 Second, there was ample prima facie evidence that lead contamination is not confined to the KMC townships and that residents across the District are affected.[118] For example, Anglo's own expert, Professor Sharma, confirmed that significant lead contamination and poisoning extended beyond the KMC townships.[119]

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[115] Judgment p 084-156 para 268.
[116] Judgment pp 084-148 paras 249 to 259.
[117] Judgment p 084-153 – 154 paras 266 – 267.
[118] Applicants' heads p 007-113 para 251; Applicants' heads p 007-205 para 457; RA p 001-7640 paras 142 – 148.
[119] See Mr Sharma's affidavit p 001-3264; Sharma map p 001-3263.

Third: Zambian limitation law

77 The Court made a final determination, at certification stage, that the Zambian Limitation Law applies in these proceedings.

78 The undisputed effect of that choice is to bar the claims of thousands of women of child-bearing age, who suffered injuries before 20 October 2017, despite having no knowledge of Anglo's identity or the material facts giving rise to their injuries. This is a compelling reason for leave, by itself.

79 There are strong prospects that the SCA would hold that the Court acted on wrong principle and was misdirected in reaching these findings, for three reasons:

79.1 First, no gap-filling choice arose, as our Prescription Act ought properly to be characterised as procedural in nature and hence it applies to the exclusion of the Zambian Limitation Act.[120]

79.2 Second, if a gap-filling choice arose, this is a policy-laden question of fact and law that should be determined by the trial court, with the benefit of full evidence and argument. It was incorrect to determine this issue at certification.

79.3 Third, even if it was appropriate to decide this question at certification, individual justice, constitutional rights, and public policy require that the class members' rights of access to court be preserved. This Court's choice – not obligation – to apply the Zambian Limitation Law was an unjustifiable limitation of section 34 rights in the circumstances.

[120] The Constitutional Court routinely treats our Prescription Act as a matter of procedural law and has repeatedly held that the Prescription Act limits the fundamental right of access to court, which is a procedural matter. See *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 87 to 90; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2018 (1) SA 38 (CC) at para 22.

Fourth: Actionable injury and drawing blood from children

80 The Court held that children with elevated blood-lead levels, who require regular venous blood testing, have not sustained an actionable injury and that the inclusion of such an injury would result in the class being "*overbroad and vague*".[121]

81 The SCA would likely hold that this, too, was a misdirection as it again involved the determination of a triable issue under the guise of class definition.

81.1 The UK Supreme Court's judgment in *Dryden* is clear: the determination of actionable injury is a question of fact, not law, to be determined at trial.[122]

81.2 The applicants established ample *prima facie* evidence of this actionable injury, primarily through the expert evidence of Professor Dargan, one of the world's leading experts on clinical toxicology, with decades of clinical experience . He confirmed, based on his experience, that regular, invasive venous blood tests, requiring needles to be inserted into the arms of very young children every few months or weeks, can be very painful and distressing, particularly for infants and young children.[123]

81.3 No evidence was presented to contradict Professor Dargan's expert opinion or to question his credibility.

81.4 On the *Dryden* test, a change in the body requiring young children to undergo repeated, painful and distressing venous blood draws using a needle – every

[121] Judgment p 084-177 para 332.
[122] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at para 48; Hermer 2020 p 001-2298 – 2300 paras 34 – 38; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 779.
[123] Dargan 2022 p 001-9283 para 14.4.1.4.

six months up to every two weeks - is clearly a change in the body "*for the worse*".

Fifth: Injury and objective criteria

82 The Court further erred in holding that defining the class by reference to injury suffered due to exposure to lead is insufficiently objective.[124]

83 This finding conflicts with *Nkala*, where the Full Court determined that the possibility of medical examination and diagnosis is a sufficiently objective measure.[125] Class membership also does not need to be determined at the first stage. It is sufficient that class membership be determined during the second, opt-in stage of the class action, when individual class members opt-in to prove their individual claims and undergo medical testing and evaluation.[126]

FOURTH GROUND: REMEDIATION AS A HEAD OF DAMAGES

84 In refusing certification of a claim including remediation as a head of damages. the Court committed two primary errors:

84.1 It incorrectly characterised this head of damages as a standalone claim or cause of action; and

84.2 It wrongly determined a triable issue, that ought to be resolved at trial.

[124] Judgment p 084-177 para 334.
[125] *Nkala* at para 48.
[126] Nkala at paras 47 – 50,

Nature of the remediation claim

85 The claim for remediation is a claim sounding in money, as one of the heads of damages flowing from the alleged injuries, to allow the residents to reduce their exposure to lead pollution in their homes and surrounding environment. It is not a stand-alone claim.

86 The claim is not for a mandamus that Anglo remediate the entire Kabwe district. Further, the claim for remediation was not formulated as a claim for damage to property or as a nuisance claim.[127]

87 The relief sought is that Anglo is liable to pay compensation to the members of the class who establish their claims in the second stage of the class action, the quantum of which compensation is to be determined at the second stage.[128]

88 On an individual basis, the remediation of a claimant's home environment or immediate vicinity is calculable and allocable, and is special damages which flows from the actionable injury sustained. It is no different from the alteration of a home to make a door wider to accommodate a wheelchair for a claimant who was rendered paraplegic following a motor vehicle accident.[129]

89 Any reservations concerning this head of damage relief may be dealt with in trial by way of separation of issues. A subhead of special damages is not a basis to refuse certification in totality.[130]

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[127] Judgment p64 para 175.
[128] Draft POC p001-188-189, Prayers 1 and 2.
[129] *Cassel v Hammersmith and Fulham Health Authority* [1992] PIQR Q168 the court awarded a sum for 'alterations to the present accommodation' for an 11-year-old (agreed between the parties). See also Hermer KC, CaseLines 001-2301, para 41.
[130] Judgment, para 333.

Whether the remediation claim is "actionable"

90 The Court wrongly concluded that there was no evidence that damages for remediation were actionable.[131] This was on the basis that Mr Mwenye SC and Mr Hermer did not specifically address the issue.[132] This finding was incorrect for three reasons.

91 First, remediation is a head of damages flowing from the actionable injuries suffered by victims of lead poisoning. But, in any event, on the *Dryden* test, the existence of actionable harm is a question of fact, not law, to be decided at trial.[133]

92 Second, the Court adopted an unduly narrow construction of the expert evidence in respect of Zambian law. Mr Mwenye SC opined that the particulars of claim disclosed a cause of action in the tort of negligence.[134] That is sufficient. There is no need, at certification stage, to establish that the class members will succeed in the recovery of all conceivable heads of damages flowing from their injuries.

93 Third, the Court misconstrued the presumption and resultant onus as it applies to foreign law, suggesting that *"[t]he onus lies on the party who asserts that the law of a foreign country applies where it differs from our own. …"*.[135]

93.1 This ignores the presumption that there is no difference between South African law and the law in the foreign country. As a result, the party who seeks to

[131] Judgment p64 para 174.
[132] Judgment p64 para 172.
[133] Mr Hermer KC, 001-2302, para 42.
[134] Mr Mwenye SC, RA, 001-9689, para 4.15.
[135] Judgment p 084-119 para 173.

establish the difference bears the onus.[136] Consequently, the onus rested on Anglo to demonstrate the areas in which Zambian law would differ from our own.

93.2 Notably, Anglo's experts did not challenge the actionability of the remediation claim. The Court adopted Anglo's unsubstantiated skepticism about the remediation claim.[137]

94 There are thus reasonable prospects that a court of appeal would find that remediation, as a head of damages, is a triable issue. Even if a court of appeal were to take the opposite view, it would not refuse certification of an otherwise valid claim merely because of doubts over a single head of damages.

FIFTH GROUND: MANAGEABILITY AND APPROPRIATENESS

95 The Court made several important findings relevant to manageability and appropriateness. The Court correctly held that:

95.1 The class action raised sufficient common issues that could be appropriately determined on a class-wide basis.[138]

95.2 Appropriate procedural mechanisms exist to manage the trial at the first and second stages of the class action.

[136] See *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA 479 (W) at p 485 to p 487.
[137] Judgment: pp64-65, para 175.
[138] Judgment p 084-70 paras 34-43.

95.3 Class action proceedings represent the only feasible way to secure access to justice for the class members.[139]

96 Despite these findings, the Court went on to find that the class action would be unmanageable and not in the interests of justice. This is a clear contradiction to its earlier findings.

97 In holding that the class action would be unmanageable, the court took into account the number of potential claimants (a total of between 131 000 and 142 000 people);[140] the length of time the trial would take; prejudice to Anglo, access to justice and the length of time it would take the legal team to take instructions from every member of the proposed classes.[141]

98 First, the size of the potential classes does not render the class definitions over-broad and thus unmanageable. This Court addressed the point in *Nkala*, where it noted that *"the sizes of the two classes may be very large, but that does not make the class definition overbroad or the class-action trial unmanageable."*[142] This Court added that once it is found that there are sufficient common issues *"it cannot be unmanageable."*[143] Therefore, given the Court's findings on sufficient commonality and appropriate mechanisms to resolve the common issues, manageability was not in question.

99 Second, the interests of justice and access to justice require certification. As this Court has correctly found:

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[139] Judgment p 084-73 para 42 and 43.
[140] Judgment p 084-179 para 336.
[141] Judgment p 084-179 para 337.
[142] *Nkala* (n **Error! Bookmark not defined.**) para 53.
[143] Ibid.

99.1 Litigating these matters in each case would be inefficient for litigants and the judicial system. A class action would save duplicating court efforts to settle these concerns.

99.2 Resolving common difficulties can aid in the advancement of class members' claims.

99.3 Anglo has not proposed a realistic alternative to a class action for adjudicating the large amounts of common evidence in individual claims raised by Kabwe residents.

100 A class action relieves the courts of the burden of resolving other class-wide problems. This is why class action proceedings are the only realistic and acceptable way to resolve these problems.[144]

101 Further to the interests of justice, the class action includes two classes comprising indigent children and women of child-bearing age who seek damages they say were caused by the wrongful acts of Anglo. Further the first class sought to be certified comprises children, whose best interests this Court is constitutionally obliged to regard as of “paramount importance” in every matter concerning the child, in terms of section 28(2) of the Constitution.[145]

102 There are thus reasonable prospects that a court of appeal would find that the class action would be appropriate, manageable, and in the interests of justice.

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[144] Judgment p 084-73 para 42 and 43.
[145] This is not only a constitutional imperative, but also statutory and international legal imperative. Main HoA pp 007-239 to 007-240 paras 533 – 536; Anglo’s HoA p 008-283 para 747; AA p 001-2997 to 001-2998 paras 875.2, 876.1 and 876.2. See also United Nations Convention on the Rights of the Child and Children’s Act 38 of 2005.

THE CROSS-APPEAL

103 Anglo seeks leave to cross-appeal, limited to this Court's rejection of a supplementary affidavit from Mr Schottler. The applicants maintain that there was no basis to admit that further affidavit. The rejection of that affidavit is also an interlocutory ruling that is not appealable.

CONCLUSION

104 For these reasons, we submit that leave to appeal ought to be granted to the SCA, against the whole of the judgment and order.

GILBERT MARCUS SC
GRACE GOEDHART SC
MABASA SIBANDA
CHRIS MCCONNACHIE
THABANG POOE

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22 March 2024