IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: 526/2024
HC Case No: 2020/32777

In the matter between:

KABWE AND OTHERS Appellants

and

ANGLO AMERICAN SOUTH AFRICA LIMITED Respondent

APPELLANTS' HEADS OF ARGUMENT

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I INTRODUCTION

1 This appeal concerns the certification of a class action on behalf of victims of lead poisoning living in the Kabwe District of Zambia. The proposed class action seeks to hold Anglo American South Africa Ltd (Anglo) liable for its contribution to the catastrophic levels of lead poisoning in Kabwe, arising from its 50-year involvement in a lead mine and smelter in the town.

2 The question on appeal is whether it is in the interests of justice, and the best interests of the class, in particular the affected children, to refuse certification of a class action in circumstances where:

2.1 The High Court has jurisdiction over Anglo.

2.2 The High Court accepted that:

2.2.1 A class action in a South African court is the *only* way for the class members to pursue their claims.

2.2.2 There are sufficient common issues to be tried for the benefit of the class.

2.2.3 No suitable alternative exists to try these common issues.

2.3 The rights of children are implicated, requiring that their best interests be given paramount importance.

3 The High Court's refusal of certification, in these circumstances, does not serve the interests of justice. It was vitiated by material misdirections, including the impermissible usurpation of the functions of the trial court and the making of central findings of fact against the applicants on issues which were not disputed on the papers.

4 These heads of argument demonstrate why the appeal must succeed and certification should follow. In Part II, we begin by addressing the relevant background facts. In Parts III and IV, we address the test for certification and the High Court's judgment. In Parts V to VIII, we address the High Court's central findings against certification: the questions

of triability, jurisdiction over an opt-out class of foreign residents, class definition, and appropriateness.

II BACKGROUND

5 While there are many factual disputes to be resolved at trial, the central facts are largely common cause.

6 Lead is a deadly poison.[1] Its harmful effects have been understood for thousands of years, in greater detail than any other industrial toxin.[2]

7 Infants and young children are particularly vulnerable due to their behaviour and the fact that their growing bodies and brains absorb more lead than adults do, causing irreparable brain damage, developmental defects, and even death.[3]

8 Childhood exposure to lead has lifelong consequences, particularly for women. When women fall pregnant, the lead stored in their bones and organs is released back into their bloodstream, poisoning them and their unborn children.[4]

9 The scientific consensus is that there is no safe level of lead in the blood and that irreparable harm may occur at the lowest blood lead levels (BLLs).[5] Our National Institute of Communicable Diseases treats a BLL of 5 micrograms of lead per decilitre of blood (µg/dL) as a confirmed case of lead poisoning which must be notified to the Department of Health within 7 days of diagnosis.[6]

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[1] Founding Affidavit (FA) Core Bundle (Core) Vol 1 p 35 para 52; p 36 para 59 - 60; Not denied Answering Affidavit (AA) Core Vol 6 pp 1034, 1036 - 1037 paras 1020, 1033 - 1037.
[2] FA Core Vol 1 p 70 paras 137 - 138. Not denied AA Core Vol 6 p 1051 paras 1094 - 1096.
[3] FA Core Vol 1 p 36 paras 59-60.
[4] FA Core Vol 1 p 36 para 60. Prof Dargan Core Vol 4 p 573 - 584 paras 9 - 10.
[5] FA Core Vol 1 p 37 para 62; Replying affidavit (RA) Core Vol 9 p 1513 paras 250-251; Annexure ZMX125 Core Vol 10 p 1704 (Executive summary of WHO guideline for clinical management of exposure to lead) at p 1705: "*Exposure to lead, even at very low levels, has been associated with a range of negative health effects, and no level without deleterious effects has been identified*."
[6] Item 11 of Table 2 to Annexure A of the Regulations relating to the Surveillance and the Control of Notifiable Medical Conditions GN 1434 Government Gazette 41330 of 15 December 2017 read with the NICD diagnosis document at https://www.nicd.ac.za/wp-content/uploads/2021/12/NMC_category-2-case-definitions_Flipchart_01October-2021.pdf.

10 There is no dispute that the town of Kabwe in Zambia is one of the most lead polluted places on earth.[7] Generations of Kabwe children have been exposed to dangerous levels of lead, resulting in BLLs that are among the highest in the world.[8] The primary source of this poison is the Broken Hill Mine, later known as the Kabwe Mine, which operated from 1906 to 1994.[9]

11 The Mine was established in what was then Northern Rhodesia, at the height of British colonial rule. Both the town and the Mine were originally named "Broken Hill", after the famous lead mining town in Australia. They were renamed "Kabwe" after Zambia's independence.[10]

12 Anglo's involvement at Broken Hill commenced in 1925. Over the next 50 years, until 1974, Anglo exercised effective control over the Mine's key operations. The evidence of this *de facto* control is not meaningfully disputed at certification, as Anglo accepts that this is a matter for trial.[11]

13 Throughout this time, Anglo held itself out as having a duty to promote and protect the welfare of the communities in which it operated. In 1954, Anglo's founder and then chairman of the Mine's owner (RBHDC), Sir Ernest Oppenheimer, issued a statement that remains an article of faith for the Anglo Group:

> *"The aim of this Group is, and will remain, to earn profits for our shareholders, but to do so in such a way as to make a real and lasting contribution to the communities in which we operate"*. [12]

14 Anglo's direct involvement at the Mine coincided with the highest levels of lead production. More than 66% of all lead produced in the Mine's lifetime was mined and

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[7] Kříbek et al Annexure ZMX14 Core Vol 3 p 369: "Kabwe Town and its surroundings (central Zambia) belong to the most contaminated districts in Africa"); Yabe et al 2019 Annexure ZMX 19 Vol 3 p 378: "Kabwe is known as one of the most significant cases of environmental pollution in the world").

[8] FA Core Vol 1 p 24 para 25.1 and 25.2; Yabe et al 2015 Annexure ZMX 18 Core Vol 3 p 376 ("*childhood Pb poisoning in Zambia's Kabwe mining town is among the highest in the world, especially for children under the age of 3 years*").

[9] FA Core Vol 1 p 24 para 26; Accepted by the High Court at Judgment Record Vol 41 p 6768 para 9.

[10] FA Vol 1 p 42 para 69. Anglo AA Core Vol 4 p 674. The Mine was owned by the Rhodesian Broken Hill Development Corporation ("RBHDC") which was a subsidiary of Anglo from 1925.

[11] FA Section V Core Vol 1 p 51 paras 81 - 122 (Anglo's structure and involvement in the Broken Hill Mine). Not meaningfully denied AA Core Vol 6 pp 1045 - 1046 at paras 1075 - 1079, as Anglo claims that the question of de facto control "*is not an issue that is capable of determination at certification stage*".

[12] FA Core Vol 1 p 66 para 126; Annexure ZMX 56 Core Vol 3 p 403.

smelted on Anglo's watch, from 1925 to 1974.[13] By contrast, only 12% of lead production occurred before Anglo's arrival in 1925 and only 22% after its departure.[14]

15 Throughout this time, lead fumes and dust poured from the Mine's smelters and dumps, blanketing the surrounding area.[15] Reports from the 1920s onward complained of the "*noxious*" clouds of fumes from the smelter that blanketed the surrounding communities, causing "*discontent and trouble*" and even "*one or two deaths*".[16]

16 Lead particles in the fumes and dust settled in the surrounding soil.[17] Because lead is heavy, stable and does not corrode, it remains in the environment for generations. Lead polluted soil acts as a reservoir of contamination, which is continuously remobilised as dust in the dry Kabwe conditions. Anglo readily concedes that "*once an area becomes contaminated with lead it will persist for many decades or even centuries*" unless remediated. [18]

17 The segregated townships and staff quarters, built for black workers and their families, were placed directly downwind from the Mine and smelter, in the path of the fallout.[19] White employees and residents were housed to the north of the Mine, away from the worst fumes and dust. Anglo was directly involved in the planning and development of these townships and housing.[20]

18 Anglo accepts that the former Mine townships – Kasanda, Makululu and Chowa - remain among the worst affected by lead contamination to this day.[21]

19 On Anglo's own version, for more than 45 years, it made no attempt to investigate or monitor lead pollution and its effect on the health of the surrounding communities.[22]

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[13] FA Core Vol 1 p 105 – 106 paras 221 – 222; Annexure ZMX 79 Core Vol 3 p 458. Sharma Core Vol 7 p 1154 ("*65.5.% of the lead produced at the Plant was processed between 1925 and 1974*").
[14] Annexure ZMX 79 Core Vol 3 p 458. Admitted AA Core Vol 4 p 681 para 98.
[15] FA Core Vol 1 p 45 para 75; p 112 para 237; Replying Affidavit ("RA") Core Vol 9 p 1501 para 216.
[16] FA Core Vol 1 p 83 para 160. Annexure ZMX 65 Core Vol 3 p 432.
[17] FA Core Vol 1 p 35 paras 55 – 56; p 46 paras 76-77; pp 106 - 108 paras 223 - 225.
[18] AA Core Vol 4 p 682 para 103.
[19] FA Core Vol 1 p 45 para 74;
[20] Letter dated 28 June 1942 Annexure ZMX 53 Core Vol 3 pp 399 - 401.
[21] FA Core Vol 1 p 47 para 78; AA Vol 6 p 1044 para 1066; See Mr Sharma's affidavit, Core Vol 7 p 1142; Sharma map Core Vol 7 p 1141; Kribek study Annexure ZMX13 Core Vol 3 p 369.
[22] AA Core Vol 6 p 1075 para 1178.

20 In 1969, it was left to a young doctor at the mine, Dr Lawrence, acting entirely on his own initiative, to conduct the first investigations of lead poisoning in the surrounding communities.

21 When Dr Lawrence arrived at the mine in 1969, he witnessed children dying of lead poisoning. He set to work testing the blood lead levels of children, which revealed widespread 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.[23] He could not understand why no one had thought to do such testing before.[24]

22 Dr Lawrence's findings led to a further investigation in 1970 by Professor Lane and Dr King, two international experts on lead pollution. While their final report has not been disclosed,[25] we know from contemporaneous correspondence that they made serious findings and strong recommendations, including that the townships be relocated and the topsoil replaced.[26]

23 Memoranda from the time reflect that Anglo and the Mine chose to reject the bulk of these recommendations as being "*too costly*" and likely to cause "*panic*".[27]

24 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, continued Dr Lawrence's investigations. Between 1971 and 1974, Dr Clark surveyed the BLLs of children in Kabwe and found significant numbers of children who had BLLs far in excess of the threshold levels set by the US Center for Disease Control at the time.[28] He identified lead emissions from the Mine's smelter as the primary source of lead pollution. Soil samples from the

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[23] Lawrence Affidavit Core Vol 4 p 635 para 25; p 632 para 6a.
[24] Id p 634 para 17.
[25] RA Core Vol 8 p 1431 para 30; pp 1448 - 1450 paras 90 – 93; Annexure ZMX90 Core Vol 10 p 1668.
[26] FA Core Vol 1 p 90 para 179; Annexure ZMX 76 Core Vol 3 p 447; RA Core Vol 9 p 1449 para 92; Annexure ZMX107 Core Vol 10 p 1686.
[27] Annexure ZMX 107 Core Vol 10 p 1686.
[28] Annexure ZMX3 Core Vol 2 p 246 – 250 figure 3[3], 3[4], 3[5]; RA Core Vol 8 p 1421 para 31.

townships of Kasanda, Chowa, and Makululu showed elevated lead levels, which Dr Clark attributed directly to "*fall out originating from the smelter stack*". [29]

25 This meant that, by 1970 at the latest, Anglo knew, as a matter of certainty, that it had an environmental catastrophe on its hands, that children were dying of lead poisoning, and that this poison had contaminated the soil, requiring extensive remediation.

26 Anglo ought to have foreseen the danger far sooner. Since the Broken Hill Commission of Inquiry in the late 19th Century in New South Wales, it has been clear that anyone operating with basic common sense and human decency will anticipate that a lead mine is likely to poison those living in its vicinity unless appropriate steps are taken to address the lead pollution caused by the mine.

27 Long before 1970, there were ample warnings of the dangers of lead pollution and its long-lasting effects in Kabwe.[30] The tools to investigate lead pollution and its effects on the local population were also well-understood and readily available.

28 This class action is confined to the period from 1925 to 1974 – the "relevant period" – when Anglo was directly involved at the Mine.

29 After 1974, the Mine continued to operate under the control of Nchanga Consolidated Copper Mines (NCCM), later renamed Zambian Consolidated Copper Mines (ZCCM).

30 The Mine ultimately closed in 1994, following years of declining production and profits. This 20-year period from 1974 to 1994 accounted for just 22% of the Mine's total lead production. [31]

31 Anglo seeks to blame ZCCM for all present-day harms, casting ZCCM's actions after 1974 as unforeseeable intervening events, entirely divorced from Anglo's conduct before and after 1974. We will address this attempt at blame-shifting in detail below, in addressing the triable issues of causation.

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[29] Annexure ZMX3 Core Vol 2 p 233, FA Core Vol 1 p 92 para 181.4.
[30] See paragraph 91 below.
[31] Annexure ZMX 79 Core Vol 3 p 458. Admitted AA Core Vol 4 p 681 para 98.

32 It suffices to note that the Kabwe environment was already severely lead-polluted under Anglo's watch, before 1974, and Anglo accepts that this pollution would remain present to this day. ZCCM's actions after 1974 could not erase Anglo's 50-year contribution.

33 The attempt to cast ZCCM as a wholly independent actor is also unavailing. The evidence already establishes that Anglo remained intimately involved in ZCCM's affairs from 1974 to the early 2000s:[32]

33.1 Anglo was the "*principal minority shareholder*" of ZCCM, through its direct and indirect shareholdings, throughout this period.[33]

33.2 Anglo had directors on the ZCCM board throughout this period. [34]

33.3 Anglo employees continued to be seconded to ZCCM after 1974. [35]

33.4 ZCCM approached Anglo for engineering advice, well after they stopped acting as consulting engineer to the Zambian operations. [36]

33.5 The appellants will, in due course, call on Anglo to make proper discovery of the records of its dealings with ZCCM through this period.

34 Quite aside from Anglo's direct involvement in ZCCM, the alleged unforeseeability of ZCCM's conduct can obviously not be assessed at certification stage in advance of discovery by Anglo of all documents relevant to its contemporaneous knowledge and views of ZCCM and the likelihood that it would remediate the polluted environment that Anglo had bequeathed to it.

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[32] See generally, "Anglo Group's view on the future of ZCCM", a speech in 1995 of the Anglo Director, Mr Holmes, ZMX 119 Core Vol 10 p 1696 and ZMX120 letter from Mr Holmes to the Zambian Minister of Finance Vol 29 pp 4780 - 4782.
[33] FA Core Vol 1 p 64 para 123.1; Annexure ZMX 46 Core Vol 3 p 001-997; ZMX 123 Core Vol 10 p 1702.
[34] FA Vol 1 p 64 para 123.3. Response at AA Core Vol 6 p 1047 – 1050 paras 1083 - 1090. RA Core Vol 9 p 1484 para 172. Annexure ZMX 117 Core Vol 10 p 1694.
[35] FA Core Vol 1 p 64 para 123.2.
[36] FA Core Vol 1 p 65 para 123.4; Response at AA Core Vol 6 p 1047 paras 1083 - 1090.

35 After the Mine closed in 1994, a series of remediation efforts were tried but failed. Anglo suggests that ZCCM's "*hurried and ill-advised*" [37] privatisation in the 1990s contributed to these failures and the ongoing danger.

36 However, contemporaneous reports suggest that Anglo played a leading role in these disastrous privatisation efforts and that it reaped substantial windfalls in the process.[38] Anglo's precise role in these reforms – described as an "*object lesson in how not to privatise"* [39] – will also be a matter for discovery and evidence at trial.

37 Numerous reports and studies have analysed the failed remediation efforts after 1994. One of the primary reasons for this failure is the enormity of the task in cleaning up almost a century of lead pollution and neglect. Blame has been squarely placed on the period before the 1970s, while Anglo was in effective control of the Mine operations:

37.1 A 2003 report by the World Bank further acknowledged *"[a]t the time of the privatization, ZCCM was burdened with a huge 'environmental mortgage' accrued over 70 years of mining operations, which it could not address because it lacked the necessary resources*". [40]

37.2 A further World Bank report from 2011 specifically acknowledged that "*ZCCM was burdened with enormous environmental liabilities accrued over 70 years of mining operations*." [41]

38 These class action proceedings seek to determine Anglo's liability for its 50-year contribution to lead pollution in Kabwe and the ongoing harms suffered by its residents.

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[37] AA Core Vol 5 p 825 para 510.
[38] RA Core Vol 9 pp 1485 - 1487 paras 178- 180. RAID Report ZMX 123 Core Vol 10 pp 1701 - 1703.
[39] Annexure ZMX 122 Core Vol 10 p 1699.
[40] Annexure AA 64 Core Vol 8 p 1334.
[41] Annexure AA 90 Core Vol 8 p 1373 para 3.

39 Whether ZCCM and other actors may also be culpable, alongside Anglo, is no bar to a claim against Anglo, least of all at certification stage. As in all cases, the applicants have a right to pursue the wrongdoer of their choice.[42]

40 The twelve appellants are all lifelong residents of Kabwe, ten of whom are children assisted by a parent or guardian. Their blood lead levels range from 10 μg/dL to 114 μg/dL. [43] As the High Court accepted, all of these applicants "*present with the recognised sequelae of lead exposure and poisoning*", as confirmed in medical reports by two experts, Professors Dargan and Adnams.[44]

41 There is no dispute that the High Court has jurisdiction over Anglo, because its registered offices are in Johannesburg.[45] The court would thus have jurisdiction over any individual claims against Anglo brought by the prospective class members.

42 Therefore, the question in these proceedings is not *whether* but *how* these class members should pursue their claims against Anglo.

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[42] Harms *Civil Procedure in the Superior Courts*, Last Updated: February 2019 - SI 64 at B10.2 Direct and Substantial Interest; *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd T/A Nedbank* 1998 (2) SA 667 (W) at 673.

[43] See table at AA Core Vol 6 p 939.

[44] Judgment Record Vol 41 p 6768 para 8.

[45] AA Core Vol 7 p 1112 para 1327: "The Respondent does not deny that, in light of the Respondent's South African residence, the South African courts have jurisdiction".

III THE TEST FOR CERTIFICATION

43 The applicants seek certification of a class action on behalf of two proposed classes, as defined in the accompanying draft order, attached as **Annexure A**: a) the class of children, and b) the class of women of child-bearing age.

44 The proposed class action will advance in two stages, following the bifurcated procedure adopted in *Nkala*.[46] The first stage will proceed on an opt-out basis, to resolve questions of fact and law that are common to all class members. This will not fully determine the merits of the class members' claims or Anglo's liability. In the second stage, class members will come forward on an opt-in basis to prove their individual claims, including proof of individual harm and quantum, after the common issues have been determined.

45 In *CRC Trust*, this Court identified the relevant considerations for certification:[47] first, there is a class or classes which are identifiable by objective criteria (*class definition*); second, there is a cause of action raising a triable issue (*triability*); third, the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class *(commonality*); fourth, the relief sought, or damages claimed, flow from the cause of action and are ascertainable and allocable (*ascertainability and allocability of damages*); fifth, the proposed representatives of the classes are suitable to be permitted to conduct the action and represent the class (*suitability*); sixth, a class action is the most appropriate means of determining the claims of class members, given the composition of the class and the nature of the proposed action (*appropriateness*).

46 In *Mukaddam*, the Constitutional Court emphasised that none of these factors is to be treated as a jurisdictional fact. The overriding consideration remains the interests of justice.[48]

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[46] *Nkala v Harmony Gold Mining Company Limited* [2016] ZAGPJHC 97; 2016 (5) SA 240 (GJ); 2016 (7) BCLR 881 (GJ) ("*Nkala*").
[47] *Children's Resource Centre Trust v Pioneer Foods* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA) at para 26 ("*CRC Trust*"), approved with qualification in *Mukaddam v Pioneer Foods* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at paras 34 - 37.
[48] *Mukaddam* id.

47 The assessments of the interests of justice must be guided by two relevant rights. The first is the section 34 right of access to court, which the class action mechanism is designed to protect and advance.[49]

48 The second is the section 28(2) best interests of the child standard, which is implicated because the first class is comprised of children. Section 28(2) of the Constitution, read with the Children's Act,[50] requires that the best interests of these children be afforded paramount importance. This duty has both substantive and procedural components.[51] Substantively, decisions must be in children's best interests. Procedurally, mechanisms must exist to ensure that children's interests are protected. Section 14 of the Children's Act confirms that "*[e]very child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.*"[52]

49 A further dimension of this principle is that these children have a right to pursue effective remedies, particularly for environmental harms. In the Committee on the Rights of the Child's (CRC) latest General Comment 26[53] on the Convention,[54] the CRC emphasised that class action procedures are an important mechanism to protect and advance children's rights in the face of environmental pollution.[55] The CRC further noted that, in cases such as this, "*[c]hildren may face particular difficulties in obtaining remedies in cases involving business enterprises*". In such cases, States Parties have an obligation "*to establish non-judicial and <u>judicial mechanisms</u> to provide access to effective remedies for abuses of children's rights by business enterprises, <u>including as a result of their extraterritorial activities and operations</u>".*[56]

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[49] *CRC Trust* above n 47 at para 19.
[50] Children's Act 38 of 2005, sections 6, 7 and 9.
[51] *AB and Another v Pridwin Preparatory School* 2020 (5) SA 327 (CC) ("*Pridwin*") at paras 140 - 141.
[52] Children's Act, section 14.
[53] United Nations Committee on the Rights of the Child, General Comment No 26 (2023) on children's rights and the environment, with a special focus on climate change UN Doc CRC/C/GC/26 at paras 82 - 90. The Constitutional Court has frequently drawn guidance from the CRC's General Comments on the content of the section 28(2) right. See, for example, *Pridwin* above n 51 at para 140.
[54] Convention on the Rights of the Child, United Nations General Assembly, adopted 20 November 1989. South Africa ratified the Convention on 16 June 1995.
[55] General Comment 26 para 85.
[56] Id at para 88.

50 The class action mechanism was developed to ensure access to justice and effective redress, precisely for circumstances such as this. The applicants request judicial permission to use this mechanism.

IV THE HIGH COURT'S JUDGMENT

51 The High Court found for the appellants on several core considerations that favour certification:

51.1 First, the court held that there are ample common issues for class-wide determination[57] and that the resolution of "*any and all of the common issues would help the class members' claims move forward*".[58] The Court itemised those common issues at paragraph 35 of the judgment.[59]

51.2 Second, the court held that this class action is the "*only realistic and appropriate method*" for the class members, the majority of whom are children, to resolve their claims against Anglo.[60] This was due to the undisputed evidence that the class members have no realistic prospect of pursuing claims in Zambia[61] and have no means to launch individual claims against Anglo in South Africa.[62] As the court emphasised, "*no individual litigant in this matter could be expected to match Anglo's resources in one-on-one litigation*".[63]

51.3 Third, the court held that appropriate procedural mechanisms exist to manage the trial,[64] noting that "*Anglo has not offered any practical suitable alternatives to a class action*".[65]

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[57] Judgment Record Vol 41 p 6777 paras 34 - 43.
[58] Judgment Record Vol 41 p 6780 para 42.
[59] Judgment Record Vol 41 p 6777 para 35.
[60] Id.
[61] Mr Mwenye SC Core Vol 3 p 505 para 6.53; FA Core Vol 1 p 140 – 142 para 314; Bald denial and avoidance AA Core Vol 7 p 1112 paras 1327 – 1329.
[62] FA Core Vol 1 p 140 - 142 para 312
[63] Judgment Record Vol 41 p 6779 at para 41.
[64] Judgment Record Vol 41 p 6779 para 41.
[65] Judgment Record Vol 41 p 6780 para 43.

51.4 Fourth, the court accepted that the class representatives and their lawyers are suitable to pursue these claims on behalf of the classes.[66]

51.5 Fifth, the court further endorsed the proposed third-party funding arrangements as necessary and appropriate. It rejected each of Anglo's objections as being without merit.[67]

52 We do not revisit these issues in these heads of argument, as they are amply addressed in the judgment.

53 However, the High Court proceeded to refuse certification, based on five primary findings that have wider implications for our class action jurisprudence.

53.1 First, the court wrongly concluded that it was "*in as good a position as the trial court*" to resolve the complex factual disputes in the matter,[68] and "*there is no chance that the evidence presented to court will change materially after certification*".[69] In the process of making this extraordinary conclusion, the High Court made two central findings of fact against the appellants on issues that were not even disputed on the papers:

53.1.1 The common cause English Law and Zambian Law expert evidence that the draft particulars of claim disclosed a cause of action in Zambian Law; and

53.1.2 The undisputed evidence that Anglo ought, by the 1950s, to have been aware that health risks caused by lead pollution of the neighbouring environment would continue indefinitely into the future because lead was already known to be immobile in the soil.

53.2 Second, the court held that foreign-domiciled litigants are barred from engaging in opt-out class actions in our courts,[70] endorsing a previous *obiter* finding in *De*

[66] Judgment Record Vol 41 p 6772 paras 20 - 33 and p 6780 paras 44 - 45.
[67] Judgment Record Vol 41 p 6781 paras 46 - 85.
[68] Judgment Record Vol 41 p 6815 para 137.
[69] Judgment Record Vol 41 p 6814 para 134.
[70] Judgment Record Vol 41 p 6845 para 224.

Bruyn.[71] Given the High Court's jurisdiction over Anglo as defendant, and its conclusion that the class action was the only realistic mechanism by which class members would obtain access to justice, this finding was fundamentally at odds with the guiding principle that certification of a class action must be guided by the interests of justice. It was also inconsistent with this Court's judgment in *Ngxuza*,[72] and the order granted by the full court in *Nkala*, upheld on appeal in this Court, which permitted an opt-out class action to the benefit of tens of thousands of foreign-domiciled mineworkers.[73]

53.3 Third, 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*"[74] and formulate a class definition that includes "*only those with a triable claim against the prospective defendant*".[75] This new test is directly in conflict with the tests formulated by this Court in *CRC Trust*[76] and by the full court in *Nkala*,[77] which assess overbreadth by reference to sufficient common issues.

53.4 Fourth, the court exercised a choice of law – not an obligation – to apply a Zambian time bar to all claims by women of child-bearing age who suffered injuries before 20 October 2017, even where they had no knowledge of a claim.[78] This choice, has clear implications for the class members rights of access to Court.

53.5 Fifth, the court concluded that it was in the interests of justice to deny certification and, in doing so, gave no consideration to the impact of this decision on children's rights of access to court and the duty to ensure effective redress.[79]

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[71] *De Bruyn v Steinhoff International Holdings N.V.* 2022; 2022 (1) SA 442 (GJ) at para 120 ("*De Bruyn*").
[72] *Permanent Secretary, Dept Welfare, Eastern Cape, v Ngxuza* 2001 (4) SA 1184 (SCA) ("*Ngxuza*").
[73] *Nkala* above n 46.
[74] Judgment Record Vol 41 p 6848 para 232.
[75] Judgment Record Vol 41 p 6862 para 270.
[76] *CRC Trust* above n 47 at para 31.
[77] *Nkala* above n 46 at paras 94 -97.
[78] Judgment Record Vol 41 p 6863 paras 273 - 293.
[79] Judgment Record Vol 41 p 6885 paras 335 - 340.

54 While the High Court exercised a discretion in refusing certification, this Court is at large to intervene where the lower court "*based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts*".[80] As we now turn to demonstrate, the High Court's judgment contains material misdirections and legal errors.

V THE TRIABLE CASE

55 Triability requires two things: first, a tenable case on the law; and second, a *prima facie* case on the facts.[81]

56 Legal tenability requires no more than that the pleadings would survive an exception.[82]

57 A *prima facie* case on the facts is not "*a difficult hurdle to cross*" and "*should not pose any insuperable difficulties for an applicant for certification.*"[83]

57.1 This merely requires "*evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief — <u>not even if the probabilities are against him</u>*".[84]

57.2 A certification court would only find the absence of a prima facie case where the respondent's 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*." Even then this "*<u>is not an invitation to weigh the probabilities at certification stage</u>*".[85]

58 The applicants more than satisfied this triability threshold, presenting detailed draft pleadings, supported by copious evidence, including the evidence of ten experts. This is, without question, the most detailed and extensive case for certification yet presented in our nascent class action jurisprudence.

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[80] *Mukaddam* above n 47 at para 48, citing *SABC v NDPP* 2007 (1) SA 523 (CC) at para 41.
[81] *CRC Trust* above n 47 at paras 39 - 41.
[82] Id at para 35.
[83] Id at paras 40 - 41.
[84] Id at para 40.
[85] Id at para 41.

59 The High Court's rejection of triability reflects three critical flaws, which we expand upon in this section: a) it impermissibly usurped the function of the trial court; b) it misapplied the test for legal tenability; and c) it disregarded the *prima facie* evidence and made crucial adverse findings against the applicants on issues that were not disputed.

The High Court's misdirected approach

60 In its assessment of triability, the High Court adopted Anglo's arguments, almost entirely verbatim, complete with its impermissible weighing of the probabilities and selective treatment of the evidence.

61 In doing so, the High Court held that it was "*in as good a position as a trial court*" to decide the extensive factual disputes on paper.[86] The court proceeded to hold that the case "*will not get better at trial*",[87] and that "*there is no chance that the evidence presented to court will change materially after certification*".[88]

62 This was a clear misdirection, for five reasons.

63 First, the High Court turned the question of triability into a full dress-rehearsal for trial, with severe implications for access to justice:

63.1 On the High Court's approach, the applicants had to litigate their case in full, at certification, without the benefit of discovery, the ability to subpoena documents and evidence, to lead evidence, or to test evidence under cross-examination.

63.2 In *Okpabi,*[89] the UK Supreme Court warned of these dangers of *"conducting a mini-trial"* in interlocutory proceedings, as this 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".*

[86] Judgment Record Vol 41 p 6815 para 137.
[87] Judgment Record Vol 41 p 6817 para 143.
[88] Judgment Record Vol 41 p 6814 para 134.
[89] *Okpabi v Shell* [2021] UKSC 3 at para 26 ("*Okpabi*").

63.3 Permitting such an approach would set a dangerous precedent for future class actions, allowing well-resourced litigants, like Anglo, to turn certification proceedings into a nightmare of complexity and cost, as it has done here, barring all but the most well-resourced from ever launching class actions.

64 Second, there was no basis for the court to rule out the value of discovery, pre-trial evidence-gathering, and oral evidence. That is an inherently impermissible stance at certification, but it is particularly impermissible in this case, involving complex factual disputes spanning a century.

64.1 Anglo has not yet made any meaningful disclosure of its degree of involvement in and control of the Mine's key operations, over the 50-year period. In answer, it declined to address the issue, stating that it can only be properly ventilated and addressed at trial.[90]

64.2 There is no affidavit from any Anglo employee confirming, under oath, that it has no further documents in its possession or control that are relevant to the disputed issues. In earlier interlocutory proceedings, Anglo's counsel expressly disavowed any suggestion that Anglo had no relevant documents.[91] In its answering affidavit, Anglo further itemised an extensive list of documentary evidence which it considered relevant but which it had not yet been able to locate.[92]

64.3 No Anglo employee has gone on affidavit to explain what has happened to its extensive company archives and internal records, if they are no longer in its possession, and to identify who is in possession of the relevant internal company records, correspondence, and documents. This is in circumstances where contemporaneous reports refer to a "triangular" system of correspondence with the Mine, where records of "*all important managerial decisions*" were stored at Anglo's Johannesburg headquarters.[93]

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[90] AA Core Vol 6 p 1046 para 1079: "*the determination of the 'de facto control' issue … is not an issue that is capable of determination at certification stage.*"
[91] Interlocutory proceedings regarding Anglo's request for an extension of time to file the answering affidavit.
[92] AA Core Vol 6 p 1017 para 959ff.
[93] Article by Mr Alistair G. Tough, the first NCCM company archivist, Core Vol 12 p 2031.

64.4 The existence of key records in private archives is hardly a matter of "speculation". Reports by mining archivists confirm that relevant records from the Mine and ZCCM were transferred to private archives in Johannesburg, which are closed to the public.[94] Mr Munene, a mining researcher, notes the significant gaps in the publicly accessible archives, stating that *"[i]n the case of [Rhodesian Anglo American] … its parent company, AAC [Anglo], has historical records and information in their library in Johannesburg, South Africa"* adding that *"[r]esearchers have been unable to access its documents freely because [Anglo] is still active, and like the majority of active corporations, [Anglo] determines who can access their records."*[95]

64.5 The appellants have been limited to evidence available in publicly accessible archives. That their legal representatives have already uncovered so much evidence only stands to their credit. The appellants ought not be punished for diligent research or barred from using the tools of discovery and subpoena to access further, critical records.

65 Third, the High Court considered itself at large to decide the case on paper, holding that the applicants' case relies "*solely on historical documents written by deceased or otherwise untraceable authors*".[96] In doing so, it overlooked the evidence of critical living witnesses, such as Dr Lawrence; the evidence of the class representatives themselves; and, most importantly, the evidence of experts.

66 Fourth, the High Court disregarded the value of this expert evidence, suggesting that experts could be of no assistance in interpreting the meaning of documents.[97] But the disputes between the parties relate to the inferences to be drawn from the detailed historical records on highly complex and technical matters. These are no mere debates over words. As this Court has held, expert evidence on technical matters is both relevant and often critical because the experts "*by reason of their special knowledge and skill …*

[94] Mr Tough's article id; Mr Munene's article Appeal Vol 35 pp 5939 - 5940.
[95] Mr Munene article id.
[96] Judgment Appeal Vol 41 p 6814 para 134.
[97] Judgment Appeal Vol 41 p 6815 para 137.

are better qualified to draw inferences than the trier of fact."[98] The fact that the parties have already presented the evidence of 18 experts is ample demonstration of its significance to this case.

67 Fifth, the Court overlooked the necessity of testing the reliability and credibility of the experts at trial. The appellants have already presented evidence raising serious concerns over the objectivity and independence of Anglo's experts, Dr Banner, Dr Beck, and Mr Sharma.[99] These issues can only be fairly raised and tested through cross-examination, where the experts will have an opportunity to respond.

The tenable case in law

68 As already noted, the legal tenability of the applicants' case, at certification stage, depends on whether it would survive an exception.[100] And an exception must be decided by assuming the truth of all facts alleged by the applicants in their pleadings.[101]

69 The parties agree that the substantive issues are to be determined by Zambian tort law (the *lex causae*), which mirrors the relevant principles of English law in all relevant respects.[102]

70 The content of this foreign law is a question of fact, which requires expert evidence.[103] As a result, the applicants produced expert reports by Mr Mwenye SC, a former Zambian Attorney General[104] and Mr Richard Hermer KC, the current UK Attorney General.[105] Anglo's experts did not disagree, in any material respect, with their summaries of the applicable law.

71 The elements of the tort of negligence are well-settled, requiring: a duty of care; a breach of the duty of care through negligent conduct; actionable harm; and a causal connection

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[98] *PricewaterhouseCoopers Inc v National Potato Cooperative Ltd* [2015] 2 All SA 403 (SCA) at para 97.
[99] RA Core Vol 9 pp 1541 – 1555 paras 337 – 382; AA in Strike Out Core Vol 12 p 2091 - 2108 paras 115 - 149.
[100] *CRC Trust* above n 47 at para 35.
[101] *Mineral Sands Resources (Pty) Ltd v Reddell* [2022] ZACC 37; 2023 (2) SA 68 (CC); 2023 (7) BCLR 779 (CC) at para 41.
[102] Mwenye Core Vol 3 p 396 para 6.19 - 6.22.
[103] *The Asphalt Venture: Windrush Intercontinental SA v UACC Bergshav Tankers AS* [2016] ZASCA 199; 2017 (3) SA 1 (SCA) at paras 30 - 33
[104] Mwenye Core Vol 3 p 494.
[105] Hermer Core Vol 4 p 585.

between the negligent conduct and the harm, involving both factual and legal causation.[106]

72 The applicants' draft pleadings, supported by the founding papers, addressed each of these elements.

73 Anglo did not once allege in its papers, nor did any of its foreign law experts suggest, that the applicants' claims would be excipiable. On the contrary, Anglo's own English law expert, Mr Gibson KC, studied the pleadings and founding papers and confirmed that the case *"raises a 'real issue' to be tried"* on the question of duty of care.[107] He further confirmed that proof of the remaining elements of the tort will depend on the facts and the evidence at trial.

74 The High Court's contrary finding that the claim is "legally untenable" flowed from three primary errors, repeated throughout its judgment.

75 First, the High Court made no finding of excipiability, nor could it sustain such a finding.

76 Second, the High Court disregarded the assumption of truth that would apply to any exception, as it based its conclusions of "legal untenability" on a series of conclusive findings on disputed factual issues, including the foreseeability of harm, causation, and actionable harm.

77 Third, on Anglo's urging, the High Court reached conclusions on the content of English and Zambian law that departed from and materially contradicted the expert evidence, including the legal test for establishing a duty of care, which we address below. This again ignored the principle that foreign law is a question of fact, that must be proven at trial by expert evidence.[108] If Anglo wished to disavow or contradict the conclusions of its own legal expert – as it repeatedly did in argument – it had to present expert evidence, but it failed to do so.

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[106] *Donoghue v Stevenson* (1932) AC 562. Mwenye Core Vol 3 p 496 paras 6.19 - 6.22.
[107] Gibson Core Vol 7 p 1222 para 23.
[108] See n 103 above.

The prima facie case in fact

78 The applicants provided *prima facie* evidence supporting each of the elements of the tort of negligence. In what follows, we address these elements in turn.

Anglo's duty of care

79 Tort law is casuistic in nature. This means that the existence of a duty of care is established by applying pre-existing categories of duty.[109] Only when there is no existing category will a court resort to the flexible *Caparo* test of proximity, foreseeability, and reasonableness to establish a new duty.[110]

80 Both English law experts, Mr Hermer KC[111] and Mr Gibson KC,[112] were in full agreement on the applicable category of duty in this case. They concluded that the pleaded case falls squarely within the principles laid down by the UK Supreme Court in *Vedanta*[113] and *Okpabi v Shell*,[114] concerning the duty of care owed by multinational companies in respect of the acts and omissions of their subsidiaries.

81 Anglo's expert, Mr Gibson KC conceded that this pleaded duty, read with the founding papers, "*raises a 'real issue' to be tried.*"[115] He did so while acknowledging "*the significant scope of the duty alleged"* including that *"it is said to be owed to an entire community of people, as opposed to just employees of a subsidiary"* and *"that it is said to extend over several decades … to individuals that were not even alive at the time of the alleged negligent acts or omissions.*"[116]

82 Mr Mwenye SC's uncontested evidence was that Zambian courts would treat *Vedanta* and *Okpabi* as highly persuasive authority and would apply these principles.[117]

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[109] Hermer Core Vol 4 p 589 – 596 paras 10 - 22.
[110] *Caparo Industries plc v Dickman* [1990] 2 AC 605.
[111] Hermer Core Vol 4 p 588ff (Issue 1); Hermer Core Vol 11 p 1921ff. Mr Hermer KC represented the successful parties in both matters and provided a helpful overview of these judgments and the broader principles.
[112] Gibson Core Vol 7 pp 1219 - 1222 paras 13 - 23.
[113] *Vedanta Resources PLC v Lungowe* [2019] UKSC 20 at para 56 ("*Vedanta*").
[114] *Okpabi* above n 89.
[115] Gibson Core Vol 7 p 1222 para 23.
[116] Id.
[117] Mwenye Core Vol 3 p 498 para 6.28; Mwenye Core Vol 11 p 1919 para 5.2.

83 The relevant principles in *Vedanta* and *Okpabi* are the following:

83.1 The duty of care is established by the degree of *de facto* control over, intervention in, supervision, or advice provided by the parent company in respect of the relevant operations of the subsidiary. [118]

83.2 While this is an open-ended factual inquiry, there are several well-recognised circumstances in which a parent company may assume a duty of care, including:[119] a) taking over the management or joint management of the relevant activity of the subsidiary (Route 1); b) providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as a matter of course by the subsidiary (Route 2); c) promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by the subsidiary (Route 3); and / or c) holding out that it exercises a particular degree of supervision and control over the subsidiary (Route 4).

84 The undisputed evidence of Anglo's direct and indirect involvement in the relevant Mine activities from 1925 to 1974 establishes a *prima facie* case on these principles. All four routes identified in *Vedanta* and *Okpabi* are satisfied by this evidence, due to Anglo's roles as a consulting engineer to the Mine; its role as the Chief Medical Officer of the Group; its repeated interventions in matters of lead pollution and emissions controls at the Mine; and its much touted "group system" of centralised control and management from Johannesburg.

85 Anglo made no genuine attempt to contest this evidence of *de facto* control. It conceded in its answering affidavit that "*the determination of the 'de facto control' issue … is not an issue that is capable of determination at certification stage*" and it therefore declined to "*address the issue meaningfully*". [120]

86 That ought to have been the end of the matter for purposes of certification. Instead, Anglo performed an about-turn in argument. It impermissibly sought to attack the

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[118] *Vedanta* above n 113 at para 49; *Okpabi* above n 89 at paras 25, 146 – 147.
[119] *Okpabi* id at paras 26 – 27; 145 – 148; drawing on *Vedanta* above n 121 at paras 51 – 53.
[120] AA Core Vol 6 p 1046 para 1079.

conclusions of its own expert, suggesting that both Mr Gibson KC and Mr Hermer KC were wrong to conclude that *Vedanta* and *Okpabi* apply to this case.

87 The High Court simply repeated Anglo's arguments that were incompatible with its own expert evidence. It held that *Vedanta* and *Okpabi* are distinguishable and of no relevance here.[121] The Court suggested that this case raises a new duty, involving *"an intergenerational duty of care"* which it regarded as *"untenable"*[122] and would set a "*grave precedent*" that must be rejected.[123]

88 The High Court again overstepped the bounds of what is permissible at certification stage. Its conclusions on the content of foreign law (which again is a question of fact) directly contradicted the common cause evidence of Mr Hermer KC and Mr Gibson KC to the effect that the alleged intergenerational duty of care presented a triable issue.

89 Moreover, none of the English cases cited by the High Court hold that a so-called "intergenerational duty" in tort law is impermissible.[124] Instead, both cases turned on the factual question whether relevant harms were reasonably foreseeable. In this case, there is ample *prima facie* evidence of reasonably foreseeability, as we now turn to demonstrate.

Harm to the Kabwe community was reasonably foreseeable

90 Foreseeability requires *prima facie* evidence either: a) that Anglo foresaw the danger to Kabwe residents; or b) that the danger was reasonably foreseeable.[125]

91 The appellants demonstrated that Anglo knew, or should have known, from an early stage that the operations of the Mine were causing significant pollution of the neighbouring area and a resultant public health risk to the residents living around the Mine.

[121] Judgment Record Vol 41 p 6820 para 150.
[122] Judgment Record Vol 41 p 6822 para 157.
[123] Judgment Record Vol 41 p 6887 para 339.
[124] *Cambridge Water Co Ltd v Eastern Counties Leather plc* (1994) 2 A.C. 264; *Savage v. Fairclough* [2000] Env L.R. 183.
[125] *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 at paras 21, 25.

91.1 In 1924, there were already reports that "*[t]he fumes from the smelter cause discontent and trouble*" and were "*indeed most noxious*", which had already caused "*one or two deaths*".[126]

91.2 Between 1947 and 1949, Dr van Blommestein, Anglo's Chief Medical Officer, unequivocally warned of the dangers of uncontrolled lead fumes and dust and the harmful effects this was having on workers.[127] Dr van Blommestein alerted the Mine's management to the dangers of lead dust and fumes "*both inside and outside the plant*"[128] warning that if his recommendations were not adopted "*there will be a steady increase in the number of cases of lead poisoning in the future.*" [129]

91.3 While Dr van Blommestein was concerned with the occupational hazards of exposure to lead, it was obvious to any observer that the billowing fumes and dust that he observed were not confined to the Mine precincts. In 1948, Mr CT Hardy reported on his inspection of the Mine.[130] "*An observer is struck*," Mr Hardy noted, "*by the enormous amount of fume given off from the blast furnace during the tipping of slag and lead*." [131] The furnaces "*stood in the open and the prevailing winds carry away the dust and fume in a direction past the main building*". [132]

91.4 By the mid-1950s, there were further reports of "*dense smoke and pungent fumes*" which were "*most offensive and irritating*", and which blew directly over the surrounding residential areas on a seasonal basis.[133]

91.5 Anglo ought reasonably to have known that this smoke and fumes contained significant levels of lead. Reports throughout the period reflected that many tons

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[126] FA Core Vol 1 p 83 para 160. Annexure ZMX 65 Core Vol 3 p 432.
[127] FA Core Vol 1 p 83 - 88 paras 163 - 172; RA Core Vol 9 pp 1437 – 1438 paras 53 - 56. Annexures ZMX 37 Core Vol 3 p 395; ZMX 67 - 70 Core Vol 3 pp 434 - 440 and Annexure AA19 Core Vol 7 p 1248.
[128] Van Blommestein October 1947 letter Annexure ZMX 67 Core Vol 3 p 434. Van Blommestein October 1949 letter Annexure ZMX 37 Core Vol 3 pp 395 - 396.
[129] Van Blommestein October 1947 letter Annexure ZMX 67 Core Vol 3 p 435.
[130] Hardy report Annexure ZMX 59 Core Vol 3 p 408.
[131] Id p 420.
[132] Id.
[133] FA Core Vol 1 p 88 para 174; Annexure ZMX 72 Core Vol 3 p 443.

of lead were "*unaccounted for*" in the smelting process, which were being emitted from the sinter plant and smelter stacks.[134]

91.6 By 1959, there was evidence of lead poisoning in dogs in the surrounding community.[135]

91.7 In 1960, Anglo knew that water polluted by the Mine's operations had poisoned a neighbouring farmer's livestock and crops.[136] The reports acknowledged that "*we have without doubt, been polluting the Kamakuti Dambo and the Nuwishi River*" and that "*toxic elements"* had penetrated the soils. What those "*toxic elements*" were leaves little to the imagination – this was a major lead mine, after all.

91.8 By 1963, the municipality again recorded complaints of noxious fumes emanating from the Mine, noting that this nuisance was becoming more frequent.[137]

91.9 On their frequent trips to the Mine, Anglo's officials could not have failed to observe the noxious fumes that were emanating from the smelter and blanketing the surrounding community.[138]

92 It is not in dispute that by 1970, at the very latest, Anglo had <u>actual</u> knowledge and foresight that mining and smelting had caused catastrophic levels of lead pollution in the communities surrounding the Mine that was killing children.

92.1 Anglo knew this, as a fact, due to Dr Lawrence's work, supported by Professor Lane and King's findings and recommendations in 1970, and confirmed by Dr Clark's further research between 1971 and 1974.

92.2 Anglo also knew, from Professor Lane and King recommendations, that this lead pollution had settled in the soil, posing such a danger that it could be addressed only by relocating the townships or by replacing all the topsoil.

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[134] Harrison Core Vol 11 p 1840 para 7.42, p 001-9539 para 7.45. Betterton Core Vol 11 p 1884 para 11.1.9.
[135] Annexure ZMX 106 Core Vol 10 p 1685.
[136] Annexure ZMX 97 Core Vol 10 p 1675.
[137] FA Core Vol 1 p 90 para 178; Annexure ZMX 75 Core Vol 3 p 446.
[138] FA Core Vol p 89 para 175; Annexure ZMX 73 Core Vol 3 p 444.

93 The precise extent of Anglo's actual knowledge of the dangers of lead pollution before 1970 will emerge through discovery and the subpoena of relevant company records.

94 In any event, there is ample *prima facie* evidence to conclude that a reasonable company in Anglo's position would have foreseen the dangers, investigated them and thus established that it was poisoning the children of the Kabwe community. Had Anglo displayed a modicum of common sense and human decency, this would have been the case.

94.1 It is common cause that the toxic properties of lead have been known for thousands of years.[139]

94.2 Anglo and the Mine knew that lead dust and emissions posed a serious health risk to workers at the Mine and Anglo intervened to control the processes of the Mine in this regard.[140]

94.3 It was clear from at least the 1950s that the Mine was sending substantial lead emissions into the Kabwe environment and creating dumps from which lead polluted dust blew around the Kabwe area.[141]

94.4 In the circumstances, Anglo was, at the very least, under a duty to investigate whether, and to what extent its operations were poisoning the surrounding population.

94.5 Yet it failed to do so and now seeks to rely on its own indifference to the predictable harm it was causing by contending that it had no duty to investigate the health impacts of the operations of the Mine in the Kabwe community and can

[139] FA Core Vol 1 p 70 paras 137 – 138. Not denied AA Core Vol 6 p 1051 paras 1094 – 1096.
[140] FA Core Vol 1 p 83 para 160; FA Core Vol 1 pp 83 - 85 paras 163 - 166; Annexure ZMX59 Core Vol 3 p 408; Annexure ZMX67 Core Vol 3 p 434; Annexure ZMX68 Core Vol 3 p 436; Annexure ZMX71 Core Vol 3 p 441; Annexure ZMX78 Core Vol 3 p 444.
[141] Provincial Medical Officer letter 21 November 1955 Annexure ZMX72 Core Vol 3 p 443; Town Council Minutes 28 August 1963 Annexure ZMX75 Core Vol 3 p 446 (Item 471); Reilly and Reilly Article July 1972 Annexure ZMX77 Core Vol 3 p 452; Clark Thesis Annexure ZMX3 Core Vol 2 p 197 at p 228.

rely on its professed ignorance of those impacts to resist the allegation of negligence against it.[142]

95 The High Court accepted Anglo's argument which sought to characterise the applicants' case in this regard as an attempt to impose contemporary standards on historical actors. This was a misdirection. At all material times during Anglo's period of control of the Mine

95.1 Basic common sense would have made clear that the operations of the Mine were likely to be causing substantial harm to the health of Kabwe residents;

95.2 Basic human decency would have demanded that Anglo investigate to establish the true facts; and

95.3 A cursory investigation would have established that the operations of the Mine were causing massive lead pollution in Kabwe and poisoning substantial numbers of Kabwe residents.

96 That this is so, is clear from

96.1 The example of the Broken Hill Commission where a Commission appointed *"to gather the best information obtainable as to the amount of sickness and the percentage of deaths due to lead poisoning under the present conditions of work at the Broken Hill silver-mines"* did not confine its investigations to questions of occupational health, but saw the obvious need to investigate the extent to which emissions from the Broken Hill mine were leading to lead poisoning of residents of the Broken Hill town;

96.2 From as early as 1907, Mine officials knew that it was "*not desirable*" to locate residential areas close to the Mine as residents would be exposed to "*refuse, fumes and smoke from the furnaces of the mine plant, as well as water contaminated by the mining and metallurgical operations*".[143]

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[142] AA Core Vol 6 p 1074 para 1178.
[143] FA Core Vol 1 p 82-3 para 159; Annexure ZMX 64 Core Vol 3 p 431.

96.3 Dr Lawrence, who within two months of his arrival as mine doctor in Kabwe in 1969 became so concerned at the signs of lead poisoning in local children that he conducted his own investigation into blood lead levels and uncovered the chilling truth that we now know about the extent of the lead poisoning caused by the Mine[144]

96.4 Dr Clark, who in his 1975 thesis based on research from 1971 to 1974, cited Legge's third aphorism from the 19th century which states:

> *"Practically all industrial lead poisoning is due to the inhalation of dust and fumes and if you stop their inhalation you will stop the poisoning"*

And then made the self-evident observation that

> *"This important aphorism might well be applied not only within a lead industry but also to the surrounding general community where persons may be at risk owing to industrial effluent."*[145]

Dr Clark then proceeded to conduct the investigation which basic common sense and human decency ought to have driven Anglo to conduct decades earlier, and established that the Mine was poisoning vast numbers of Kabwe residents.[146]

96.5 Anglo's obligations, in these circumstances, were clear: "*a large and multi-faceted corporation ha[s] an obligation, not merely to acquaint itself with what [is] in the literature, but to seek out information before engaging in an enterprise which [is] known to carry risks*".[147]

96.6 The risks that must be guarded against include risks to persons on the other side of the mine fence.[148]

97 Anglo was aware of Dr Lawrence's report.[149]

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144 Lawrence Affidavit Core Vol 4 pp 632 - 635 paras 13 to 25.
145 Clark Thesis Annexure ZMX3 Core Vol 3 p 378.
146 Id.
147 *CSR Ltd v Young* 1998 16 NSWCCR 56 2260; (1998) Aust Torts Reports 81-468 at 64,952.
148 *Margereson v JW Roberts [1996] Env LR* 304 (CA) at 310: *"there is nothing in the law that circumscribes the duty of care by reference to the factory wall".*
149 Lawrence Affidavit Core Vol 4 p 636 para 28.

98 It is likely that it was also aware of the fact that, by June 1970, a Mine Medical Officer had certified that a child in the township had died from lead poisoning. Anglo American Central Africa was certainly aware of this fact.[150]

99 By 1971, eight children were known to have died in Kabwe due to lead poisoning.[151]

100 Through the acts of Dr Lawrence, Anglo had been released from its wilful blindness as to the lead poisoning problem created by the Mine by 1970 at the latest. However, Anglo's response to Dr Lawrence's findings was instructive

100.1 Professors Lane and King were commissioned to make recommendations as to what could be done to cure the problem of lead poisoning to the community caused by the Mine.[152]

100.1.1 Professors Lane and King reported that the entire Kasanda Township should be moved. They were told that *"this would be far too expensive and please think again."*

100.1.2 They then recommended scraping the top layer of ground from throughout the township and replacing it with unpolluted earth, whilst tarring all roads and covering the dumps. The response to this recommendation was that the remediation of the polluted earth in the township was *"thoroughly impractical … and would lead to potential panic.*"

100.1.3 Anglo's response to the Lane and King recommendations also recorded that *"something should be done about the dumps and that roads should be tarred"* but instead of removing or remediating the township it would resolve a longstanding dispute with the Union by building 488 houses in a new location to replace a similar number of substandard houses

[150] Annexure ZMX105 Core Vol 10 pp 1683 - 1684.
[151] Clark Thesis Annexure ZMX2 Core Vol 2 p 202.
[152] Their recommendations and Anglo's response to these recommendations in July 1970 are recorded in Annexure ZMX107 Core Vol 10 p 1686.

occupied by Mine employees in the township. *"The new houses could be built over an extended period causing no panic and satisfying the Union."*

100.2 The decision ultimately taken in response to the Lane King report (on 7 September 1970)[153] was

100.2.1 to water the dumps to suppress dust dispersal,

100.2.2 to reject the recommendation to remediate Kasanda by replacing polluted topsoil and instead to establish the Chowa township east of the mine and to demolish mine employee houses in sections A, B and C of Kasanda. The employees whose houses had been demolished would be moved into Chowa or into houses vacated elsewhere in Kasanda by other more senior employees, and

100.2.3 to leave the remaining areas of Kasanda fully occupied but to tar the roads in these areas.

100.3 The rehousing scheme was ultimately implemented between January and June 1973 and resulted in 3000 people (mine employees and their families) moving from Kasanda to Chowa, but still left 8000 Kasanda residents living in an area which was now clearly known to be a very serious source of ongoing lead poisoning.[154]

100.4 In his 1975 thesis Clark reported surface lead soil concentrations in Chowa that were not significantly better than those in Kasanda. So the rejection of the primary recommendations of the Lane King report resulted in a situation where the known lead poisoning risk to the community was barely affected.[155]

100.5 The context for the debates about duty of care and negligence is then not one of unfairly imposing contemporary standards on Anglo. Rather it is one where:

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[153] Annexure ZMX76 Core Vol 3 at pp 447 - 451.
[154] Clark Thesis Annexure ZMX3 Core Vol 2 pp 219 - 220.
[155] Clark Thesis Annexure "ZMX3" Core Vol 2 p 218 (Fig 1).

100.5.1 Available scientific knowledge about lead poisoning, basic common sense and human decency ought to have alerted Anglo to the fact that the Mine was poisoning large numbers of Kabwe residents.

100.5.2 When Dr Lawrence's actions made it impossible for Anglo to sustain its wilful blindness, and expert advice was commissioned, it did nothing to prevent the Mine from simply ignoring the expert advice and leaving the Kabwe community continuing to be subject to an overwhelming risk of lead poisoning.

The foreseeable harm to the class members

101 Was it reasonably foreseeable that this lead pollution would pose a long-term danger to the class members after 1974?[156] The applicants have presented ample evidence of the reasonable foreseeability of harm, up to 50 years later, when the class members would have been exposed to toxic lead pollution in childhood.

102 First, lead's properties, as a heavy, stable poison that does not naturally corrode or break down, have been known for thousands of years.[157]

103 Second, the applicants provided expert evidence from three international experts, Professor Harrison, Professor Taylor and Professor Betterton, who confirmed that the long-term dangers of lead pollution, up to 50 years into the future, were reasonably foreseeable during the relevant period:

103.1 Professor Harrison expressed that opinion on two independent grounds. First, the "l*ong-term stability*" of lead was a fact that has been "*known for centuries, and would have been clearly understood by Anglo*".[158] Second, he identified scientific studies dating back to the 1950s on the immobility of lead in the soil and the

[156] The class of women of childbearing age will include women who were born in the late 1970s, shortly after Anglo's departure.
[157] FA Core Vol 1 p 35 para 55. Admitted with qualification AA Core Vol 6 p 1034 para 1022 - 1023: "Lead may accumulate over time and become a long-lasting pollutant where it is released into an environment which is then not properly remediated". FA Core Vol 1 p 70 paras 137 - 138; Not denied AA Core Vol 6 p 1051 paras 1094 – 1096.
[158] Harrison Core Vol 4 p 642 para 23.

largely irreversible nature of lead pollution, which provided reasonable grounds to foresee the long-term danger.[159]

103.2 Professor Taylor supported these conclusions, providing detailed evidence for his conclusion that *"[t]he very fact that the company [Anglo] were miners should be sufficient to answer this question"* due to the centuries of knowledge on lead's stability and toxicity.[160]

103.3 Professor Betterton agreed, adding that given the centuries of detailed knowledge of lead's characteristics, "*the basic chemical and physical properties governing the fate and transport of lead and lead compounds in the environment should have been well-known to the company's chemists and metallurgists at the time*".[161]

104 Beyond a bald denial, these allegations as to foreseeability were not put in issue. In particular, Anglo presented no expert evidence of its own to contradict the expert evidence of the appellants' experts. Its own experts on lead pollution – Mr Sharma and Mr George – were entirely silent on this issue.

105 <u>Third</u>, the recommendations by Professor Lane and Dr King, in 1970, that the topsoil in the townships surrounding the Mine needed to be removed and replaced, provided more than reasonable grounds to conclude that a) the lead pollution had entered the soil and b) that the problem was not transient and the danger would remain unless all topsoil was remediated.

106 <u>Finally</u>, the precise state of Anglo's scientific knowledge of the long-term effects of lead pollution is a matter that will emerge in discovery. The applicants will, in due course, call for all of Anglo's internal records on the relevant science of lead pollution at the time, and the testing that it conducted at the Mine or elsewhere.

107 The High Court did not address the bulk of this *prima facie* evidence. Instead, it inexplicably rejected the applicants' expert evidence on the reasonable foreseeability of

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[159] Harrison Core Vol 4 p 643 para 25.
[160] Taylor Core Vol 3 p 525. See also pp 526-8.
[161] Betterton Record Vol 5 p 690 para 5; Core Vol 3 p 480 para 5 continue.

harm to future generations, despite the fact that Anglo had put up no expert evidence of its own to contradict this expert evidence. In so doing, the High Court misdirected itself in several material respects:[162]

107.1 First, the Court made no reference to Professor Taylor's uncontested evidence on the reasonable foreseeability of harm.

107.2 Second, the Court quoted from a section of Professor Betterton's report that was not relevant to this question.[163] It then concluded that the irrelevant quoted section did not establish that "*the Mine or Anglo were aware of the long-term harm*".[164] It simply ignored the relevant section of Professor Betterton's report quoted in paragraph 103.3 above.

107.3 Third, the court then sought to reject Professor Harrison's expert evidence, suggesting that despite the undisputed scientific evidence of lead's immobility, dating back to the 1950s, this somehow does not establish that "*lead poses a threat to future generations when it remains in the environment*".[165]

107.4 The court concluded by quoting Professor Harrison's report out of context, to suggest that he could only establish reasonably foreseeabilty from 1974 onwards,[166] despite his report clearly referencing studies supporting the reasonable foreseeability of the long-term danger dating to the 1950s at the very least.

108 The High Court further adopted Anglo's argument that harms were not reasonably foreseeable, because of "evolving standards" of lead poisoning. The court suggested that the authorities regarded blood lead levels between 50 and 60 μ/dL as "typical" in the 1950s and 1960s. This reasoning is again mistaken, both on the facts and the law.

109 First, it is inconsistent with the evidence.

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[162] Judgment Record Vol 41 p 6812 p 130 - 133.
[163] Judgment Record Vol 41 p 6812 para 131.
[164] Judgment Record Vol 41 p 6813 para 132.
[165] Judgment Record Vol 41 p 6813 para 132.
[166] Judgment Record Vol 41 p 6812 para 133.

109.1 The threshold levels cited by Anglo did not indicate that BLLs below those levels were safe. By the late 1950s it had been recognised that "*the actual level at which poisoning occurs is variable"*[167] and, by the early 1960s, that clinicians should do their best to "*detect and treat lead toxicity before the onset of very severe symptoms*" and "*Preconceived ideas about the level of blood lead at which toxicity occurs should be abandoned"*.[168] This was 10 years before Anglo stopped operating the mine**,** at which time there is no evidence they sought to investigate or prevent lead poisoning in the community before the independent investigations of Dr Lawrence compelled them to do so.

109.2 In any event, while Anglo was still operating the Mine, Dr Lawrence and Dr Clark's studies showed that that children in Kabwe were registering BLLs far in excess of the reference values that were applicable at the time. For instance, Clark's blood testing between 1971 and 1974 showed that BLLs of 80 - 100 ug/dL were common.[169] Dr Lawrence recalled that almost all of the BLLs of the children he tested were in excess of 40 ug/dL, many were in excess of 100 ug/dL and they ranged up to 403 ug/dL. Even by the lower thresholds of the day, Anglo would have known that it had a public health catastrophe on its hands.

110 Second, this argument is unsustainable on the law. Reasonable foreseeability relates to the general type (the *genus*) of the harm, not the precise nature or degree of the harm.[170] All that needs to be proved at trial is that it was reasonably foreseeable that children may suffer harm from exposure to lead. The precise nature and extent of that harm and the precise threshold levels of BLLs required to trigger harm need not have been foreseeable.

111 For these reasons, courts have repeatedly rejected these "evolving standards" arguments in cases involving asbestos pollution:

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[167] Moncrieff et al "Lead poisoning in children" *Archives of Disease in Childhood*, 1 February 1964 ZMX62 Core Vol 3 p 429 lines 35 - 42.
[168] Moncrieff et al "Lead poisoning in children" *Archives of Disease in Childhood*, 1 February 1964 ZMX62 Core Vol 4 p 522 lines 20 - 32.
[169] Affidavit of Dr Lawrence Core Vol 4 p 633 para 13 to p 635 para 25. Clark's Thesis Annexure ZMX 3 Core Vol 2 p 197.
[170] *Jolley v Sutton* LBC [2000] 1 WLR 1082 at 1091D: *"what must have been foreseen is not the precise injury which occurred but injury of a given description. The foreseeability is not as to the particulars but the genus".*

111.1 In *Margereson v JW Roberts*,[171] the Court of Appeal considered damages claims brought by claimants who had been exposed to asbestos as children in the 1930s and 1940s. At that time, it was not yet known that asbestos could cause mesothelioma, an aggressive type of lung cancer, nor was it yet known that breathing in a single asbestos fibre was sufficient to cause injury. But that was held to be irrelevant to reasonable foreseeability. Asbestos was known to be dangerous. It was also reasonably foreseeable that exposure to asbestos dust could cause a spectrum of pulmonary injuries. That was sufficient. As the lower court observed, "*[o]nce it is established that personal injury … is reasonably to be foreseen the fact that the particular form in fact resulting was unforeseeable is irrelevant*".[172] The Court of Appeal agreed.[173]

111.2 Similarly, in *CSR v Young*,[174] the New South Wales Court of Appeal rejected the defendant's appeals to the lack of general knowledge of the environmental risks posed by asbestos and the absence of any agreed standards for safe levels of asbestos in the air. The majority concluded that *"[f]oreseeability does not mean foresight of the particular course of events causing the harm. Nor does it suppose foresight of the particular harm which occurred, but only of some harm of a like kind."*[175] The known fact that asbestos dust was harmful was enough.

111.3 The evidence shows that BLLs below 40ug/dL entail injuries of the same type as BLLs above 40ug/dL.[176] It follows that the class members suffered harm of kind that was foreseeable to Anglo at the relevant time.

112 The reasoning in those cases applies with equal, if not greater force to victims of lead poisoning in Kabwe. Our knowledge of the dangers posed by asbestos is comparatively recent. The dangers of lead have been known for thousands of years. Knowledge of this danger may have grown in specificity, but reasonable foresight of harm does not require

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[171] *Margereson v JW Roberts* [1996] Env LR 304 at 310.
[172] Margereson *v J W Roberts Ltd.* [1996] P.I.Q.R. P154 p 180.
[173] *Margereson v J W Roberts Ltd.* [1996] EWCA Civ 1316 p 308.
[174] *CSR Ltd v Young* above n 147.
[175] Id at p 19, citing *Mt Isa Mines Ltd* v *Pusey* (1970) 125 CLR 383 at 402.
[176] FA Core Vol 1 pp 37-40 paras 63-4.

detailed scientific knowledge of the biomechanics of lead injury or precise measurements of levels of lead in the blood.

Negligence

113 Negligence turns on two questions: a) What would a reasonable person, exercising basic commonsense and decency, have done in Anglo's position? b) Did Anglo's actions fall short of this standard of reasonable conduct?

114 This is an objective standard that does not depend on evidence of how others acted at the time. In *Healthcare at Home Limited v The Common Services Agency,*[177] Lord Reed explained that the "*reasonable person*" is a legal fiction, that merely describes a "*legal standard applied by the court*".[178]

115 The applicants' draft pleadings and evidence establish a *prima facie* case of Anglo's negligence on five grounds, covering the relevant period from 1925 to 1974:[179]

115.1 Anglo's failure to investigate and monitor the impact of lead pollution on the Kabwe community;

115.2 Anglo's failure to put in place adequate controls to prevent and mitigate lead pollution;

115.3 Anglo's failure to protect the communities, by constructing housing and townships in the worst fallout zone and failing to relocate those communities and remediate the polluted environment it had created.

115.4 Anglo's failure to warn the communities and the authorities of the known danger.

115.5 Anglo's failure to cease or relocate the smelting activities, if the danger could not be contained.

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[177] *Healthcare at Home Limited (Appellant) v The Common Services Agency (Respondent) (Scotland)* [2014] UKSC 49 at para 1 - 3.
[178] Ibid at para 3.
[179] FA Core Vol 1 p 98 para 197, p 103 para 211; Draft PoC Annexure ZMX1 Core Vol 1 p 171 para 45, p 175 para 47.

116 The High Court did not address these pleaded grounds in any detail, incorrectly suggesting that the applicants' papers were somehow "*bereft of any specification of what Anglo is said to have done wrong*".[180]

117 The applicants contend that Anglo was negligent throughout the relevant period. However, for purposes of certification, *prima facie* evidence of Anglo's negligence at any time during its 50-year involvement will suffice.

118 The evidence of Anglo's negligence from 1969 to 1974 is sufficient illustration of the triable issue, but it was almost entirely overlooked by the High Court.

119 Due to Dr Lawrence's single-handed efforts, Anglo knew, by 1970 at the latest, that it had created an environmental catastrophe, which was killing children and infants.

120 Dr Lawrence's investigations reflect what any reasonable person with a modicum of human decency would have done when confronted with the self-evident dangers: they would have investigated and monitored the danger. Yet, on Anglo's own version, it failed to conduct any such investigations before 1970. Anglo issues a bald denial that it had any duty "*to conduct monitoring and evaluation"* and *"to take steps to monitor the health impacts of lead pollution on the surrounding community*". [181]

121 After Dr Lawrence's findings, Professor Lane and Dr King were commissioned in 1970 to conduct a study and to provide their recommendations. While that Lane / King report has not yet been revealed, we know from contemporaneous correspondence that they made strong recommendations to Anglo:[182]

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

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

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[180] Judgment Record Vol 41 p 6817 para 142.
[181] AA Core Vol 6 p 1074 para 1178.
[182] FA Core Vol 1 p 90 para 179; Annexure ZMX 76 Core Vol 3 p 447; RA Core Vol 9 p 1449 para 92.2; Annexure ZMX107 Core Vol 10 p 1686.

121.3 They further advised Anglo and the Mine that if relocation could not be done, then all topsoil had to be replaced, recognising that the soil was laced with poisonous lead.

122 The available evidence demonstrates, *prima facie*, that Anglo and the Mine refused to fully implement these recommendations, preferring instead to adopt piecemeal interventions:

122.1 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*."[183]

122.2 Anglo and the Mine rejected the further proposal to remove and replace the topsoil. This was rejected out of hand as being *"impracticable*" and likely to "*lead to potential panic*".[184]

122.3 In the end, Anglo relocated an estimated 3000 of its workers and their families to the newly developed township of Chowa, leaving behind more than 8000 workers and their families in the most contaminated areas.[185]

122.4 Thousands of other residents of these contaminated townships, who were not employed by the Mine, were ignored.[186] Anglo and the Mine made no attempt to assist these remaining residents, describing them as the "*squatter problem*". [187] The Mine's General Manager suggested that once the Mine's employees had been moved from the affected townships "*we could withdraw completely from involvement with the squatter problem as none of our employees would be in the area*." [188]

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[183] RA Core Vol 9 p 1449 para 92.2; Annexure ZMX107 Core Vol 10 p 1686.
[184] Ibid; Annexure ZMX105 Core Vol 10 p 1683.
[185] Clark Thesis Core Vol 2 p 219 para 1.
[186] Id, Clark recorded several thousand other residents remaining in the area (8000 residents remaining in Kasanda and 3000 remaining in Makululu).
[187] Annexure ZMX 76 Core Vol 3 p 447; p 450 para 6.
[188] Id p 450 para 6.

122.5 The limited relocation programme to nearby Chowa did not meaningfully address the danger. In his thesis Clark reported surface lead soil concentrations in Chowa that were not significantly better than those in the township of Kasanda, from where many residents were moved.[189] So, the rejection of the primary recommendations of the Lane / King report resulted in a situation where the known lead poisoning risk to the community was barely affected and the rehousing scheme placed workers and their families in a contaminated area, that remains severely contaminated to this day.

123 This is the very definition of *prima facie* negligence: evidence that calls for an answer at trial.

123.1 Anglo has offered no explanation for its failure to properly implement Professor Lane and Dr King's full recommendations in 1970.

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

123.3 There is no evidence that Anglo made any alterations to its smelting operations in response to these reports and the acknowledged dangers.

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

123.5 And 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 by that time.

124 The High Court's dismissive treatment of the appellants' case, as suffering from "*hindsight bias*" and failing to articulate "*prevailing standards*", is impossible to square with the evidence and the law:

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[189] Clark Thesis Annexure ZMX3 Core Vol 2 p 218 (fig 1), p 233 ("Lead is widespread over Kabwe, but it is more concentrated in Kasanda, Chowa and Makalulu areas"); 238 ("Chowa, where the ground lead is also high").

124.1 First, the dangers were not a matter of "hindsight", as Anglo had specific knowledge that children were dying, yet it failed to adhere to the standards deemed applicable by its own experts at the relevant time.

124.2 Second, the High Court was mistaken in imposing an onus on the plaintiffs to articulate the "*prevailing standards*" at other lead mines. No such onus exists in English or Zambian law, nor was it supported by any of the foreign law experts. As emphasised above, reasonableness is a legal standard, based on the facts of each case, that does not depend on how others may have behaved. As the English High Court has made clear "*if standard practice was inherently dangerous, it cannot be condoned as sound and rational even though almost everybody does the same"*.[190]

124.3 Third, while the High Court referred to *Thompson v Smith Shiprepairers (North Shields) Ltd*,[191] it ignored the key principle established in that case. There Mustill J held that while evidence of industry standards may be a relevant consideration, this cannot be determinative of negligence. This is because a defendant cannot be exonerated merely by showing that others were "*just as negligent*" at the time.[192] Moreover, where a party, like Anglo, "*has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions.*"[193]

124.4 Fourth, in *Morris v West Hartlepool Steam Navigation Co Ltd*, [194] the Court of Appeal held that a defendant seeking to rely on a defence of "prevailing standards" must show that those standards operated in "*like circumstances*". But Anglo has not identified the standards that it relied upon, nor has it pointed to any lead mine in the world that operated in "like circumstances" to the Kabwe Mine: a

[190] *Begum v Maran (UK) Ltd* [2020] EWHC 1846 (QB) at para 15.
[191] *Thompson v Smith Shiprepairers (North Shields) Ltd* [1984] 1 All ER 881 at 889, citing *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] 1 All ER 385.
[192] *Thompson* ibid.
[193] Thompson ibid, citing Swanwick J in *Stokes v GKN (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 at 1783.
[194] *Morris* above n 191 at p 402 (Lord Cohen) at 402.

colonial operation in which black workers and their families were housed directly downwind of the smelter, causing the deaths of children.[195]

125 As for the High Court's finding that it is "*undisputed that Anglo installed emission controls that were state of the art*", that simply ignored the evidence. The applicants presented extensive *prima facie* evidence showing substantial deficiencies in the design and operation of the plant and smelting equipment over the decades, as confirmed by Professors Harrison and Betterton in their expert reports.[196] This is evident from the timeline of contemporaneous reports, warning of critical failures:

125.1 It is common cause that there were no emission controls whatsoever on the open blast furnaces, which remained in use from 1925 until at least 1945, under Anglo's watch.[197]

125.2 The limited emission controls that were installed on the Newnam Hearth plant, which came into operation in 1946, were primarily aimed at recapturing valuable lead rather than protecting workers and the community.[198]

125.3 The absence of adequate controls was evident from contemporaneous accounts of "enormous" quantities of lead fumes and dust being vented directly into the atmosphere,[199] monthly reports of significant "stack losses", and frequent equipment breakdowns and malfunctions.[200]

125.4 When Dr van Blommestein raised the alarm in 1947 the Mine, with Anglo's knowledge and evident approval, chose to put off the implementation of proper emission controls to save costs.[201]

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[195] FA Core Vol 1 p 45 para 74; Annexure ZMX13 Core Vol 3 p 368.
[196] Harrison Core Vol 11 p 1839 - 1842 paras 7.41 - 7.43; Betterton Vol 11 pp 1883 - 1888 para 11.1.4 - 11.1.17.
[197] AA Core Vol 4 p 681 paras 99 - 101. AA Core Vol p 685 para 112, Anglo states that the Newnam Hearth Plant was "*the first time that the lead recovery process at the Mine had an emissions control system*".
[198] Betterton Core Vol 3 p 1628.
[199] Hardy report FA Annexure ZMX 59 Core Vol 3 p 420.
[200] Betterton Core Vol 11 p 1883 paras 11.1.5 - 11.1.11; Harrison Core Vol 11 p 1840 - 1841 paras 7.42 - 7.43.
[201] FA Core Vol 1 pp 83 - 88 paras 163 - 172; RA Core Vol 9 pp 1437 - 1439 paras 53 - 56. The timeline of correspondence: Van Blommestein October 1947 letter Annexure ZMX 67 Core Vol 3 p 434; November 1947 responses Annexures ZMX68 - 69 Core Vol 3 p 436 - 437; Van Blommestein October 1949 letter Annexure ZMX 37 Core Vol 3 pp 395 – 396; November 1949 response Annexure AA19 Core Vol 11 p 1248.

125.5 The Dwight Lloyd plant, introduced in 1953, also proved to be ineffective in containing lead emissions, with records showing that copious amounts of lead continued to be emitted as smoke, dust and fume.[202]

125.6 After the Dwight Lloyd plant was decommissioned in 1957, the Mine returned to using the heavily polluting Newnam Hearth plant without implementing any further emission controls and despite Dr Van Blommestein's warnings of the dangers.[203]

125.7 The Imperial Smelting Furnace plant, installed in 1962, was far from clean, well-functioning technology. Equipment failures were common, lead poisoning within the plant was still commonplace, there were increasing reports of noxious fumes in surrounding community, and lead-bearing emissions and effluent continued to pour into the environment.[204]

125.8 Throughout this period, there were frequent problems with the Mine's much vaunted electrostatic precipitator, baghouse failures, and breakdowns of the flue chain leading to ventilation into the atmosphere, all of which contributed to substantial fugitive lead losses venting into the atmosphere.[205]

126 All of this speaks to a pattern of neglect and dysfunction, memorably described in a 1970 report as *"the 'Broken Hill Attitude' which may be summed up as:- the place here has always been in this state so a bit more rubbish or a dump here or there will not make any difference".*[206] The picture painted by that internal memorandum is not of a Mine using state-of-the-art technologies diligently and effectively to manage lead emissions and environmental pollution.

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[202] FA Core Vol 1 p 88 para 173; RA Core Vol 9 pp 1460 - 1461 para 126; Harrison Core Vol 11 p 1840 para 7.42.

[203] FA Core Vol 1 p 89 para 176; Not denied AA Core Vol 4 p 692 para 136, Core Vol p 1064 paras 1164 - 1165.

[204] FA Core Vol 1 p 90 para 178; Annexure ZMX 75 Core Vol 3 p 446 ("noxious fumes"); Annexure ZMX 95 Core Vol 10 p 1671 ("high incidence of lead absorption"); Annexure ZMX 101 Core Vol 10 p 1682.

[205] Baghouse failure and flue chain – RA Core Vol 9 p 1461 para 126.2; Precipitator issue – Harrison Core Vol 11 p 1840 para 7.42; RA Core Vol 9 p 1461 para 126.3.

[206] RA Vol 9 p 1458 paras 121 - 123; Annexure ZMX 89 Core Vol 10 p 1667a - 1667b.

Factual causation

127 To establish factual causation, it is not necessary to prove that Anglo's conduct was the "but for" cause of the ongoing lead pollution and harms in Kabwe.

128 In cases of "cumulative causation", such as this, where injury is caused by an accumulation of actions, it suffices to show that Anglo made a "material contribution" to the pollution and the harms.[207] Both English law experts agreed on this test.

129 This is not a high bar. A material contribution is simply a contribution that is more than *de minimis* – trivial or of no significance. [208]

130 Once a material contribution is established, the extent of Anglo's liability will ultimately be apportioned according to its relative contribution to the harm. [209] That process of apportionment does not require any precise scientific measurement, but is instead a "*rough and ready*" exercise, shaped by considerations of fairness and justice. [210] That is self-evidently a matter for the trial court.

131 For purposes of certification, there is ample *prima facie* evidence, supported by expert reports, to establish that Anglo's negligence made a material contribution to the ongoing dangers:

131.1 Anglo does not dispute that the critical period from 1925 to 1974 accounted for over 66% of the Mine's lifetime production of lead. [211]

131.2 Anglo cannot dispute that, by 1974, the Kabwe environment was already heavily lead polluted as result of its 50 years of lead mining and smelting.[212]

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[207] Hermer Core Vol 4 p 600 paras 29 - 31; Gibson Core Vol 7 p 1224 at para 42ff. See *Sienkiewicz v Grief* [2011] 2 AC 229 at paras 16 - 17.
[208] *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at pp 618 - 619.
[209] Hermer Core Vol 4 p 601 para 33.
[210] *Sienkiewicz* above n 207 at para 17.
[211] FA Core Vol 1 p 105 - 106 paras 221 - 222; Annexure ZMX 79 Core Vol 3 p 458; Not denied: AA Core Vol 4 p 682 para 107 (1925 - 1929 = 2,4% of lead production); AA Core Vol 4 p 684 para 109 (1937 – 1945 = 1% of lead production) AA Core Vol 4 p 686 para 117 (1946 – 1962 = 29% of total lead production AA Core Vol 4 p 693 para 139 (1963 – 1974 = 33% of total lead production); Core Vol 7 p 1084 para 1202; Sharma Core Vol 7 p 1154 ("*65.5.% of the lead produced at the Plant was processed between 1925 and 1974*").
[212] See, for example, Clark's thesis Annexure ZMX 3 Core Vol 2 p 197.

131.3 Anglo readily concedes that "*once an area becomes contaminated with lead it will persist for many decades or even centuries*".[213]

131.4 As Prof Betterton notes: "*given the fact that Anglo produced about half a million long tons of lead whilst it operated the facility over a period of nearly 50-years, it is inconceivable that they did not materially contribute to lead contamination and exposure in Kabwe*".[214]

131.5 This is reinforced by Prof Harrison's "*mass balance*" calculations,[215] showing that the lead pollution from 1925 and 1974 would have had a major influence upon current soil lead levels in Kabwe, specifically the area downwind of the smelter site. Prof Harrison compared emission rates, airborne concentrations and soil lead concentrations and concludes that "*the emissions reported by the plant management during the 1950s and 1960s could easily account for a large proportion of the measured soil reservoir of lead"*.[216]

132 Anglo has presented no evidence that could overturn this *prima facie* case of a "material contribution" at certification stage:

132.1 The attempts to blame the pre-1925 smelting operations ring hollow, in circumstances where that period accounted for only 12% of the Mine's lifetime total lead production.[217]

132.2 Attempts to blame natural lead deposits are equally unavailing. As Professor Taylor explains, natural lead sources result in concentrated contamination around ore bodies, but this is not the case in the Kabwe District, where lead pollution is widespread.[218] Furthermore, soil lead sampling shows that lead is most

[213] AA Core Vol 4 p 682 para 103.
[214] Betterton Core Vol 11 p 1883 para 11.1.1.
[215] Harrison Core Vol 11 p 1836 Appendix 1, explained at Core Vol 11 p 1838 para 7.39 – 7.40.
[216] Harrison Core Vol 11 p 1842 para 7.43.
[217] Annexure ZMX 79 Core Vol 3 p 458.
[218] Taylor Core Vol 3 p 511; Taylor Core Vol 11 p 1849 - 1852 para 7.5.

concentrated in the surface soil,[219] consistent with airborne deposits from the Mine.[220]

132.3 As for the other anthropogenic sources of lead pollution, such as historical use of lead petrol and small-scale artisanal mining, the applicants' experts have demonstrated that this could not account for the extreme levels of lead pollution seen in the Kabwe District or the consistency of lead pollution and harm between 1974 and today.[221]

133 Anglo concentrates its efforts on arguing that ZCCM's activities after 1974 are solely responsible for all lead pollution in Kabwe today.

134 However, that would require Anglo to provide incontrovertible evidence, at certification stage, that ZCCM's actions rendered all of Anglo's contributions to lead pollution *de minimis* and of no significance. Anglo has failed to meet that burden, for three primary reasons.

135 First, we repeat that Anglo cannot escape the fact that the Kabwe environment was already severely polluted under its watch, long before it left Kabwe.[222]

136 Second, the period after 1974 to 1994 accounted for little over 22% of lead production.[223] Only 7% was produced during the period from 1985 to 1994,[224] which Anglo alleges was the worst period of ZCCM's negligence. Anglo's contribution to total lead pollution in the Kabwe environment was hardly *de minimis*.

137 Third, Anglo's efforts to highlight ZCCM's alleged negligence reflect on its own negligence. The applicants have presented prima facie evidence that ZCCM's alleged

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[219] Kříbek Annexure ZMX14 Core Vol 3 p 369.
[220] Taylor Core Vol 11 p 1852 para 7.6 - 7.7.
[221] RA Core Vol 9 p 1510 paras 240 – 247. Taylor Core Vol 3 p 530 para 7.5; Harrison Record Vol 33 p 5520 - 5521 paras 7.19 - 7.20.
[222] AA Core Vol 4 p 682 para 103.
[223] AA Core Vol 4 p 705, para 176.
[224] AA Core Vol 4 p 727 para 223.2. Lead production table: Annexure ZMX 79 Core Vol 3 pp 457 - 458.

failures were a continuation of a pattern of negligence already established under Anglo's watch.[225]

137.1 In its answering affidavit, Anglo accused ZCCM of negligently operating the Waelz kilns, using slag with a lead content of over 7.5%. But that was consistent with Anglo's own designs for the operation of these kilns developed, which it developed before 1974.[226]

137.2 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", addressed above.[227]

137.3 Anglo points to "common sense" interventions that ZCCM ought to have undertaken to address the problem, including the replacement of soil and further remediation. But it is precisely those "common sense" measures that Anglo failed to implement while it was directly involved in the Mine by refusing to implement the Lane / King recommendations.[228]

138 In these circumstances, the *prima facie* case of factual causation is clearly established.

Legal causation

139 The test for legal causation turns on combined questions of fact and policy. Once it is established that Anglo factually caused children in Kabwe to suffer brain damage (among injuries), is it fair, just and reasonable to absolve Anglo of all liability because of events after 1974? The *prima facie* answer, at certification stage, is "No".

140 Anglo attempts to portray ZCCM's actions and inactions after 1974 as an unforeseeable, new intervening event (a *novus actus interveniens*).

[225] RA Core Vol 8 p 1427 para 25.3; RA Core Vol 9 p 1472 - 1488 paras 149 -183
[226] RA Core Vol 9 p 1474 para 152; Barlin report Annexure ZMX 11 Core Vol 2 p 367.
[227] RA Vol 8 p 1427 para 25.3. See para 100 above.
[228] RA Core Vol 8 p 1427 para 25.3.

141 However, this defence is plainly a matter for trial. Anglo's expert, Mr Gibson KC, emphasises that the "*[t]he causative potency of these intervening acts and omissions, as well as their unreasonableness and foreseeability, <u>are matters for factual and expert evidence.</u>*"[229]

142 For Anglo's *novus actus interveniens* test to succeed, it would have to overcome significant legal and factual obstacles in the trial.

143 In English law, an intervening act does not sever the chain of causation merely because it is culpable. Even criminal conduct may not amount to a *novus actus* in circumstances where it was foreseeable.[230] Intervening omissions are also generally unlikely to constitute a *novus actus interveniens*. This is so even where the intervening act consists of a negligent failure to prevent damage caused by the defendant's wrong.[231]

144 At certification stage, there is ample *prima facie* evidence that ZCCM's alleged actions and inactions after 1974 do not constitute a new intervening event that absolves Anglo of liability. This is so for seven primary reasons:

145 <u>First</u>, and most obviously, if the neglect of ZCCM was foreseen or foreseeable, it cannot be held to be a *novus actus interveniens* under English/Zambian Law. Without discovery, it is not possible for the appellants to know what Anglo's internal documents reveal about what Anglo subjectively foresaw in relation to ZCCM's negligent custodianship of the Mine or what was objectively foreseeable in this regard.

146 <u>Second</u>, we again repeat that Anglo knew, by 1970, that the Kabwe Mine had caused catastrophic lead pollution. The persistence of that danger was reasonably foreseeable.

147 <u>Third</u>, Anglo's efforts to highlight ZCCM's alleged negligence reflect on its own negligence. The applicants have demonstrated prima facie evidence that ZCCM's alleged negligence was a continuation of a pattern of negligence already seen under Anglo's watch.

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[229] Gibson Core Vol 7 p 1235 para 104.
[230] Gibson Core Vol 7 pp 1234 - 1235 para 101 – 103. See also *Begum v Maran (UK) Ltd (Rev1)* [2021] EWCA Civ 326.
[231] Id, citing *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507 at 533.

148 Fourth, Anglo's attempts to blame ZCCM for failing to adequately remediate the Kabwe environment again reflect on its own negligence. ZCCM's alleged inaction mirrors Anglo's own inaction, in 1970, when advised on the need to remediate all topsoil in the contaminated areas surrounding the Mine. This is much like the arsonist attempting to blame another for failing to put out the fire.

149 Fifth, 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.

150 Sixth, Anglo remained an active minority shareholder in ZCCM from 1974 until at least 2000, with directors on the ZCCM board. *Prima facie*, the actions of a company over which Anglo continued to hold significant sway, and from which it presumably extracted substantial profits, could never be classed as a new intervening event, entirely divorced from Anglo. To the extent that Anglo seeks to deny all knowledge or involvement in ZCCM's actions after 1974, that is plainly a matter for discovery and proper interrogation at trial.

151 Seventh, as highlighted earlier, there is *prima facie* evidence that Anglo was instrumental in the ZCCM privatisation process in the late 1990s and early 2000s, which it now seeks to blame for the failed remediation efforts.[232] Again, the extent of Anglo's involvement in these events is a matter for discovery.

152 Therefore, there is ample *prima facie* evidence, at this stage, to conclude that Anglo remains factually and legally liable for its material contribution to the harms.

Actionable harm

153 The existence of actionable injury is a factual inquiry which, the High Court accepted, must be determined on the UK Supreme Court's *Dryden* test:[233]

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[232] RA Core Vol 9 pp 1485 - 1487 paras 178 - 180.

[233] Judgment Record Vol 41 p 6881 - 6882 paras 325 – 328. *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at para 12; Hermer Core Vol 4 p 602 - 604 paras 34 - 38; Mwenye Core Vol 3 p 498 para 6.29.

153.1 The primary question is whether there has been a change in the body that has left a person "worse *off*" in respect of "*health or capability*". [234]

153.2 These actionable injuries can be asymptomatic, meaning that it is "*hidden and currently symptomless"* and the individual is unaware of it. [235]

154 The High Court held that the applicants have established a *prima facie* case of actionable injury on all three of the pleaded grounds: [236]

154.1 First, the class members have suffered and are at risk of developing a range of "*sequelae*" injuries due to exposure to lead, including brain damage, organ damage, neurodevelopmental problems, among a range of other injuries; [237]

154.2 Second, the class members have suffered injuries *per se* where they have elevated BLLs requiring medical monitoring and interventions; [238] and

154.3 Third, the sub-class of girl children and the class of women of child-bearing age, who have been pregnant or are capable of falling pregnant, have suffered further harms due to the risk of lead-related injuries in pregnancy.

155 The High Court accepted the general proposition that elevated BLLs requiring medical monitoring and intervention constitute a *prima facie* case of actionable injury. "*Irrespective of whether a claimant with elevated BLLs has developed acute injuries*", the court held "*she has suffered a clear physiological change, leaving her worse off: a poison has entered her bloodstream and is being absorbed by her organs and bone*". On the *Dryden* test, *"[t]his is no benign or de minimis change in physiology*".[240] The court further accepted that this is a factual question that will be resolved at trial.[241]

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[234] *Dryden* id at paras 24 and 27.
[235] *Dryden* id at para 27.
[236] FA Core Vol 1 p 109 paras 227 - 236; p 118 - 119 paras 254 - 255; Draft POC ZMX 1 Core Vol 1 p 181 - 183 paras 54 - 56.
[237] Judgment Record Vol 41 p 6876 - 6877 paras 310-313.
[238] Judgment Record Vol 41 p 6880 - 6881 paras 322 - 334.
[239] Judgment Record Vol 41 pp 6878 - 6879 paras 314-321.
[240] Judgment Record Vol 41 p 6883 para 331.
[241] Id.

156 However, the court proceeded to contradict this finding by conclusively deciding that regular venous blood testing of children with elevated BLLs does not constitute actionable injury.[242]

157 The finding does not follow because:

157.1 The court accepted that the existence of actionable injury is a factual inquiry for trial.[243]

157.2 The court accepted that the applicants produced sufficient evidence to demonstrate that the high lead levels in Kabwe are not "transient".[244]

157.3 *Prima facie*, a change in the body, being the presence of poisonous lead in the blood which is being absorbed by the organs and bones, requiring young children and infants to undergo regular, painful blood draws with a needle is clearly a change in the body "*for the worse*" on the *Dryden* test.

157.4 The requirement that children with elevated blood lead levels be subject to regular venous blood-lead testing is a recommendation of the World Health Organisation (WHO)[245] and medical authorities.[246]

157.5 Professor Dargan, one of the world's leading experts on clinical toxicology, confirmed this in his expert evidence. Based on his extensive clinical experience, he stated 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. [247] No evidence was presented to contradict Professor Dargan's expert opinion or to question his credibility.

157.6 The High Court sought to disregard this evidence, suggesting that it was an impermissible new case in reply,[248] but that is unsustainable. This evidence was

[242] Judgment Record Vol 41 p 6883 para 332.
[243] Judgment Record Vol 41 p 6883 para 331.
[244] Judgment Record Vol 41 p 6883 para 332.
[245]; WHO 2021 Guidelines Annexure AA142 Core Vol 12 p 2086 at 2088.
[246] Dargan Core Vol 4 pp 568 – 574 para 8.4; Dargan Record Vol 32 pp 5373 – 5399 para 14; WHO 2021 Guidelines ZMX 125 Core Vol 10 p 1707 – 1709 (summary table), Core Vol 12 p 2088 (blood lead testing).
[247] Dargan Record Vol 32 p 5392 para 14.4.1.4.
[248] Judgment Record Vol 41 p 6876 para 308.

simply elaboration on the founding affidavit[249] and Professor Dargan's first report, which addressed the requirements of medical monitoring at different BLL thresholds.[250] His second report updated these requirements, in light of the WHO's 2021 guidance.

Remediation relief

158 The Court wrongly concluded that there was no evidence that damages for remediation were actionable.[251]The claim for remediation is not a stand-alone claim but a head of damage flowing from the tort of negligence.[252] Mwenye SC opined that the particulars of claim disclosed a cause of action in the tort of negligence, which evidence is sufficient.[253] At certification stage, the applicants are not required to demonstrate that each head of damage, to be determined in the second stage, will succeed. The court misconstrued the presumption and resultant onus as it applies to foreign law.[254] The onus was on Anglo to demonstrate the areas in which Zambian law would differ from our own.[255] Anglo's experts on foreign law did not challenge the actionability of the remediation claim.

Summary

159 In sum, the applicants have more than cleared the threshold of a *prima facie* case and triability has been established.

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[249] FA Core Vol 1 p110 para 234; p111 para 236; Core Vol 1 Draft POC p181 paras 54 and 54.3; Dargan Core Vol 4 p 552 paras 8.3.6.2.3 and 8.3.6.2.4; p 555 para 8.3.6.2.7.
[250] FA Core Vol 1 p 37 – 41, paras 62-66; Dargan 2020 pp 001-1834 - 1840 para 8.4; CDC Recommendations, Annexure ZMX 8 Record Vol 2 p 189 – 194.
[251] Judgment Record, Vol 41 p 6827 para 174.
[252] Draft PoC Annexure ZMX1 p 184 para 59 at 59.5 – 59.6.
[253] Core Vol 3 p 498 para 6.30 to p 499 para 635.
[254] Judgment Record Vol 41 p 6827 para 173.
[255] *Schapiro v Schapiro* 104 TS 673; *Bank of Lisbon v Optichem Kunsmis (Edms) Bp*k 1970 (1) SA 447 (W) at 450D-G/h; *Harnischfeger Corporation and another v Appleton and another* 1993 (4) SA 479 (W) at 485I-486F.

VI JURISDICTION OVER AN OPT-OUT CLASS ACTION

160 The opt-out procedure is the most appropriate mechanism at the first stage, for the following reasons:

160.1 As the High Court accepted, the prospective class members have no realistic prospect of pursuing claims against Anglo outside of this class action, so the class members require the most accommodating procedure for the class-wide determination of the common issues at the first stage, with the fewest hurdles.

160.2 The only concerns that ordinarily militate in favour of an opt-in procedure are concerns about *res judicata* in circumstances where there is a realistic prospect that a class member may want to sue the defendant separately. In this case there is no realistic prospect of such a situation arising.

160.3 This Court has confirmed that the opt-out regime is the *"conventional situation"*.[256] It has been adopted in *Nkala* and *Ngxuza*, as the mechanism best designed to ensure access to justice for large classes spread across jurisdictions. Other class action regimes – including in Canada, the US and Australia – require that class actions be conducted on an opt-out basis, because it is most accessible. [257]

160.4 Opt-in mechanisms, that require class members to go to efforts to join the class, tend to be under-inclusive, as acknowledged by the Ontario Court of Appeal in *Airia Brands v Air Canada*.[258] An opt-in mechanism, at the first stage, would therefore exclude many class members from the benefits of a class-wide determination of the common issues, due to inertia, inattention, or because the affected children may not receive the necessary assistance from their parents or

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[256] Nkala above n 46 at para 29.

[257] See e.g. Federal Rules of Civil Procedure, Rule 23(c)(2)(A) (USA); Class Proceedings Act, 1992, S.O. 1992, c. 6, s 9 (Ontario, Canada); Part IVA of the Federal Court of Australia Act 1976 (Cth), s 33J. A minority of provinces in Canada have statutory opt-in mechanisms.
See also Mulheron's criticism of England's limited opt-in system as being 'wholly inadequate' and that the 'continuing gap in English civil procedure' is 'the generic opt-out class action'. Mulheron "Justice Enhanced: Framing an Opt-out Class Action for England" *The Modern Law Review* Vol. 70, No. 4 (Jul. 2007), pp. 550 - 580 at p 552.

[258] *Airia Brands Inc. v Air Canada* 2017 ONCA 792 at par 85. See also Walker "Cross Border Class Actions: A View from Across the Border" (2004) 3 *Mich. St. L. Rev*. 755.

guardians. This would deprive those class members of access to justice, probably in perpetuity.

160.5 Once the common issues have been determined, and the trial court has established that the classes or certain sub-classes have viable claims, the class members can then exercise a properly informed decision on whether to opt-in to resolve their individual claims or to seek assistance in pursuing separate claims against Anglo.

161 The appellants have proposed a detailed opt-out notification procedure.[259] This procedure is more sophisticated than the notification process that was approved in *Nkala* for informing foreign class members of a class action. This will ensure that the prospective class members receive proper notice of the class action and their rights to opt-out.

162 However, the High Court ruled out the possibility of an opt-out mechanism involving a class of foreigners,[260] endorsing the *obiter dicta* in *De Bruyn*. This finding has far-reaching implications for all class actions going forward - regardless of whether the classes partly or exclusively comprise non-resident foreigners (*peregrini*). The approach is flawed for several reasons.

162.1 First, the Court wrongly characterised this as a matter of jurisdiction;

162.2 Second, it goes against this Court's binding precedent in *Ngxuza*.

162.3 Third, it undermines access to justice, as a simple comparison with *Nkala* demonstrates.

162.4 Fourth, the approach jars with that in established jurisdictions, such as the United States, Canada, and Australia,

[259] NOM Core Vol 1 p 3 prayers 4 - 7 and 9; FA Core Vol 1 p 144 para 319 – 329. The proposed class notice is appended to the notice of appeal Record Vol 42 p 6986.
[260] Judgment Record Vol 41 p 6845 para 224.

Jurisdiction was never in doubt

163 The High Court mischaracterised the issue as one of jurisdiction, casting the question as whether "*this court can exercise jurisdiction over foreign peregrine class members on an opt-out basis, simply on the fiction that they received notice and decided to take no action*".[261]

164 However, the Court's jurisdiction was never in doubt. Anglo correctly conceded that this Court has jurisdiction because it is domiciled here.[262] Territorial jurisdiction is ordinarily vested in the High Court on one of two bases, namely: (i) *in personam jurisdiction* over the defendant based on their residence; or (ii) jurisdiction based on cause of action.

165 Once established, the High Court may not refuse to exercise jurisdiction.[263] Our law does not recognise the doctrine of *forum non conveniens.*[264]

166 The class representatives therefore have an absolute right to pursue their own claims Anglo in South Africa, as would any individual class member.

167 The question the High Court had to consider was not whether it had jurisdiction to certify a class action against Anglo. It was whether it was in the interests of justice for it to certify a class action against Anglo, a defendant which every member of the class was entitled to sue in the High Court.

Ngxuza was on point and binding

168 The appropriateness of an opt-out procedure in respect of extra-jurisdictional class members was authoritatively decided by this Court in *Ngxuza.*[265]

169 This Court affirmed the principle 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.*"[266] The implication is that

[261] Judgment Record Vol 41 p 6790 para 190.
[262] AA Core Vol 7 p 1112 para 1327.
[263] See section 21(1) of the Superior Courts Act, 10 of 2013
[264] *SAHRC Commission v Standard Bank of South Africa Ltd* 2023 (3) SA 36 (CC) at paras 35 and 38.
[265] *Ngxuza* above n 72.
[266] Id at para 24.

once it is accepted that the class representatives have established jurisdiction, there can be no bar to an opt-out class involving foreign class members.

170 In *Ngxuza,* the applicants applied to certify an opt-out class action to enforce the payment of social grants in the Eastern Cape Province. This was pursuant to the Department of Social Welfare's decision to cease payment of their benefits.

170.1 The application was brought in the Eastern Cape Division in Grahamstown.

170.2 Three of the four applicants received their pensions within the Court's territorial jurisdiction. The cause of action (being the non-payment of their grants) arose within the Eastern Cape Division's territorial jurisdiction. Those applicants were entitled to sue out of that court.[267] In those cases, the Court had territorial jurisdiction based on cause of action – the non-payment of the pensions had taken place within its jurisdiction.

170.3 Pensioners whose grants were paid in the Ciskei Division could ordinarily not sue in Eastern Cape Division. That Division lacked jurisdiction because (i) their causes of action did not arise there, and (ii) the respondents (the MEC for Social Welfare, and other senior officials in the Eastern Cape Social Welfare Department) resided in Bhisho, which was then outside the Eastern Cape Division and in the Ciskei Division.

170.4 The High Court nevertheless certified their class action on an opt-out basis, because the *ratio jurisdictiones* was the claim itself. [268]

171 The jurisdictional question in *Ngxuza* was therefore more complex than in this case, because the Court could not base its jurisdiction on the respondents' domicile. By contrast, Anglo's domicile removes any doubt over the High Court's jurisdiction.

172 Before this Court in *Ngxuza*, the Department challenged the High Court's jurisdiction to make the order. This Court rejected the jurisdictional argument. The distinction between

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[267] Id at para 20.

[268] *Ngxuza v Permanent Secretary, Dept Welfare, Eastern Cape* 2001 (2) SA 609 (ECD) at 628E-I.

class action litigation and ordinary litigation justified the development of the doctrines and principles of jurisdiction.[269]

172.1 First, it extended the *continentia causae* principle to cover instances where the Court lacked jurisdiction based on cause of action or the defendants' residence but enjoyed jurisdiction over some, but not all, of the plaintiffs. Consequently, jurisdiction over the original applicants gave the Court jurisdiction over the whole claim.

172.2 Second, it applied the extended principles of *continentia causae* in the context of class actions. The upshot is that once the applicant has established a jurisdictional basis for his suit, the existence or even preponderance of extra jurisdictional applicants cannot impede the progress of the class action.[270] The class "…*subject to satisfactory 'opt-out' procedures, will accordingly be bound by its judgment."*

172.3 Third, the Court endorsed the US Supreme Court's decision in *Phillips*,[271] which held that even a large preponderance of extra-jurisdictional plaintiffs could not impede the class action from proceeding.[272] This development gave best effect to the fundamental right of access to court in the context of class actions.

173 In *Phillips*,[273] the US Supreme Court rejected the argument that an opt-in mechanism is required to establish jurisdiction over absent foreign plaintiffs. An appropriate opt-out notice procedure was sufficient.[274]

174 The High Court erred by rejecting *Ngxuza* and *Phillips*. The court ought to have found that *Ngxuza* was binding. The High Court's grounds for distinguishing *Ngxuza* are flawed.

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[269] *Ngxuza* above n 72 at para 22.
[270] Id at para 24.
[271] *Phillips Petroleum Co. v Shutts et al* 472 U.S. 797 (1985).
[272] *Ngxuza* above n 72 at footnote 37.
[273] *Phillips* above n 271.
[274] Id at p 808.

174.1 First, the court distinguishes *Ngxuza* on the basis that the class members in that case were local *peregrini*, whom South African law treats differently to foreign peregrini.[275] The principles expressed in *Ngxuza* apply regardless of whether class members are *incolae* or *peregrini*. This is so because *Ngxuza* holds that all that is required is for the applicant to demonstrate a jurisdictional basis for their own suit.[276] Its *ratio decidendi* established the principles of jurisdiction in respect of plaintiffs in class actions.

174.2 Second, while the concept of local peregrinus has been done away with, this is no basis to distinguish *Ngxuza* as the court did.[277] *Ngxuza* was decided at a time when that distinction was alive and well. *Ngxuza* developed the law on the basis that a strict construction of the existing rules weighed against permitting the inclusion of extra-jurisdictional applicants in a plaintiff's class.[278]

174.3 Third, the court misreads Ngxuza to mean that "*the court's personal jurisdiction over the incolae justified the assumption of personal jurisdiction over the local peregrine …*".[279] But paragraphs 22, 24 and 25 of *Ngxuza* indicate that this Court was not referring to personal jurisdiction over the *incolae* plaintiffs, but to territorial jurisdiction over their suits by virtue of the defendant's domicile or cause of action. That anchor is sufficient.

175 The High Court also discards the principles in *Phillips*, despite this Court's full endorsement of those principles.[280] The attempts to distinguish *Phillips* are also, with respect, flawed. The judgment says *Phillips* is distinguishable because it did not involve foreign peregrine plaintiffs. This is a mistake. *Phillips* plainly records that the putative class members resided in all 50 states within the United States and in foreign jurisdictions. The judgment also misreads *Phillips* as requiring the most stringent first-class postal notice provision to qualify as an adequate due process protection. That is not what *Phillips* says. All it requires is "*… best practicable notice, reasonably calculated,*

[275] Judgment Record Vol 41 p 6834 para 194.
[276] *Ngxuza* above n 72 at para 24.
[277] Judgment Record Vol 41 p 6834 para 194.
[278] *Ngxuza* above n 72 at para 23.
[279] Judgment Record Vol 41 p 6835 para 195.
[280] See Judgment Record Vol 41 p 6839 para 205.

under all circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections…". Notably, *Ngxuza* also sets the standard as satisfactory opt-out procedure.[281]

Nkala illustrates the judgment's far-reaching implications

176 *Nkala* illustrates the profound and adverse effect of the High Court's judgment in this matter. The class members in Nkala were mostly indigent. The majority of class members in Nkala were *peregrini*, living in neighbouring countries, with "*little or no access to the South African justice system*".[282]

177 Despite the existence and preponderance of *peregrine* class members, the full court certified an opt-out class action. That was in the interests of justice. It meant that the mineworkers could benefit from the determination of the common issues in stage one.

178 *Nkala* was an unmitigated success for access to justice. The mineworkers ultimately settled their claims against the mines. This development is captured in the unreported settlement decision in *Ex Parte Nkala*.[283] The full court certified a settlement class which included foreign *peregrini* on an opt-out basis.[284] This allowed the mineworkers to benefit from the settlement.

179 It makes no difference that the classes in *Nkala* included both local residents and foreigners who were once resident in South Africa.[285] This distinction suggests that there is a difference between classes entirely or only partly comprising *peregrini*. If the only way to assert jurisdiction over peregrine class members is by requiring their express submission through an opt-in process, the *Nkala* foreign class members' previous domicile in South Africa or existing connections would not have made a difference.

[281] *Ngxuza* above n 72 para 22.
[282] *Nkala* above n 46 at paras 100 - 103.
[283] *Ex Parte Nkala* (unreported) (44060/18) [2019] ZAGPJHC 260 (26 July 2019)
[284] *Ex Parte Nkala* at paras 91 - 95.
[285] This is the only remaining distinction in the Judgment Record Vol 41 p 6835 para 196.

De Bruyn is of no application

180 The High Court erred by adopting and confirming the obiter remarks in *De Bruyn,*[286] which is inconsistent with the *Ngxuza* and does not follow the "jurisdictional first principles" for class actions. *De Bruyn*, however, provides a useful illustration of the errors in the approach adopted by the lower court.

181 First, *De Bruyn* was inconsistent with the "*jurisdictional first principles*" described in *Ngxuza*.

182 Second, *De Bruyn* inappropriately applied the principles applicable to peregrine defendants in non-class action litigation to peregrine 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 a class member must also submit. That is, with respect, a non-sequitur.

183 Third, *De Bruyn* is also premised on the assertion that certification binds *incolae* but not *peregrini*.[287] There is no authority for this proposition. None is cited in *De Bruyn*. Closely allied to this is the notion in *De Bruyn* that submission to jurisdiction is necessary to satisfy the doctrine of effectiveness.[288] Jurisdictional concerns are influenced by the need for an effective remedy against a foreign defendant. However, no such concerns arise in relation to the certification of a class action against a South African defendant.[289]

184 Fourth, *De Bruyn* is plainly distinguishable on the facts, as it raised none of the same access to justice concerns. Unlike in *De Bruyn*, where there was already evidence of parallel litigation in other countries, there is no possibility of jurisdictional arbitrage in this case. The prospective class members in Kabwe will be denied all access to justice if the class is not certified in the present case.

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[286] *De Bruyn* above n 71 at para 32, read with Judgment Record Vol 41 p 6840 para 210.
[287] *De Bruyn* id para 32.
[288] Id paras 36 - 38.
[289] *Barclays National Bank Limited v Thompson* 1985 (3) SA 778 (A) at 796 D – F.

185 *De Bruyn* illustrates that there will be cases where it is not in the interests of justice for foreign plaintiffs to bring class actions in South Africa. But that is an issue of the interests of justice. It is not a jurisdictional issue. And in the present case, the interests of justice are overwhelmingly in favour of certification of the class action.

Comparative law supports the position in Ngxuza

186 The weight of foreign authorities supports the proposition that an opt-out notice can bind extra-jurisdictional class members.

187 This is the position in the United States, which is the birthplace of class actions.[290] The US accepts that an opt-out mechanism with adequate notice provisions can properly establish jurisdiction. The only controversy has been whether the foreign class actions satisfy the "superiority requirement" set out in Rule 23(b)(iii) of the US Federal Rules of Civil Procedure. The argument there is not that the court lacks jurisdiction to decide an opt-out class action comprising foreign peregrine plaintiffs. The argument is that such class actions would not meet the superiority threshold unless they have a preclusive effect in other jurisdictions.[291] The requirement that the judgment has a preclusive effect in foreign jurisdictions in order to attain superiority has been substantially lessened.[292] This superiority requirement is not part of South African law.

188 The High Court's reliance on Professor Basset's article,[293] does not take the matter any further. Professor Basset's views are not law in the United States. They were expressly rejected by the US Supreme Court in *Phillips*.

189 The approach in the Canadian province of Ontario matches the approach in *Ngxuza*. The Ontario courts apply the "real and substantial connection test,"[294] in deciding

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[290] See *Phillips v Shutts* above.

[291] See *Bersch v Drexel Firestone Incorporated & Ios JH* [1975] USCA 2 313; 519 F.2d 1974. See also: In re: *Vivendi Universal SA Sec Litigation* 838 F3d 223, 264 (2nd Cir. 2016)

[292] *Morrison v National Australia Bank Limited* 561 US 247 and In re: *Petrobras Sec Litigation* 312 FRD 354, 364 (SDNY 2016) which was affirmed in *Univs. Superannuation Scheme Ltd. v. Petróleo Brasileiro S.A. Petrobras (In re Petrobras Sec.)*, 862 F.3d 250 (2d Cir. 2017) and *Villella v. Chem. & Mining Co. of Chile*, 15 Civ. 2106 (ER) (S.D.N.Y. Sep. 23, 2019).

[293] Judgment Record Vol 41 p 6842 para 214 referring to Debra Lyn Bassett (US Class Action Go Global: Transnational Class Actions and Personal Jurisdiction" 72 Fordham Law Review .41 (2003) pp 74 – 75.

[294] *Club Resorts Limited v Van Breda* [2012] 1 RCS at paras 80 – 90. See also *Currie v MacDonald's Restaurant of Canada Limited* 2005 Canlii 33760 ONCA at paras 29-30.

whether to permit a class action on behalf of absent foreign plaintiffs, against a resident defendant. The "real and substantial connection test" provides four presumptive factors that establish a substantial connection to the court's jurisdiction. These are (i) the defendant's domicile within the court's jurisdiction; (ii) the defendant carrying on business within the court's jurisdiction, (iii) the tort having been committed in the province, or (iv) a contract connected with the dispute having been made within the province.[295] The presence of any one or more of these factors creates a rebuttable presumption of jurisdiction.[296] At face value, Anglo satisfies at least two presumptive factors. That is sufficient.

190 The Australian approach, set out in *BHP Group*,[297] is also consistent with *Ngxuza* and *CRC Trust*. The majority decision in *BHP* follows what is called the "claims approach". This approach proceeds from the notion that a class action is a procedural rather than a substantive device. It creates a procedural mechanism by which jurisdiction may be exercised. The actual jurisdiction is sourced from other statutes and the common law. What matters is the respondents' presence in the court. That is the hinge on which the court can adjudicate the claim, even of absent foreign plaintiffs.[298]

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[295] *Van Breda* id at para 90.
[296] Id at para 80.
[297] *BHP Group Limited v Vince Impiombato & Anor* [2022] HCA 33. This is a decision of Australia's apex court.
[298] Id at para 54 - 57 and 68.

VII CLASS DEFINITION

191 The appellants seek certification of two classes: a) children and b) women of childbearing age.

192 Both sets of classes are defined by four objective criteria: a) age; b) current residence in the Kabwe District; c) a minimum residence period; and d) injury from exposure to lead.

193 Thus, the class of children comprises: a) children under the age of 18 on the date that the certification application was launched, 20 October 2020; b) who reside in the Kabwe District, Central Province, Zambia; c) in the case of children over the age of seven, have lived in the Kabwe District for at least two years between the ages of zero and seven; and d) who have suffered injury as a result of exposure to lead.

194 The class of women of child-bearing age comprises: a) women over the age of 18 and under the age of 50 on 20 October 2020; b) who reside in the Kabwe District; b) have lived in the Kabwe District for at least two years between the ages of zero and seven; and d) have been pregnant or are capable of falling pregnant and have suffered injury as a result of exposure to lead.

195 The requirements for a valid class definition are well-established:

195.1 First, the class must be defined with sufficient precision that class membership is objectively determinable; and

195.2 Second, the class must not be unnecessarily broad. [299]

196 The first requirement ensures that a prospective class member and the court may determine their membership of the class.[300] In two-stage class actions, such as this, it is not necessary to identify all members of the class upfront, at the first stage.[301] It

[299] *CRC Trust* above n 47 at paras 29 - 31; *Nkala* above n 46 at para 44.
[300] CRC Trust above n 47 at para 31
[301] *Nkala* above n 46 .para 44

suffices that the determination membership may be made at some stage after a decision on the common issues.[302]

197 The breadth of the class definitions is primarily 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. [303]

198 The High Court impermissibly conflated the test for overbreadth with an assessment of the merits of the class members' claims. This led the Court to decide a range of triable issues, under the guise of class definition. In doing so, it upheld Anglo's arguments that the classes were overbroad in three senses. First, they were geographically overbroad because they included the whole Kabwe District, where there was only evidence of harm in the Kasanda, Makululu, and Chowa townships ("KMC Townships"). Second, the women's class included persons whose claims were time-barred under Zambian law. Third, both classes included persons who did not suffer actionable harm. The incorrect test for overbreadth permeates each of these findings.

The incorrect test for overbreadth

199 As already noted, overbreadth is tested by reference to the existence of common issues for determination in the class action. [304]

200 In *Hollick,* [305] the Supreme Court of Canada provided a useful test for overbreadth: can the class be defined more narrowly without arbitrarily excluding some people who share an interest in the resolution of the common issues? This is "*not an onerous"* requirement, as *"[t]he representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue."*[306]

201 Therefore, the question is <u>not</u> whether the class definitions can be made narrower. It is also <u>not</u> whether the proposed definitions are broad. Instead, the proper question is

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[302] Id at para 48 – 50.
[303] *CRC Trust* above n 47 at para 31.
[304] Id at para 31.
[305] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68 at para 21.
[306] Ibid at para 21.

whether the definitions are <u>unnecessarily</u> broad, such that narrowing the definitions would not arbitrarily exclude people with an interest in the common issues.

202 Here, the High Court correctly held that sufficient commonality had been established as there is a range of common issues that can be determined at the first stage for the benefit of all class members.[307] It further accepted the test for commonality in *Vivendi*,[308] as endorsed in *Nkala.*[309] Common issues do not require identical answers for all class members, instead *"the common question may require nuanced and varied answers based on the situations of individual members".* [310]

203 That finding of commonality ought to have been the end of the matter. As the full court held in *Nkala*,[311] "*once it is found that there are sufficient common issues affecting the entire classes that can be determined at one hearing or, if the hearing is split into stages, at the first stage, <u>then it follows as a matter of logic that the class definitions are not overbroad</u>*."

204 But the High Court did not stop there. The court adopted a different approach to overbreadth of the class definitions. It tested the appropriateness of the class definitions, not against the common issues, but rather against the merits of class members' individual claims. The starting proposition is that a "*mismatch between the class definition and the triable issues*" renders the class definition overbroad.[312] The judgment then assesses the breadth of the class definitions against the class members' prospects of success in proving triable issues.[313] The rationale is to include "*… only those persons with a triable claim*"[314] such that the class definition may only include those who can demonstrate their prospects of success.[315]

205 This novel test for overbreadth is incorrect, for several reasons.

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[307] Judgment Record Vol 41 p 6776 para 33.
[308] *Vivendi Canada Inc v Michell Dell' Aniello* [2014] SCR 1.
[309] *Nkala* above n 46 at paras 94 - 97.
[310] *Vivendi* above n 308 at para 46.
[311] *Nkala* above n 46 at para 52.
[312] Judgment Record Vol 41 p 6846 para 227.
[313] Judgment Record Vol 41 p 6848 para 232.
[314] Judgment Record Vol 41 p 6862 para 270.
[315] Judgment Record Vol 41 p 6848 para 232 and p 6862 para 270.

206 First, this new test for overbreadth is directly in conflict with *CRC Trust* and *Nkala,* setting an incorrectly high barrier to certification.

207 Second, it improperly conflates the question of class definition with the merits of individual class members' claims and so engages the wrong enquiry. As this Court has warned in *CRC Trust*, a class definition that depends upon the prospects of individual claims succeeding is circular, because membership of the class will depend upon the result of the litigation.[316]

208 Third, the authorities on which the High Court judgment relies do not support the test it adopts. *Stellenbosch Law Clinic* and *De Bruyn* are not authority for the proposition that the class definition should identify who is entitled to relief. Furthermore, the US Supreme Court decisions in *Wal-Mart*,[317] and *Falcon*,[318] do not establish that the probity or breadth of the class definition is tested against its prospects of success. Instead, both cases dealt with commonality. The size of the classes and lack of common issues rendered the classes overbroad. Even *Hollick*, on which the lower court relied, rejects the proposition that breadth depends on the merits of individual claims.[319]

209 In summary the High Court erred in law, exercised its discretion on the wrong principles, and misdirected its enquiry. These errors are not pedantry. They undermine each basis upon which the court proceeded to reject the class definitions, as the court was impermissibly drawn into making final determinations on the factual merits of the claims. We now turn to these findings.

Geographical scope of the classes

210 The appellants define both classes by residence in the Kabwe District. That is the officially demarcated administrative district that incorporates the town of Kabwe, approximately the size of the City of Johannesburg.[320]

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[316] *CRC Trust* above n 47 at para 33 citing *Emerald Supplies Ltd v British Airways* [2010] EWCA Civ 1284.
[317] *Wal-Mart Stores v Dukes* 564 US 338 (2011) referred to at para 233 of the Judgment Record Vol 41 p 6849.
[318] *General Telephone Co of Southwest California v Falcon* 457 US 147 (1982).
[319] Judgment Record Vol 41 p 6862 para 271.
[320] AA Core Vol 6 p 914 para 747.

211 The merits of this geographic limit are fourfold: [321]

211.1 This is an officially demarcated boundary line, allowing for objective determination of class membership;

211.2 It is well understood by prospective class members;

211.3 It allows for targeted class notification; and

211.4 It encompasses all areas that Anglo accepts are worst affected by lead pollution.

212 By contrast, Anglo argued for a narrower geographical limit to the classes, confined to the so-called "KMC" townships of Kasanda, Makululu, and Chowa.

213 The Court applied its novel test for overbreadth in rejecting the definition encompassing the Kabwe District. The Court held that the appellants were required to prove, at certification stage, "*that the Mine poisoned the soil <u>of the entire district throughout the relevant period</u> (and hence produced increased BLLs throughout the district) rather than only the KMC townships*".[322]

214 The Court further held that there was no prima facie evidence of lead contamination beyond the three KMC townships.[323]

215 The effect of this finding is to exclude tens of thousands of children in Kabwe who register extreme levels of lead poisoning, who live outside the KMC townships.[324]

215.1 Anglo's own expert, Prof Canning, estimates that limiting the geographical scope of the class in this way would exclude an estimated 1,624 children with a BLLs of over 45 μg/dL and 79,392 children with BLLs of over 5 μg/dL. [325]

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[321] RA Core Vol 9 p 1558 para 390 - 392.
[322] Judgment Record Vol 41 p 6863 para 268.
[323] Judgment Record Vol 41 p 6854 - 6858 paras 249 to 259.
[324] Judgment Record Vol 41 p 6861 - 6862 paras 266 - 267.
[325] Canning Core Vol 7 p 1231 para 93 (summary); Core Vol 7 p 1203 (Table 4b, BLL exceedances in Kabwe); Core Vol 7 p 1204 (Tables 7a – 7c, BLL exceedances in KMC townships). RA Core Vol 9 p 1560 - 1561 paras 401 - 404.

215.2 Prof Canning's figures are likely a significant underestimation.[326] Prof Thompson has presented more accurate figures, showing that the Anglo definition would exclude between 89 000 and 99 000 children with BLLs of over 5 μg/dL, 17 000 to 26 000 children with BLLs of over 25 and 7 000 to 9 000 children with BLLs of over 45. [327]

216 This exclusion is arbitrary and impermissible for three reasons.

217 First, all of these affected children have a direct interest in the determination of the common issues. As the High Court accepted, one of those critical common issues is the extent of "*the Mine's contribution to lead pollution in the Kabwe District*".[328]

218 Second, this common issue is plainly a matter for trial as it depends on extensive expert evidence on the geographical spread of lead pollution from the Mine. It cannot be determined at certification stage, let alone through the artificial means of narrowing the class definition.[329] It is for the trial court to resolve that question after considering all available evidence and weighing the probabilities.

219 This pre-emption of the trial court's function would result in obvious injustice. A finding by the trial court that lead pollution from the Mine has indeed spread beyond the KMC townships would be of no benefit to the excluded class members, who would have to prove the same issue again in future litigation, resulting in duplication and the waste of resources.

220 Third, the High Court impermissibly rejected and overlooked every scintilla of evidence that shows lead pollution spreading far beyond the KMC Townships.[330]

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[326] RA Core Vol 9 p 1561 para 405.
[327] See Thompson Core Vol 3 p 482; Thompson Core Vol 11 p 1908 – 1915 paras 23 - 39.
[328] Judgment Record Vol 41 p 6777 para 35.
[329] Judgment Record Vol 41 p 6861 para 268.
[330] Judgment Record Vol 41 p 6853 - 6861, paras 245-268

221 The applicants presented extensive *prima facie* evidence that lead contamination from the Mine is not confined to the KMC townships and that residents across the District are affected.[331]

221.1 While the appellants accepted that the highest concentrations of lead pollution are found in the KMC townships, they never suggested that lead pollution from the Mine is confined to these areas.[332]

221.2 The Human Rights Watch Report, attached to the founding papers, says that BLLs in children in Chowa, Kasanda, Katondo, Mutwe Wansofu, Makandanyama, and Makululu averaged 25µ/dL.[333] Median soil lead levels in these areas were also unsafe.[334]

221.3 Betterton opined that the lead particulates from the Mine could easily be transported beyond KMC,[335] depending on particle size and even on the mean (lower) wind speeds reported by Dr Clark.[336] This notion was bolstered by the Kribek study.[337] In reply, Professor Betterton further demonstrated through modelling that windborne emissions from the Mine were capable of spreading lead emissions throughout the district depending upon the prevailing winds.[338]

221.4 The World Bank Data evidenced high soil contamination levels in Chowa, Kasanda, Katondo, Mutwe Wansofu, Makandanyama, Makululu, and Luangwa.[339]

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[331] FA Core Vol 1 p 42, para 67 and fn 2; Human Rights Watch Report, Annexure ZMX10 Core Vol 2 p 332 setting out a map of several lead-affected townships beyond KMC; and p 333 referring to townships beyond KMC.
[332] FA Core Vol 1 pp 91 - 93, paras 181-183 r/w Clark, FA, Ann ZMX 3 Core Vol 3, pp 197 to 328.
[333] Annexure ZMX10 Record Vol 2 p 228.
[334] Annexure ZMX10 Record Vol 2 p 237 - 238.
[335] Betterton Core Vol 3 p 469.
[336] Betterton Core Vol 3 p 478.
[337] FA Core Vol 1 p 47, para 78, r/w ZMX14 Core Vol 3 p 372 para 4.2.2
[338] Betterton Core Vol 11 p 1875 – 1878 para 9.1.1-9.1.12.
[339] FA Core Vol 1 p 50 para 80.7 r/w Annexure 17 (same as AA 103) Core Vol 8 p 1400 para 11.

221.5 Professor Thompson's report further computed the existence and extent of class members with exceedances in BLL not only in KMC but throughout the Kabwe District.[340]

221.6 Yamada et al (2020) plotted the simulated geographic distribution of BLLs for children aged 16 months and showed that BLLs exceeded 5 µg/dL throughout most of the Kabwe District.[341]

222 In answer, Anglo's own experts, Mr Sharma and Dr Beck, confirmed that lead contamination and poisoning is not confined to the KMC townships.[342]

222.1 Mr Sharma noted that soil tests in other townships register severe levels of lead contamination, including the townships of Katondo, Railway, Luangwa, Makandanyama and Mutwe Wansofu.[343] This is clearly illustrated by a map of the townships, appended to Mr Sharma's report, showing substantial lead contamination spreading far beyond the KMC Townships.[344]

222.2 Dr Beck's report further incorporated graphs showing BLLs in different Kabwe townships, showing that elevated BLLs are not confined to residents of the KMC townships.[345]

223 Not only did the Court overlook this *prima facie* (and, in some cases, common cause) evidence, but it then tried to resolve competing expert evidence on the papers. This in the face of the appellants' challenge to the credibility and independence of Anglo's experts, Mr Sharma, Dr Banner, and Dr Beck, which can only be resolved at trial.[346]

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[340] Thompson Record Vol 5 p 721 – 726, Core Vol 3, p 492 – 493.
[341] Annexure ZMX 114 Core Vol 10 p 1689.
[342] See Mr Sharma's affidavit, Core Vol 7 p 1142; Sharma map Core Vol 7 p 1141.
[343] Mr Sharma's affidavit Core Vol 7 p 1142.
[344] Sharma map Core Vol 7 p 1141.
[345] Dr Beck Core Vol 7 p 1190.
[346] RA Core Vol 9 p 1541 – 1555, paras 337-382.

Zambian limitation law

224 Also under the guise of class definition, the High Court exercised a choice of law, at certification stage, to apply a strict three-year time bar in the Zambian Limitation Act to the claims of the class of women.

225 The effect of that choice is to bar any claims by adult women who suffered harm before 20 October 2017, irrespective of whether they had knowledge of a cause of action or whether the harm is ongoing. On the basis of that choice, the Court sought to restrict the definition of the class of women to those that have suffered harms after 20 October 2017.

226 Had the Court applied our Prescription Act, these claims would not be barred where women could not reasonably have had knowledge of the facts giving rise to the cause of action and Anglo's identity.[347]

227 The High Court accepted that that it had a choice – not an obligation – to apply the Zambian law in preference to our Prescription Act:[348]

227.1 Under our choice-of-law rules, all procedural issues in this matter will be governed by South African law. Substantive issues will be determined by Zambian law.

227.2 The Zambian limitation law is purely procedural in nature. It does not extinguish rights, but establishes a procedural time-bar.

227.3 By contrast, this Court has characterised our Prescription Act as substantive in nature, which extinguishes substantive rights rather than merely barring claims.[349]

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[347] Section 12(3) of the Prescription Act Section 12(3) provides that a debt is only deemed to be due, and the prescription period only begins to run, when "the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care." See *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) para 48.

[348] Judgment Record Vol 41 pp 6865 – 6866 paras 281 – 283.

[349] *Society of Lloyd's v Price* 2006 (5) SA 393 (SCA) at para 10. Whether the Constitutional Court will uphold this characterisation remains to be determined. 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 12 (CC) at paras 87 to

227.4 There is therefore a “gap” in the law, as neither the procedural Zambian law nor the substantive South African law automatically applies.

227.5 This requires the court to exercise a gap-filling choice.[350]

228 The High Court correctly accepted, with reference to this Court’s judgment in *Price* that the gap-filling choice is ultimately a policy-laden question, guided by considerations of “*individual justice, equity or convenience*”, that must be determined on a case-by-case basis.[351]

229 Nevertheless, the High Court concluded that it was fully entitled to decide this complex question, on paper, at certification stage, without the benefit of complete evidence of how many women would be affected and to what degree. It proceeded to hold that the Zambian law has “the closest connection to the dispute”.[352] It further rejected all concerns that this choice would deprive class members of their right of access to justice, suggesting that this is simply “*what time bar rules do*”.[353]

230 The High Court acted on wrong principles and was misdirected in reaching these findings, for three primary reasons:

231 First, the gap-filling choice is a triable 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, even more by means of narrowing the class definition.

232 Second, the gap-filling choice is not the type of pure legal question that yields a binary legal answer, such as was described in *CRC Trust* and *De Bruyn*, that can be conclusively determined at certification stage.

90; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* 2018 (1) SA 38 (CC) at para 22.

[350] *Price* id.

[351] Judgment Record Vol 41 p 6866 para 283.

[352] Judgment Record Vol 41 p 6867 para 286.

[353] Judgment Record Vol 41 p 6868 para 288.

233 Third, the High Court gave no regard to the fact that its gap-filling choice is a limitation of section 34 rights of access to court, which is only permissible if it is justified under section 36 of the Constitution. The court was not asked to impugn the constitutionality of a foreign law. Instead, the court's exercise of a discretion to apply that law in our courts, to the exclusion of South African law, had to be tested for constitutional compliance. In this regard, the time bar of Zambian law clearly limits section 34 rights[354] and its rigidity makes that limitation unjustifiable.[355]

234 Even if it is somehow appropriate to make the gap-filling choice at certification stage, which is denied, the considerations of justice, equity, and convenience all favour applying our Prescription Act.

234.1 Anglo does not deny the essential injustice of its argument: that potentially thousands of vulnerable and indigent women, who had no knowledge of Anglo's identity or its role in causing them harm, will be denied access to justice, even where harms are ongoing.

234.2 There is also essential injustice in allowing Anglo to cloak itself in the protections of a Zambian time bar, while it enjoyed the protection and benefits of the South African legal system at all material times.

234.3 Anglo was headquartered in Johannesburg, from where it issued orders and instructions on the Mine's operations, including the management of lead pollution. Anglo's founders and directors – who simultaneously sat on the Mine's board – all lived and worked in Johannesburg.

234.4 It was also in Johannesburg that Anglo's founder, Sir Ernest Oppenheimer, first proclaimed that Anglo has a duty to "*make a real and lasting contribution to the communities in which we operate".*[356] Now that those communities seek to hold Anglo to its word, it responds that the claimants should not be allowed to "escape" Zambian law.

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[354] *Makate v Vodacom* 2016 (4) SA 121 (CC) at para 91.
[355] *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 6265 – 68.
[356] Anglo Group's Sustainable Mining Plan, Annexure ZMX 56 Core Vol 3 p 403.

Injury

235 The classes are defined as including all who have "*suffered injury as a result of exposure to lead*". The benefits of this definition are two-fold, avoiding the arbitrary exclusion of class members with an interest in the determination of the common issues:

235.1 First, this acknowledges the medical consensus that there is no safe level of lead in the blood, and that harm may occur from exceedingly low levels.[357]

235.2 Second, this is consistent with the medical evidence that there is a broad spectrum of conditions and illnesses that flow from lead exposure. [358]

236 This definition of injury is more narrowly tailored than the class definition that was approved in the landmark Flint Michigan lead poisoning class action.[359] There the District Court of Michigan approved a class definition that encompassed *"all persons or entities who are or could be claiming personal injury, property damage, business economic loss, unjust enrichment, breach of contract, or seeking any other type of damage or relief because at any time during the Exposure Period"*, including those who had *"ingested or came into contact with water received from the Flint Water Treatment Plant."* Despite the broad sweep of that definition, the court twice held that the definition was sufficiently ascertainable, applying a test that is akin to our test for "objective" criteria.

237 Nevertheless, the High Court sought to reject this definition of injury on two grounds.

238 First, the court held that children with elevated blood-lead levels who require regular 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".[360] That conclusion is unsustainable, for reasons we have addressed in detail above:

238.1 The appellants presented ample *prima facie* evidence that repeated venous blood draws from children constitute actionable harm on the *Dryden* test.

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[357] FA Core Vol 1 p 37 para 62; RA Core Vol 9 p 1513 paras 250-251.
[358] FA Core Vol 1 pp 37 - 40 paras 63 – 64 (Table 1 and 2).
[359] Flint Michigan judgment Annexure ZMX129 Record Vol 30 p 4943 at p 5023.
[360] Judgment Vol 41 p 6884 para 332.

238.2 Moreover, it was again impermissible for the court to determine this triable issue through class definition. As the court accepted, actionable injury is a question of fact, not law, to be determined at trial.

239 Second, the High Court suggested that this definition is too broad, as it would make the class too large.[361] However, that conclusion is in conflict with *Nkala*, where the full court 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."* [362]

240 Third, the Court further erred in holding that defining the class by reference to "*injury as a result of exposure to lead*" made it insufficiently objective.[363]

241 This finding conflicts with *Nkala*, where the full court determined that the possibility of medical examination and diagnosis is a sufficiently objective measure.[364] As emphasised above, class membership does not need to be determined at the first stage. It is sufficient that class membership will be determined during the second, opt-in stage of the class action, when individual class members will opt-in to prove their individual claims and undergo medical testing and evaluation.[365]

242 The fact that some class members may not yet be aware that they have suffered an injury is no bar to certification. Actionable injuries can be asymptomatic.[366] For this reason, many class members in *Nkala* were unaware that they had suffered injury. The interests of justice must accommodate deciding the common issues for the benefit of those who may not yet be aware of an injury, as opposed to defining the classes so narrowly as to exclude these class members from benefiting from the first stage determination, and, in the process, probably denying them access to justice completely.

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[361] Id.
[362] *Nkala* above n 46 at para 53. In doing so, *Nkala* endorsed the views of the Federal Court of Australia in J*ohnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 636 para 16. See also *Municipio de Mariana & Ors v BHP Group* [2022] EWCA Civ 951 at paras 184-5.
[363] Judgment Record Vol 41 p 6885 para 334.
[364] *Nkala* above n 46 at para 48.
[365] Id at paras 47 – 50.
[366] *Dryden* above n 233 at para 27.

VIII APPROPRIATENESS AND THE INTERESTS OF JUSTICE

243 The test for appropriateness is *"whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members."*[367] This assessment is again subordinate to the interests of justice, informed by the right of access to court and the best interests of the child standard, as addressed above.[368]

244 The High Court correctly held that the class action raises sufficient common issues that could be appropriately determined on a class-wide basis;[369] that appropriate procedural mechanisms exist to manage the trial at the first and second stages of the class action; and that class action proceedings represent the only feasible way to secure access to justice for the class members.[370]

245 It nevertheless went on to conclude that the class action would be unmanageable and not in the interests of justice, in direct contradiction of its earlier findings.

246 In holding that the class action would be unmanageable, the court took into account the number of potential claimants;[371] the length of time the trial would take; and alleged prejudice to Anglo.[372] In doing so, the High Court again acted on wrong principle.

247 First, as pointed out above at para 239, the size of the potential classes does not render the class over-broad or unmanageable.

248 Second, the interests of justice and access to justice require certification. As the High Court correctly found, litigating these matters in each case would be inefficient for litigants and the judicial system; resolving common difficulties can aid in the advancement of class members' claims; and a class action would prevent the unnecessary duplication of judicial efforts, if each claim had to be litigated individually.[373]

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[367] *CRC Trust* above n 47 at para 26.
[368] *Mukaddam* above n 47 at para 35.
[369] Judgment Record Vol 41 p 6777 paras 34-43.
[370] Judgment Record Vol 41 p 6780 para 42 and 43.
[371] Judgment Record Vol 41 p 6886 para 336.
[372] Judgment Record Vol 41 p 6886 para 337.
[373] Judgment Record Vol 41 p 6780 para 42 and 43.

249 The appellants demonstrated a host of additional factors warranting a class action:

249.1 Lack of resources: The residents of Kabwe are largely underprivileged and lack the resources to pursue claims against Anglo on an individual basis. This is illustrated that by the fact that the class representative parents are either unemployed or have menial jobs.[374]

249.2 Aggregation: The class will have the benefit of a skilled, multi-jurisdictional team of lawyers, supported by third-party litigation funding, which would not be available without the aggregation of claims.

249.3 Other litigation options are unsuitable: Other litigation methods are unsuitable and do not present the advantages of class action.

249.4 Judicial economy: Any other alternative would entail numerous identical claims against Anglo in South African courts where the causes of action are identical and Anglo's defences would be identical.

249.5 No alternative litigation methods: Anglo has not suggested any viable alternative to a class action, because there is none. The most commonly suggested alternative is a test case. But this would be unworkable as the outcome of a test case only binds the parties to it and Anglo has not indicated any intention to be bound by the outcome in subsequent cases.[375]

249.6 Information asymmetry and access to justice: The class action enables people with limited access to information or legal representation to access to judicial resources to obtain the necessary redress.

250 Third, the High Court gave no regard to the impact of the refusal of certification on the rights and best interest of the children affected by this decision. The first class sought to be certified comprises children, whose best interests this Court is constitutionally obliged

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[374] The supporting affidavits show that the third, fourth, fifth, eighth, and twelfth applicants' parents are unemployed: A3 Record Vol 4 p 608 para 1; A4 Record Vol 4 p 612 para 1; A5 Record Vol 4 p 616 para 1; A8 Record Vol 4 p 626 para 1. The tenth applicant does not attend school for lack of funds (A10 Record Vol 4 p 635 para 6.

[375] FA Core Vol 1 p 142 -143 para 317.2.

to regard as of "paramount importance" in every matter concerning the child, in terms of section 28(2) of the Constitution.[376] Refusing certification where children have no other means of pursuing their claims is manifestly inconsistent with the best interests of the child standard.

251 Throughout these proceedings, Anglo has vociferously argued that the applicants should seek relief in Zambia because the Zambian High Court has jurisdiction. That argument is without any basis.

252 This is a disguised argument of *forum non conveniens* which, as we have noted earlier, forms no part of our law. A South African court cannot refuse to exercise jurisdiction once jurisdiction has been established.

253 More significantly, the undisputed evidence of Mr Mwenye SC, Zambia's former Attorney General, is that insuperable systemic barriers prevent access to justice in Zambia on a class-wide basis. This includes the lack of access to adequate legal representation; the lack of access to experts, the prohibition on contingency fee arrangements and third-party funding; and the under-inclusivity of available class action mechanisms.[377] In *Vedanta*,[378] when the UK Supreme Court considered whether to exercise jurisdiction over Zambian claims against an English parent company, despite Zambia being an available forum,[379] the UK Supreme Court held that the English Courts could exercise jurisdiction because substantial justice could not be achieved in Zambian legal system.

254 Without this class action, there is no prospect that the class members will have access to justice. If the facility of a class action is denied to them, most will not be able to pursue claims against Anglo at all. They will be denied their right to proceed by class action in s 38(c) of the Constitution. They will be denied their right of access to court in s 34 of the Constitution. They will be denied any remedy. They will be denied the protection of the best interests of the child standard, under section 28(2) of the Constitution.

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[376] This is not only a constitutional imperative, but also statutory and international legal imperative. AA Core Vol 6 p 972 to 973 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.
[377] Mwenye Core Vol 3 p 504 - 507 para 6.43 – 6.62.
[378] *Vedanta* above n 113.
[379] Id at para 85.

IX CONCLUSION

255 The environmental disaster in Kabwe will raise complex factual and legal issues for resolution at trial. Complexity does not permit impunity, nor should it deprive victims of access to justice, especially where the rights of children are at stake.

256 In matters involving historical pollution and the action of multinationals, access to justice and the best interests of the child standard require appropriate judicial mechanisms to ensure access to effective redress.

257 This class action, at this time, in a South African court, is the only effective means of ensuring that the class members can pursue their claims against Anglo. The appellants have made out an ample case for certification.

258 The appellants therefore seek an order in terms of the notice of appeal, upholding the appeal and certifying the class action, together with costs, including the costs of three senior counsel and three junior counsel.

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

Appellants' counsel
Chambers, Sandton
11 November 2024