IN THE SUPREME COURT OF APPEAL

(BLOEMFONTEIN)

SCA case number: 526/2024

HC case number: 32777/2020

In the appeal between:

KABWE AND OTHERS Appellants

and

ANGLO AMERICAN SOUTH AFRICA LTD Respondent

ANGLO'S HEADS OF ARGUMENT IN RESPONSE TO THE *AMICI CURIAE*

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A. INTRODUCTION

1. In these heads of argument, Anglo responds to —

    1.1. the written submissions of Amnesty International ("**AI**") and the Southern Africa Litigation Centre ("**SALC**");

    1.2. the written submissions of the third to seventh *amici curiae* (various organs of the United Nations, hereafter the "**Special Procedures**");

    1.3. the written submissions of the Centre for Child Law and four academics (together, the "**CCL**"); and

    1.4. the request of the *amici* to make oral submissions.

2. By way of introduction, the golden thread running through the *amici*'s written submissions is that:

    2.1. The High Court's decision to deny certification denied access to justice to members of the proposed classes. This denial was compounded by the fact that they are vulnerable people: impoverished women and children.

    2.2. Thus, the High Court should have lowered the standards governing certification – and Anglo should not have opposed certification – so that the appellants could obtain certification with as few obstacles as possible.

3. This argument is misguided, as a matter of principle and as a matter of law:

    3.1. First, lowering the standards applicable to certification harms everyone, including vulnerable certification applicants. Reasonable certification standards (like those set by the Constitutional Court and this Court and applied by the High Court) protect both the interests of certification applicants – because it prevents them from being yoked to an expensive but ultimately doomed class action – and the interests of the South African litigating public – because it prevents unmeritorious class actions from consuming scarce South African court resources.

Second, the standards governing certification have been set in landmark decisions most notably, *CRC Trust*[1] in this Court and *Mukaddam*[2] in the Constitutional Court. These standards bind both the High Court and this Court. It was not open to the High Court to lower them, and it is not open to this Court either.

3.2. There is in any event no basis to lower these standards, because they (a) already favour certification applicants and (b) were developed with vulnerable certification applicants in mind.

3.3. Third, each of the *amici* contend, in advancing its own interests (the rights of the child, or the importance of access to a remedy, or the principles collected in the UN Guidelines), that the High Court gave incorrect weight to those interests and should have exercised its discretion differently. But as we show below, the *amici* invariably gloss over or misconstrue the *actual* findings by the High Court, the *actual* weighing done by the High Court, and the *actual* binding rules that governed Windell J's discretion.

3.4. The implication of each of the *amici's* argument is to eviscerate the requirement set in *CRC Trust* and *Mukaddam* that prospective class action plaintiffs must first obtain certification of their class action. They do so on the basis that the matter concerns the human rights of vulnerable, foreign and child claimants; or that the respondent has expressed public support for human rights. They are wrong in implying that class action law should differentiate between certain types of claims and claimants by lowering the certification threshold for sympathetic cases.

3.5. The *amici* should not be permitted to present oral argument. An *amicus* requires permission to make oral argument before this Court, and must show that its oral argument will benefit this Court over and above its written submissions. The *amici* in this case have failed to make this showing (and those that have not tried were correct not to ask for an oral hearing).

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[1] *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2012] ZASCA 182; 2013 (2) SA 213 (SCA).

[2] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC).

B. RESPONSE TO AI AND SALC

Introduction

4. The argument of AI and SALC can fairly be summarised as follows:

    4.1. South Africa bears a duty, under international law, to provide access to an effective remedy to members of the proposed classes in South Africa, notwithstanding the fact that they are all foreign nationals residing outside South Africa claiming for a wrong that occurred outside South Africa (hereafter an "**extraterritorial remedial duty**").

    4.2. This duty required the High Court to apply the interests-of-justice test for certification in a manner more favourable to the appellants and which would have resulted in certification being granted.

5. AI and SALC are incorrect. By way of summary:

    5.1. First, South Africa does not bear an extraterritorial remedial duty to members of the proposed classes. AI and SALC accept that the general international-law rule is that a state does not bear such a duty towards the alleged victims who are not its nationals of the extraterritorial activities of its corporations. This rule accords with the position under South African constitutional law, and there is no basis for departing from this rule in this case.

    5.2. In other words: because the members of the proposed classes are all Zambian nationals, claiming for a wrong they allegedly suffered in Zambia, South Africa is under no duty to provide them with an effective remedy in South Africa. Neither international law, nor South African constitutional law, requires local courts to attempt to solve wholly foreign problems.

    5.3. Second, even if it is assumed for the sake of argument that South Africa does bear an extraterritorial remedial duty towards members of the proposed classes, it has fulfilled this duty by making the class-action procedure available to the appellants. Nothing the High Court did – including denying certification – violated the duty (assuming for the sake of argument it even exists in these circumstances).

    5.4. Third, the respects in which AI and SALC claim the interests-of-justice test should be adjusted in the appellants' favour would be inconsistent with the binding authority of this Court and the Constitutional Court.

South Africa does not bear an extraterritorial remedial duty towards members of the proposed classes

6. In arguing for the existence of an extraterritorial remedial duty, AI and SALC place a great deal of reliance on so-called *"soft"* international law, such as decisions and reports of UN treaty bodies and international agencies and the decisions of international tribunals. But it bears emphasis that this soft law is not international law and is not capable of binding South Africa, even on the international plane. It can only be used as an interpretative guide to South Africa's actual international-law obligations[3] (which flow largely from treaties binding South Africa and international customary law).[4] AI and SALC appear to accept this.[5]

7. AI and SALC seek to imply such a duty upon Anglo, through an attempt at identifying such a duty upon states. AI and SALC fail to point to a single rule of binding international law that expressly creates an extraterritorial remedial duty for states, let alone for corporations. This is because there is no such rule. Indeed, some of the (few) sources of hard law referred to by AI and SALC[6] are inconsistent with the existence of any sort of extraterritorial remedial duty:

    7.1. Article 8 of the Universal Declaration of Human Rights states *"[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"*.[7] The reference to *"national tribunals"* and rights granted by *"the constitution or by law"*[8] imply a territorially restricted remedial duty.

    7.2. Article 2(1) of the International Covenant on Civil and Political Rights provides that *"[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"*.[9]

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[3] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC) paras 36 to 37.

[4] Statute of the International Court of Justice, art 38(1). Page 217 of SALC and AI's Bundle of Authorities

[5] AI and SALC written submissions paras 8 to 10.

[6] See AI and SALC written submissions para 13.

[7] Universal Declaration of Human Rights, 1948 (underlining added), art 8. Page 219 of SALC and AI's Bundle of Authorities

[8] Underlining added.

[9] United Nations (General Assembly). (1966). International Covenant on Civil and Political Rights. Treaty Series, 999, 171, art 2(1) (underlining added). Page 209 of SALC and AI's Bundle of Authorities

7.3. Article 6 of the International Convention of the Elimination of All Forms of Racial Discrimination provides that *"States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions"*.[10]

8. Thus, AI and SALC are constrained to accept that the general rule is that a state does not bear an extraterritorial remedial duty, and specifically in respect of the alleged victims of the extraterritorial activities of its corporations who are not its nationals.[11]

9. This is undoubtedly correct:

9.1. First, it is consistent with the core principle of sovereignty under international law. As stated by the Constitutional Court in *Kaunda*: *"[i]t is a general rule of international law that the laws of a State ordinarily apply only within its own territory"*.[12]

9.2. Second, it is implied by the various rules of international law referred to in paragraphs 7 to 7.3 above.

9.3. Third, the UN Guiding Principles on Business and Human Rights (the "**UN Guiding Principles**") (the primary soft-law instrument relied upon by AI and SALC) expressly stipulate that a state is generally not subject to a remedial duty in respect of the extraterritorial activities of its corporations:

9.3.1. Principle 25 provides that *"States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means,*

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[10] United Nations. (1966). International Convention on the Elimination of All Forms of Racial Discrimination. Treaty Series, 660, 195, art 6. Page 207 of SALC and AI's Bundle of Authorities

[11] AI and SALC written submissions para 24. Later, AI and SALC appear to argue (at para 28) that the mere fact that the corporation is domiciled in a state is sufficient to trigger a remedial duty in respect of the extraterritorial activities of that corporation. This cannot be correct, because it would mean that every state would always bear a remedial duty in respect of the extraterritorial activities of all of its corporations.

[12] *Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC) para 3. As stated in John Dugard et al *Dugard's International Law: A South African Perspective* 5 ed (2019) 210 (footnotes removed):

> "Jurisdiction is an important aspect of sovereignty. Sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states. Jurisdiction is the branch of law that defines these functions. The term therefore refers to the authority that a state has to exercise its governmental functions by legislation, executive and enforcement action, and judicial decrees over persons and property. In most circumstances the exercise of the functions of a state is limited to the territory of the state."

that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy".[13]

9.3.2. The commentary to Principle 2 states that *"At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction"*.

9.4. Fourth, it accords with the position under South African constitutional law:

9.4.1. In *Kaunda*,[14] the Constitutional Court made it clear that non-South Africans outside South Africa are not the bearers of rights under the Bill of Rights:

> "The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject-matter of s 7(2). To begin with two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African State to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders. Does s 7(2) contemplate that the State's obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries?
>
> Section 7(1) refers to the Bill of Rights as the —
>
> > 'cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'
>
> The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders."

9.4.2. All members of the proposed classes are Zambian nationals domiciled outside South Africa. It follows that they are the bearers of none of the

[13] Underlining added. The UN Guiding Principles page 263 – 300 of SALC and AI's Bundle of Authorities.

[14] *Kaunda* paras 36 to 37 (underlining added, paragraph numbers removed).

rights in the South African Bill of Rights – including the right of access to courts under section 34 of the Constitution.

10. Thus, it is not the duty of the South African state to provide effective remedies to Zambian nationals for alleged wrongs occurring in Zambia (fifty to a hundred years ago) – even when those wrongs are alleged to have been committed by a South African corporation. This is the duty of the Zambian state.

11. AI and SALC refer to various circumstances in which the general international-law rule (that states are not required to provide remedies to foreigners for the extraterritorial activities of their corporations) might be departed from. The first point to make is that all of these circumstances are derived from soft-law instruments, which do not bind South Africa. Second, AI and SALC never explain how these exceptions ground a duty upon Anglo, as opposed to a state.

12. But, in any event, none obtain in the circumstances of this case:

    12.1. First, AI and SALC refer to *"[w]here the remedies available to victims in their domestic courts* 'are unavailable or ineffective'*"*.[15] But the appellants (and other members of the proposed classes) have reasonable access to Zambian courts, for the reasons traversed in paragraphs 350 to 351.6 of Anglo's main heads of argument.

    12.2. Second, AI and SALC refer to *"[w]here a state is in a position to* 'influence situations located outside its territory' *by controlling the offshore activities of its corporations"*.[16] But this exception does not apply, given that Anglo lost any involvement with or alleged influence over the Mine more than half a century ago. South Africa will not fix Kabwe's problems in a permanent, sustainable fashion by saddling Anglo with monetary liability many decades after the impugned events.

    12.3. Third, AI and SALC refers to where *"[c]omplex commercial structures … make it difficult to attribute legal responsibility to any one unit"*.[17] But that is not the

[15] AI and SALC written submissions para 25.1 (footnotes removed). AI and SALC also refer to *"[l]imited financial resources"* at para 20.3 of their written submissions. This issue is dealt with in the relevant paras of Anglo's main heads of argument.

[16] AI and SALC written submissions paras 25.2 and 25.3 (footnotes removed).

[17] AI and SALC written submissions para 20.1.

appellants' case at all (they claim that the responsibility of Anglo within the relevant corporate structures is *"clear"*).[18]

12.4. Fourth, AI and SALC refer to *"fear of reprisals"* in the claimants' home state.[19] The appellants do not claim that this is an issue in Zambia.

12.5. Fifth, AI and SALC claim that there may be "*limited financial resources*" to pursue such remedies and to "*brief a lawyer, institute proceedings, and sustain an action*".[20] The appellants' case advanced by its six counsel confirms that there is no such impediment (and nothing, other than the appellants' choice of jurisdiction and election of Anglo as its defendant, stopped or stops the appellants from pursuing a claim in Zambia).

12.6. Finally, AI and SALC refer to better *"access to information"* (presumably in litigation in the respondent corporation's home state).[21] But the appellants' case will not get better after discovery against Anglo in South Africa, as the High Court correctly held[22] and for the reasons traversed in paragraphs 271 to 293 of Anglo's main heads of argument.

13. In conclusion: South Africa does not bear an extraterritorial remedial duty towards members of the proposed classes under international law, and so such a duty could not have required the High Court to decide the certification application differently.

South Africa has fulfilled any extraterritorial remedial duty towards members of the proposed classes through the certification proceedings

14. Even if it is assumed that South Africa bears such a duty towards members of the proposed classes, it fulfilled this duty by providing them access to certification proceedings. Nothing about how the High Court conducted certification proceedings, or the fact that it denied certification, violated any such duty.

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[18] Founding affidavit core bundle vol 1 pp CB51 to CB65 paras 81 to 124, and in particular para 124. This is contested by Anglo, although not as an issue to be determined at certification stage (answering affidavit core bundle vol 6 p CB1046 para 1079).

[19] AI and SALC written submissions para 20.2.

[20] AI and SALC written submissions para 20.3.

[21] AI and SALC written submissions para 20.4.

[22] High Court judgment para 137 record vol 41 p 6815.

15. AI and SALC accept that the international-law duty to provide an effective remedy does not equate to the right to the desired outcome of litigation.[23] Thus, the appellants cannot complain that they have been denied their right to an effective remedy merely because certification has been refused.

16. Towards the end of their submissions, AI and SALC claim that *"the heart of the matter before this Court"* is that *"the appellants are seeking an opportunity to have their case heard in the only court that can hold [Anglo] to account"*.[24] But this claim – that the appellants were not heard by the High Court – is not sustainable:

    16.1. They were heard. It was (and is) common cause that the High Court had jurisdiction to consider the certification application by virtue of Anglo's domicile.[25] (Anglo did, to be clear, argue that the High Court would not have jurisdiction over class members if the classes were certified on an opt-out basis at the first stage, but jurisdiction for the certification proceedings was not contested).[26]

    16.2. They were heard by the High Court diligently and with an open mind considering the almost 15 000 pages of evidence before it, the hundreds of pages of argument submitted by the appellants and the oral argument made by the appellants' six counsel.[27]

    16.3. The South African court system thus plainly granted the appellants a hearing – it simply decided against them at certification stage based on standards of certification that apply equally to South African residents and non-residents.

17. So, AI and SALC are forced to argue that the extraterritorial remedial duty entails the right to *"pursue the remedy without impediment"* and that states are *"required to remove substantive, procedural and practical barriers or systemic obstacles to these processes"*[28] – and thus, presumably, that the High Court was required to lower the various standards applicable to certification so as to enable the appellants to achieve their desired result.

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[23] AI and SALC written submissions para 15.

[24] AI and SALC written submissions para 62.

[25] Answering affidavit core bundle vol 7 p CB1112 para 1327.

[26] Answering affidavit para 801 core bundle vol 6 p CB934, Anglo main heads of argument para 341.

[27] High Court judgment para 112 record vol 41 p 6805.

[28] AI and SALC written submissions para 15 (underlining added).

18. We respond to each of the specific standards raised by AI and SALC in the following section. Here, we show the argument is wrong as a matter of principle.

19. First, AI and SALC fail to refer to a rule of binding international law that mandates access to unrestricted, frictionless remedies. Rather, the binding instruments upon which AI and SALC do rely point the other way, using limiting language like the right to *"an effective remedy"*,[29] the right to *"effective protection and remedies"*,[30] the right to *"appropriate remedies"*,[31] and *"right to have his [or her] cause heard"*.[32] None confer the right to a frictionless or procedurally unrestricted remedy.

20. Second, the UN Guiding Principles make it clear that the right to an effective remedy does not require the neutering of reasonable procedural requirements:

    20.1. Principle 26 provides as follows:

> "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."[33]

    20.2. Thus, it is not required that all procedural requirements be lifted. What is required is that *"barriers"* be *"reduce[d]"*, but only so as to prevent *"a denial of access to remedy"*.[34] The duty plainly does not require national courts to abandon reasonable certification requirements for the prosecution of a class action (which are near-universal)[35] or established rules of evidence.

    20.3. The commentary to Principle 26 refers to numerous examples of the *"legal, practical and other relevant barriers"* that lead to a denial of the right of access to an effective remedy. The appellants were subjected to none of them:

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[29] Universal Declaration of Human Rights, art 8 and International Covenant on Civil and Political Rights, art 2(3)*(a)*. Page 219 of SALC and AI's Bundle of Authorities

[30] International Convention on the Elimination of All Forms of Racial Discrimination, art 6. Page 207 of SALC and AI's Bundle of Authorities

[31] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003. Page 215 of SALC and AI's Bundle of Authorities

[32] African Charter on Human and Peoples' Rights, art 7(1)*(a)*. Page 196 of SALC and AI's Bundle of Authorities

[33] Underlining added.

[34] Underlining added.

[35] The well-known exception being Australia (see *CRC Trust* para 24).

20.3.1. Many, like the *"corruption of the judicial process"*, courts not being *"independent of economic or political pressures from other State agents and from business actors"*, and the *"obstruct[ion]"* of *"the legitimate and peaceful activities of human rights defenders"*,[36] are symptoms of a wholesale breakdown in the rule of law, from which South Africa does not suffer.

20.3.2. The appellants cannot claim that "[t]he way in which legal responsibility is attributed among members of a corporate group under domestic … laws facilitates the avoidance of appropriate accountability",[37] given that (a) Anglo identified which entities rendered services to the Mine and which entities held shareholding interests during the relevant period, but stated that the issue of *de facto* control during the relevant period as presented by the appellants was not an issue capable of determination at certification stage, and was thus not addressed any further[38] and (b) the High Court's certification decision did not turn on this issue.

20.3.3. It is not the case that members of the proposed classes *"face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim"*,[39] because (a) they can access Zambian courts, as explained above (they have simply chosen not to) and (b) they have not been denied justice in South Africa (because they obtained a fair and generous certification hearing).

20.3.4. South Africa has provided for "'market-based' *mechanisms (such as litigation insurance and legal fee structures)"* for litigation funding;[40] including the Contingency Fees Act[41] and the uplifting of the ban on champerty.[42] Through these mechanisms, the appellants have obtained litigation funding running to R158 million.[43]

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[36] UN Guiding Principles p 29. Page 294 of SALC and AI's Bundle of Authorities

[37] *Id*.

[38] Answering affidavit core bundle vol 6 p CB1046 paras 1075 to 1079.

[39] UN Guiding Principles p 29. Page 294 of SALC and AI's Bundle of Authorities

[40] *Id*.

[41] Contingency Fees Act 66 of 1997.

[42] In *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2004] ZASCA 64; 2004 (6) SA 66 (SCA).

[43] High Court judgment para 58 record vol 41 p 6785.

20.3.5. As a consequence, the appellants have not *"experience[d] difficulty in securing legal representation"*.[44] They are assisted by a South African law firm and a London law firm (Mbuyisa Moleele and Leigh Day respectively), both of which specialise in class actions;[45] and by six advocates, of which three are silk.

20.3.6. As a further consequence, this is not a case suffering from *"the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise"*.[46] Because the appellants were amply funded (for purposes of certification), the appellants and their many lawyers and experts have put up a voluminous (although ultimately flawed) case for certification, to which Anglo was entitled to make a thorough response.

20.4. Indeed, the commentary to the UN Guiding Principles refers to *"options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures)"* as means to realising the right to an effective remedy.[47] South Africa, by permitting class actions (which conventionally include a certification requirement), has realised – not hindered – whatever right to an effective remedy members of the proposed classes enjoy in South Africa.

21. Third, all of this accords with the jurisprudence on the South African right of access to courts under section 34 of the Constitution:

21.1. The section-34 right is *"a right to have disputes resolved (a) by the application of law in (b) a fair (c) public hearing before (d) a court or (e) where appropriate an independent and impartial tribunal"*.[48] It is, colloquially, a right to a fair shot at obtaining legally cognisable relief from a court or tribunal.

21.2. The right does not include the following:

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[44] UN Guiding Principles p 29. Page 294 of SALC and AI's Bundle of Authorities

[45] Founding Affidavit core bundle vol 1 pp CB130 to CB134 paras 291 to 301.

[46] UN Guiding Principles p 29. Page 294 of SALC and AI's Bundle of Authorities

[47] UN Guiding Principles p 29. Page 294 of SALC and AI's Bundle of Authorities

[48] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC) para 211.

21.2.1. It is not a right to obtain one's preferred relief from a court, or even a right to a *"correct"* decision.[49]

21.2.2. It is not a right to access the court or forum of one's preference.[50] It follows that being non-suited on the basis of jurisdiction is not a limitation of the right.[51]

21.2.3. A screening procedure that prevents the progression of unmeritorious matters through the courts is not a violation of the right.[52] Certification is precisely such a screening mechanism in the context of class actions.

21.3. In *Mukaddam*, the Constitutional Court held that certification in class-action proceedings furthers – and does not limit – the right of access to courts and access to justice. It keeps out of the justice system *"class actions which hinder, instead of advance, the interests of justice"* – such as class actions that certification proceedings show to be unmeritorious.[53]

21.4. By not certifying an unmeritorious class action, the High Court furthers access to justice in at least two respects:

21.4.1. first, it prevents the class action at issue from consuming scarce court resources, crowding out others with meritorious claims; and

21.4.2. second, it prevents class members from being yoked to an unmeritorious class action – and from being bound by an adverse result.

22. By way of conclusion: merely by hearing the appellants' certification application, South Africa fulfilled any extraterritorial remedial duty to which it might be subject. Nothing about the procedure followed, nor the outcome, warrants any criticism under international law. On the contrary, the High Court – by giving the appellants a fulsome hearing, allowing them access to justice, and closely considering their case under the precedents established by South African courts on certification – discharged AI and SALC's posited duty in exemplary fashion. There is no international-law duty that AI or SALC have identified which required

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[49] *Lane and Fey NNO v Dabelstein* [2001] ZACC 14; 2001 (2) SA 1187 (CC) para 4.

[50] *South African Human Rights Commission v Standard Bank of South Africa Ltd* [2022] ZACC 43; 2023 (3) SA 36 (CC) para 31 in reference to *Mukaddam* para 28.

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

[52] *Besserglik v Minister of Trade Industry and Tourism* [1996] ZACC 8; 1996 (4) SA 331 (CC) para 10.

[53] *Mukaddam* paras 28, 29 and 38. See also *De Bruyn v Steinhoff International Holdings NV* [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ) para 300.

a lower bar than that already identified by South Africa's own courts, and by which Windell J exercised her discretion. And Zambian nationals outside South Africa (despite not being the bearers of the rights in the Bill of Rights), were accorded access to South Africa's courts. Whatever (unidentified) duty the Court bore towards them under international law, it did not entail a right (nowhere identified either) to the outcome preferred by AI and SALC.

The specific issues raised by AI and SALC

23. AI and SALC argue that South Africa's extraterritorial remedial duty required the High Court to lower the standard for certification in various respects. They are incorrect, for the reasons set out in this section.

24. One point to make at the outset: in this section, while AI and SALC claim in the body of their written submissions to be relying on *"international law"*, the sources upon which they actually place reliance are overwhelmingly either (a) soft international law, which does not bind South Africa (as explained) or (b) foreign law, which South African courts are not required to consider[54] and which the Constitutional Court has warned should not be applied in South Africa without careful consideration of the differences between the relevant foreign jurisdiction and South Africa[55] (which consideration is entirely absent from AI and SALC's written submissions).

<u>Evaluation and the weighing of evidence</u>

25. AI and SALC argue that international law required the High Court to have evaluated the evidence in a manner more favourable to the appellants.[56]

26. This is wrong for four reasons:

    26.1. First, in *CRC Trust*, this Court explained how evidence should be evaluated in certification proceedings.[57] The High Court followed these rules,[58] as is explained in greater detail in the response to the CCL in paragraphs 57 to 57.4 below. The High Court was bound by these rules, as is this Court. It was not open to the High Court, and it is not open to this Court, to follow a different set of rules picked by AI

[54] Constitution, s 39(1)*(c)*.

[55] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC) para 26.

[56] AI and SALC written submissions paras 41 to 44.

[57] *CRC Trust* paras 40 to 42.

[58] Anglo main heads of argument paras 49 to 54.

and SALC from their favoured foreign judgments and soft-law sources (none of which is binding on South African courts).

26.2. Second, the rules in *CRC Trust* already favour certification appellants.[59] Were they to be watered down, the result would be to permit unmeritorious class actions to go to trial, consuming the resources of the courts, defendants, and applicants. It would not be in anyone's interest for the courts to *"place a ghost in the machinery of justice"*, to quote the High Court in *De Bruyn*.[60]

26.3. Third, some of the standards floated by AI and SALC would constitute a radical departure from basic principles of our law. For example, they claim that *"it would be justifiable [in certification proceedings] to shift the burden of proof to the defendant corporation"*.[61] But this would violate the fundamental rule of our law that *"[i]f one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it"*.[62] It would also infringe the constitutional right of certification respondents to a *"fair public hearing before a court"* under section 34 of the South African Constitution.

26.4. Fourth, AI and SALC, like the appellants, accuse Windell J of having conducted a *"mini-trial"*.[63] This is wrong, and unfair to Windell J. The appellants put a great deal of evidence before Windell J, to which the respondents responded by putting up further evidence which for the greater part remained uncontested. Windell J was obliged to consider the evidence, and did so carefully. AI, SALC and the appellants conflate assessing the evidence in a voluminous, complex application – which is required – with a *"mini-trial"*. But everything Windell J did was appropriate for motion proceedings in a certification context. Pertinently, she accepted factual assertions made by the appellants (together with Anglo's evidence where uncontested), but tested whether the inferences drawn by the appellants were justified by those facts.[64]

27. As a justification for relaxing evidential rules, AI and SALC refer throughout to under-resourced certification appellants struggling to obtain evidence. But this bogey is utterly

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[59] *CRC Trust* para 40.

[60] *De Bruyn* para 300.

[61] AI and SALC written submissions para 43.5.

[62] *Pillay v Krishna* 1946 AD 946 at 951 to 952.

[63] AI and SALC written submissions paras 41 to 42.

[64] See Anglo heads of argument para 54.

divorced from the facts of this application. The appellants were not under-resourced in the certification proceedings, and they did not struggle to accumulate evidence. They did not fail because they could not obtain evidence which exists – they failed because there is no evidence to support their expansive claim, despite exhaustive, and comprehensive attempts over many years to collect it.

28. AI and SALC place significant reliance upon the UK Supreme Court cases of *Vedanta*[65] and *Okpabi*.[66] But these cases are plainly distinguishable, for the reasons set out in paragraph 137 of Anglo's main heads of argument. We add the following here:

    28.1. The reliance by AI and SALC on these two cases is puzzling, given that they do not concern international law. In any event, those two cases are plainly distinguishable on the law. They concerned a preliminary determination by the English courts on whether those courts should assume jurisdiction under the doctrine of *forum non conveniens.* They did not concern procedural rules regarding class actions (which do not exist, in this context, in English law). Accordingly, they were decided under rules which did not primarily concern the question whether unmeritorious or potentially oppressive cases should be weeded out in the interests of justice.

    28.2. Those two cases are also plainly distinguishable on the facts. Both concerned recent environmental pollution harming present-day communities. They did not concern wrongs allegedly having been committed many decades ago, allegedly harming present-day claimants (very few of whom were alive when the alleged wrongs occurred). This temporal remoteness not only distinguishes this case from the English cases; it is fatal to both the substance of the appellants' tortious claim, as well as to the interests of justice for certification.

    28.3. AI and SALC rely on the exposition in both cases of English rules of evidence in summary proceedings. It is not permissible to transplant these into the South African context, especially given that this Court and the Constitutional Court have already laid down rules regarding the assessment of evidence in certification proceedings, which the High Court was bound to follow.

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[65] *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.Page 644-680 of the Respondent's Bundle of Authorities Not Readily Available.

[66] *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3. Page 397-426 of the Respondent's Bundle of Authorities Not Readily Available.

28.4. It is particularly inappropriate to seek to transplant foreign procedural rules, given that, in cases involving choice-of-law issues, the *"rules of procedure are amongst the most difficult and technical in any legal system and it would be unreasonable to expect a judge to master the foreign procedural rules as well as the substantive ones in a private international law case"*.[67] This is why, in private-international-law cases, the procedural law of the *lex fori* (in this case South Africa) applies.

Foreseeability and causation

29. AI and SALC argue that international law requires that the requirements for proving foreseeability and causation should be softened in certification proceedings. AI and SALC are vague about exactly what rules (binding or otherwise) of international law require this relaxation, or how this should be done, so the argument is difficult to engage with.

30. But there are two simple, principled reasons why the argument is bad:

30.1. First, foreseeability and causation are matters of substance, which must be determined by the *lex causae*. It is common cause that the *lex causae* is Zambian law.[68] In litigation in South African courts, foreign law is a matter of fact that must be proven by the parties relying on it.[69] AI and SALC have not proven (or even attempted to argue) that international law is law in Zambia, and so this Court cannot include international law as part of the substantive law governing the dispute.

30.2. Second, lowering substantive legal standards at certification stage would result in unmeritorious cases ultimately failing at trial which, as explained, would not be in the interests of justice.

Reasonable alternative forum, appropriateness, manageability and practicality

31. AI and SALC submit, essentially, that the High Court should have —

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[67] CF Forsyth *Private International Law* 5 ed (2012) 23, cited with approval in *Manufacturers Hanover Trust Co v the Fund Constituting the Proceeds of the Sale of the MV Ocean Runner: the MV Ocean Runner* 1994 (4) SA 692 (C) at 697C to D.

[68] Founding affidavit para 266 core bundle vol 1 p CB123, not contested at answering affidavit para 1290 core bundle vol 7 p CB1103.

[69] *Standard Bank of South Africa Ltd v Ocean Commodities Inc* [1984] ZASCA 2; 1983 (1) SA 276 (AD) at 294.

31.1. placed greater weight on various factors that militate in favour of certification (the absence of a reasonable alternative forum,[70] the appropriateness of a class action as a procedure);[71] and

31.2. placed lesser weight on factors that militate against certification (manageability and practicality).[72]

32. But AI and SALC do so ethereally, and do not engage at all with Anglo's submissions on these factors in its main heads of argument, which we do not repeat. All favour the denial of certification.

33. And AI and SALC's submissions on these factors must founder against the standard for appellate interference with the High Court's discretion – which standard AI and SALC (and the other *amici*) never come to grips with. This Court cannot interfere with the High Court's order merely because it might have placed greater weight on some factors, and lesser weight on others. It is necessary for the High Court to have misdirected itself, which it did not do. AI and SALC's preference regarding the balancing of relevant factors does not equate to a misdirection.[73]

Section 8(2) of the Constitution

34. AI and SALC argue that the fact that Anglo is capable of being the bearer of constitutional duties under section 8(2) of the South African Constitution *"should weigh heavily in favour of this Court granting certification"*.[74]

35. But section 8(2) of the Constitution is plainly irrelevant:

35.1. First, the extent of Anglo's obligation to realise constitutional rights is a matter of substance. Section 8(2) of the South African Constitution is not part of Zambian law.

35.2. Second, Anglo can only bear obligations under section 8(2) to those who hold rights under the South African Constitution. As explained, members of the

[70] AI and SALC written submissions paras 51 to 53.

[71] AI and SALC written submissions paras 63 to 66.

[72] AI and SALC written submissions paras 54 to 58.

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

[74] AI and SALC written submissions paras 59 to 62.

proposed classes, as non-South Africans outside South Africa, are not the bearers of South African constitutional rights.

35.3. Third, the events on which the alleged tort against the appellants are based, occurred long before the Constitution (or even the interim Constitution) were in force. The Constitution does not have retroactive or retrospective effect.[75]

36. In any event, the mere fact that an entity may notionally be a bearer of constitutional obligations does change the nature of the question that was before Windell J: did the appellants satisfy the established test for certification? That was the real and binding domestic duty to discharge before the High Court, on the actual evidence that was before it. It was a burden that the appellants failed to meet.

Conclusion

37. South Africa is under no international-law duty to afford non-South Africans outside South Africa access to its courts to solve wholly foreign problems. This notwithstanding, the appellants were afforded full access to the South African court system for their (ultimately unsuccessful) attempt to obtain certification, at significant expense to the South African taxpayer. They hold no further rights under South African or international law that could justify a different outcome in the certification proceedings – and they have pointed to no binding rule of international law that Windell J failed to follow or take account of.

C. RESPONSE TO THE SPECIAL PROCEDURES

Introduction

38. The Special Procedures' argument can fairly be summarised as follows:

38.1. Anglo has publicly committed itself to the UN Guiding Principles;

38.2. for Anglo to oppose certification is inconsistent with this commitment, because non-certification would result in a denial of access to justice for members of the proposed classes; and

[75] As to the interim Constitution, see *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC) paras 13 to 15, 68, 114 and 151 and *Tsotetsi v Mutual and Federal Insurance Co Ltd* [1996] ZACC 19; 1997 (1) SA 585 (CC) para 6; as to the (final) Constitution see *S v Pennington* [1997] ZACC 10; 1997 (4) SA 1076 (CC) para 36 and *Key v Attorney-General, Cape Provincial Division* [1996] ZACC 25; 1996 (4) SA 187 (CC) para 6.

38.3. thus, Anglo's election to oppose is a factor that should favour certification.

39. This argument is incorrect for the following reasons (by way of summary):

39.1. Anglo's opposition to certification is not inconsistent with the Guiding Principles. The Guiding Principles permit business enterprises to oppose unmeritorious litigation (including at the certification stage of a class action), which is what Anglo is doing.

39.2. Anglo's election to oppose is irrelevant to whether certification should be granted. Whether certification should be granted depends on the merits of the certification application.

39.3. The Special Procedures assume without justification that Anglo's opposition is somehow immoral or illegitimate. This is wrong. Anglo has a constitutional right to oppose any litigation launched against it. In this case, Anglo has put up a thorough opposition on the merits, which assisted the High Court in deciding that certification was not in the interests of justice. Had Anglo not opposed, the High Court's ability properly to decide the application would have been compromised.

Anglo's opposition to certification is not inconsistent with the UN Guiding Principles

40. The Special Procedures primarily rely on two of the UN Guiding Principles – Principles 11 and 22.[76]

41. Principle 11 provides as follows:

> "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they <u>are</u> involved";[77]

and Principle 22 provides as follows:

> "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate purposes."

[76] Special Procedures written submissions para 39.
Page 278 and 289 of SALC and AI's Bundle of Authorities

[77] Underlining added.

42. Anglo's opposition to certification is in no way inconsistent with the UN Guiding Principles, for at least the following reasons:

42.1. First, Anglo has consistently maintained that it did not cause class members any harm, and this has always been the basis of its opposition – that the appellants have failed to raise a triable issue in respect of Anglo.

42.2. In the language of the UN Guiding Principles, Anglo's case is that it did not cause or contribute to any *"adverse human-rights impacts"*. It follows that Anglo bears no obligation to the appellants under the Guiding Principles, and certainly none that could be violated merely by electing to oppose certification.

42.3. The Special Procedures claim that Anglo *"cannot seriously dispute that it has contributed to [the situation in Kabwe]"*.[78] This is absurd. The denial that it has contributed to the situation in Kabwe is a core argument in its opposition to certification, which opposition the High Court accepted.

42.4. Second, the UN itself, in its interpretative guide to the Guiding Principles, accepts that an enterprise is not precluded by the Guiding Principles from opposing an unmeritorious lawsuit. The Special Procedures surprisingly did not draw attention to the following critical passage in the guide:

> "**Q 68. What if an enterprise does not accept that it has caused or contributed to a human rights impact?**
>
> If an enterprise contests an allegation that it has caused or contributed to an adverse impact, it cannot be expected to provide for remediation itself unless and until it is obliged to do so (for instance, by a court)."[79]

42.5. Third, the Guiding Principles were only approved by the UN Human Rights Council in 2011, almost forty years after the relevant period in this matter. The Guiding Principles do not operate retrospectively. It follows that the Guiding Principles cannot be relevant to the content of Anglo's obligations in this litigation.

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[78] Special Procedures written submissions para 40.

[79] United Nations *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012) 66 to 67. Available at https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf (accessed 17 March 2025, bold heading in original, underlining added).

Anglo's election to oppose is irrelevant to certification

43. Anglo's election to oppose is in any event entirely irrelevant to whether certification should be granted. This is for one primary reason and two subsidiary reasons.

44. The primary reason is that whether certification should be granted depends on the merits of the certification application – specifically, whether certification would be in the interests of justice. In determining this issue, the certification court must have regard to the factors listed in *CRC Trust* (including, crucially, triability),[80] as well as any other factor relevant to the interests of justice.[81]

45. What is irrelevant to the interests-of-justice enquiry – and thus to certification – are the extra-curial public statements made about human rights by the respondent many years before a certification application is launched, and the extent to which these statements are consistent with the UN Guiding Principles.

46. The two subsidiary reasons that Anglo's election to oppose is irrelevant are the following:

    46.1. First, there is nothing wrong, legally or morally, with Anglo's election to oppose certification. Anglo has a right to oppose certification. This right partially exists to assist the High Court, and the exercise of this right as a matter of fact assisted the High Court.

    46.2. This right, and its value, was recognised by this Court in the context of certification proceedings in *CRC Trust*:

> ""[C]ertification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit".[82]

    46.3. The value of hearing the other side in certification proceedings is an example of its value in our law more generally. As expressed in the famous dictum from *John v Rees*:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely

[80] *CRC Trust* paras 26 to 28.

[81] *Mukaddam* paras 34 to 35.

[82] *CRC Trust* para 24.

> answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change".[83]

46.4. Anglo's opposition in this application has played precisely this role. It assisted the High Court in reaching the (with respect correct) conclusion that the class action was both *"factually hopeless"*[84] and legally untenable.[85]

46.5. Indeed, the Special Procedures' claim that Anglo should not be permitted to defend itself in the certification proceedings is undermined by their (entirely correct) concession that Anglo may defend itself at trial.[86] But this invites the question: if Anglo should be allowed to defend itself at trial, why can it also not defend itself at certification? This is especially so given that a successful defence to certification would save everyone a doomed, protracted and tremendously expensive trial – and allow the appellants to focus their efforts at a remedy in other appropriate *fora*, and against other appropriate defendants.

46.6. The second subsidiary reason why Anglo's election to oppose is irrelevant to certification is the status of the UN Guiding Principles, which are not international law, and thus do not bind South Africa or this court (or even Anglo). The Guiding Principles themselves make this clear:

> "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[87]

The reliance on Njongi is misplaced

47. The Special Procedures seek to draw parallels between Anglo and the state respondents in *Njongi*.[88]

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[83] *John v Rees* [1970] 1 Ch 345 at 402D, quoted with approval in *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC) para 176.

[84] High Court judgment para 144 record vol 41 pp 6817 to 6818.

[85] High Court judgment para 145 record vol 41 p 6818; para 339 record vol 41 p 6887.

[86] Special Procedures written submissions para 40.

[87] UN Guiding Principles p 1. Page 267 of SALC and AI's Bundle of Authorities

[88] Special Procedures written submissions paras 44 to 45.

48. In *Njongi*,[89] the Eastern Cape Department of Welfare had used prescription to oppose an application for payment of arrear social-grant payments. The Department opposed solely on the basis of prescription and did not contest the merits of the claim.[90] The Constitutional Court criticised the Department for raising prescription as its only defence, given *inter alia* the state's constitutional duty to pay social grants to those who qualify.[91]

49. But this case is worlds removed from *Njongi*:

    49.1. First, a court cannot consider prescription *mero motu*.[92] The litigant's conduct in this regard, in choosing whether to raise a prescription defence, is consequential to whether the substantive claim proceeds.

    49.2. In contrast, a Court must always determine whether the interests of justice support certification – regardless of whether a defendant opposes it. Thus, a respondent's participation in certification proceedings (including through opposing) can only assist the court in making a determination that it in any event must make.

    49.3. Second, what underlay the Constitutional Court's disdain for the Department's conduct in raising prescription in *Njongi* was its thoughtless reliance on a technical objection to non-suit what was indisputably a valid claim.

    49.4. Anglo's opposition to certification is anything but technical. It is a thoughtful and thorough opposition on the merits. Anglo's opposition (upheld by the High Court) is that certification should be denied because the appellants' claim is fundamentally bad.

    49.5. Third, unlike where a court upholds a defence of prescription, the denial of certification does not extinguish the underlying claim.

    49.6. Fourth, in *Njongi*, the Department indisputably had a constitutional obligation to pay social grants to Ms Njongi. As explained in Section B above, Anglo bears no South African constitutional obligations to members of the proposed classes; and no party has ever argued that it bears obligations under the Zambian bill of rights.

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

[90] *Id* para 31.

[91] *Id* paras 78 to 91.

[92] *Id* para 78.

Non-certification would not result in a denial of access to justice

50. The Special Procedures argue that non-certification would result in a denial of access to justice. They are incorrect. In short:

    50.1. First, as explained more fully in paragraphs 14 to 22 above, the appellants have had an extensive opportunity to put their case before the High Court in the certification proceedings. This has realised access to justice for them, regardless of the outcome.

    50.2. The Special Procedures proclaim that Anglo's opposition to certification is *"an effort to cut the litigation off before it begins"*.[93] The claim that this litigation has not yet begun is divorced from reality. It very clearly has. The appellants have had an extensive opportunity to persuade the High Court that they have a triable case, but they failed – despite preparing the matter for approximately 17 years, securing litigation funding, presenting evidence and argument running to thousands of pages, and presenting oral argument to the High Court over several days. They have been granted access to justice. And the very purpose of a certification hearing is, as this Court has ruled, to dispose of unmeritorious cases *in the interests of justice*. To the extent that the High Court's ruling has *"cut off"* the litigation going to trial, that is precisely what a certification process is designed for.

    50.3. Second, it is not correct that the appellants have no other remedy. They can sue Zambia Consolidated Copper Mines Ltd ("**ZCCM**") (which has effectively conceded liability) in Zambia.[94] Members of the proposed classes are thus not in the same position as class members in *Nkala*,[95] as the Special Procedures contend.[96]

    50.4. Indeed, this contention by the Special Procedures is inconsistent with their conduct outside this litigation.

    50.5. In 2021, two of the United Nations Special Rapporteurs (who are *amici*) wrote to the Zambian government asking it to provide information on the government's remediation plans, its regulation of artisanal mining, and the measures it was

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[93] Special Procedures written submissions para 4.

[94] See Anglo main heads of argument paras 210 to 249 and paras 350 to 351.6.

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

[96] Special Procedures written submissions paras 27 to 29.

taking to regulate, monitor and scrutinise current operators in the area, including Jubilee Metals.[97] They also wrote to Jubilee Metals requesting information on its activities,[98] and to the South African government asking what steps it has taken to ensure Jubilee Mining's compliance with its human rights obligations and to ensure their cooperation with *"legitimate remedial processes"*.[99]

50.6. The Special Procedures should be well aware that legitimate claims lie against ZCCM (and possibly others); and cannot now claim that refusing certification of this particular class action against Anglo will close the door on any remedy for the community.

50.7. Third, the Special Procedures argue that *"[a] class action is the only way [members of the proposed classes] would be able to realise their constitutional right of access to court"*.[100] But, as explained above, all members of the proposed classes are non-South Africans outside South Africa, and so are not the bearers of rights under the South African Bill of Rights, including the right of access to courts.

50.8. In a footnote,[101] the Special Procedures claim that *"any person litigating in a South African court is a bearer of [the South African right of access to courts]"*. The Special Procedures rely on the Constitutional Court judgment of *Lawyers for Human Rights*,[102] claiming that it is authority for the proposition that the right of access to courts *"covers even persons who are not South African nationals"*.

50.9. This is incorrect:

50.9.1. In *Lawyers for Human Rights*, the Constitutional Court held that rights in the Bill of Rights accorded to *"everyone"* can be claimed by non-South Africans in South African territory. It did not hold that they can be claimed by non-South Africans outside South Africa – a holding which would be inconsistent with the express holding of the Constitutional Court in *Kaunda*.[103]

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[97] Answering affidavit annexure AA105 record vol 25 p 4223 para 5.

[98] Answering affidavit annexure AA106 record vol 25 p 4228.

[99] Answering affidavit annexure AA107 record vol 25 p 4239 paras 2 and 4.

[100] Special Procedures written submissions para 28.

[101] Special Procedures written submissions para 28 fn 22.

[102] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC).

[103] See paras 9.4 to 9.4.2 above.

50.9.2. Moreover, the rule proffered by the Special Procedures would have the absurd result that any of the world's 8.2 billion people, regardless of nationality or location, acquires a constitutional right to litigate in South African courts (at the expense of South African taxpayers) merely by briefing South African attorneys.

Conclusion

51. Anglo has a constitutional right to oppose certification. This right, like all *audi* rights, exists to assist the High Court; and Anglo's opposition as a matter of fact assisted the High Court in this case. For the Special Procedures to claim that it is somehow immoral or illegitimate for Anglo to oppose certification, based on a strained reading of the UN Guiding Principles, is wrong, contrary to the established South African precedent that was binding on Windell J, and can only harm the administration of justice as this Court itself has stressed.

D. RESPONSE TO THE CCL

52. The CCL embarks on an expansive description of children's rights under section 28 of the Constitution and international law. The CCL's central thesis is the claim that the *"High Court has imposed too high a standard for triability, the effect of which has been to discriminate against child litigants"*.[104] The CCL argues instead that the best interests of the child or *"paramountcy principle"*, children's rights, and considerations of intergenerational justice require a *"light"* standard of triability[105] which imposes *"a low burden on the litigants*."[106]

53. The CCL's submissions are regrettably disconnected from the High Court's actual findings on the facts of this case, in which it applied binding precedent:

53.1. The binding test for triability as set out in *CRC Trust* is a light standard. That test does not infringe any of the non-binding soft-law principles of international law recited by the CCL. The High Court applied this test scrupulously. The appellants simply failed to meet it.

53.2. The CCL's argument nonetheless rests on the fundamentally flawed premise that the interests-of-justice test – and specifically the triability consideration – is at odds with the best interests of the child. To the contrary, the interests of child litigants

[104] CCL written submissions para 5.2.

[105] CCL written submissions para 47.

[106] CCL written submissions para 3.

and potential class members are protected by the courts' scrutiny of triability in class action certification proceedings.

54. The remaining principles recited by the CCL as grounds for criticising the High Court's refusal of certification are irrelevant. They both ignore what the High Court actually decided in its judgment, and fail to consider the facts before the High Court.

55. One point to make at the outset: the CCL relies on the children's rights in section 28 of the South African Constitution. As explained, non-South Africans outside South Africa are not beneficiaries of the South African Bill of Rights. It follows that members of the proposed classes that are children cannot avail themselves of the rights under section 28.

The High Court correctly applied the light test for triability in CRC Trust

56. The CCL claims that the High Court raised the standard of triability[107] by imposing on the appellants a "*duty to disprove at certification stage positive defences advanced*" by Anglo.[108]

57. The High Court applied the test for triability which bound it. The binding triability test is a low bar. The appellants failed to meet it.

    57.1. In line with *CRC Trust*, the High Court affirmed that certification is a procedural step and not an invitation to weigh the probabilities; that it need only be convinced that there is a cause of action raising a triable issue; and that in doing so it applies a two-part test to determine (1) whether there is a *prima facie* case on the facts and (2) whether there is an arguable case on the law.[109]

    57.2. The High Court accepted that it was bound to refuse certification if the appellants' case was factually hopeless in that the evidence available and potentially available after discovery and other steps will not sustain the cause of action on which the claim is based.[110]

[107] CCL written submissions para 46.

[108] CCL written submissions para 44.

[109] High Court judgment para 113 record vol 41 p 6805 in reference to *CRC Trust* paras 40 to 41.

[110] High Court judgment para 115 record vol 41 p 6806 in reference to *CRC Trust* para 35.

57.3. The High Court further held, correctly, that it was not precluded from considering Anglo's evidence where it was undisputed or indisputable or where the appellants' factual allegations are false or incapable of being established.[111]

57.4. The High Court applied these tests meticulously to its analysis.

57.5. It found that the appellants' case was factually hopeless: "*the facts and documentary evidence the [appellants] rely on in support of their claim is insufficient to establish a prima facie case against Anglo*".[112]

57.6. The CCL's claim that the High Court imposed a duty on the appellants to disprove Anglo's defences is simply wrong. The appellants' own evidence was insufficient to establish a *prima facie* claim.

57.7. To the extent that the High Court did consider Anglo's rebutting evidence, that evidence was uncontested by the appellants.[113] It cannot be gainsaid that a certifying court is entitled to consider uncontested evidence.

58. The High Court's factual findings are therefore squarely within the test developed in *CRC Trust*. The High Court therefore did not raise the threshold of triability.

59. The CCL does not explicitly say – but strongly implies – that the triability test in *CRC Trust* infringes the rights of the child. In line with the other *amici*, the CCL's argument boils down to a contention that this (light) test remains too demanding and ought to be watered down.

60. We emphasise, however, that there is nothing in the international-law principles or constitutional arguments raised by the CCL which conflicts with the judgment in *CRC Trust.*

61. There are, in any event, no grounds to lower the threshold of triability established in *CRC Trust* on the basis of either the fact that this case concerns children, or that it concerns allegations of human-rights infringements:

61.1. The proposed class in *CRC Trust* similarly comprised children and vulnerable populations, and the proposed class action also concerned allegations of human-rights infringements.

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[111] High Court judgment para 114 record vol 41 p 6806 in reference to *CRC Trust* para 41.

[112] High Court judgment para 116 record vol 41 p 6806. Emphasis added.

[113] See, for example, High Court judgment paras 114, 138, 143, and 158 record vol 41 pp 6806, 6815, 6817, and 6822 to 6823.

61.2. The SCA described the proposed class in *CRC Trust* as "*both large and in general poor*".[114] Three of the appellants in *CRC Trust* were described as non-governmental organisations "*that work among children, the poor and the disadvantaged"*.[115] The CRC Trust relied on infringements of the Bill of Rights.[116]

61.3. This Court nonetheless insisted that the same test for certification of a class action applies, whether or not the cause of action is founded on or implicates infringements of the Bill of Rights.[117]

62. The CCL argues further that children, unlike adult litigants, require a lower threshold of triability. This, they say, is in order to access trial procedures that may assist them to prove their case, but also because "*there is a real prospect that funding and other resources necessary for conducting investigations will be unlocked [by funders] in a staggered manner*" post-certification.[118]

63. It is unclear how child litigants would differ from adult litigants in the CCL's speculative scenario (for which the CCL provides no factual basis, and which they would have had to advance in order to justify their contention that there is some or other *"discrimination"* against children that justifies a relaxation of the binding judgments on class actions). Nonetheless, it is important to emphasise how far the CCL's speculative scenario is divorced from the case that was before the High Court for certification:

63.1. The appellants did not lack resources to procure evidence pending certification. To the contrary, the appellants told the High Court that their lawyers spent 17 years building the case.[119] The financial resources made available by their litigation funders run to R158 million.[120]

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[114] *CRC Trust* para 19.

[115] *CRC Trust* para 6.

[116] *CRC Trust* para 9.

[117] *CRC Trust* paras 19 to 21. See also *Nkala* para 38.

[118] CCL written submissions para 48.

[119] See founding affidavit paras 317 to 318 core bundle vol 1 pp CB142 to CB143. See also answering affidavit in application for extension of time paras 54. 1 to 54.5 record vol 36 pp 5963 to 5965 where Ms Mbuyisa describes the contention that the appellants took 17 years to investigate the case as a mischaracterisation but nonetheless affirms that she commenced investigating litigation on the issue in 2003.

[120] High Court judgment para 58 record vol 41 p 6785.

63.2. The essential evidence on duty of care, breach of duty and causation will also not improve for the appellants at trial.

63.3. The appellants' case is inevitably reliant on historical records. The parties have produced thousands of documents culled from several archives in Zambia, South Africa and the UK. The prospects of identifying further historical documents are purely speculative and Anglo has gone under oath to state that there is nothing in its possession or control left to disclose.[121]

63.4. There will be very few living witnesses available in a case like this where liability is sought to be established for acts taking place between 50 to 100 years ago. The appellants have put forward only one witness, aged 86, who testifies about particular events in 1969 and 1970 – one year in the entire *"relevant period"*. But even then, for the reasons set out in paragraphs 94 to 96 of Anglo's main heads of argument, that witness does not assist the appellants in respect of establishing knowledge or foreseeability of harm to future generations of a community of children and women.

63.5. The appellants also do not dispute substantial portions of the material facts adduced by Anglo.[122]

64. The deficiencies in the appellants' case are therefore highly unlikely to improve at trial regardless of further resources their foreign funders may expend on it should it go to trial. The High Court addressed this in paragraphs 134 to 144 of its judgment.[123]

65. By way of example, the CCL's argument as it relates to the element of causation illustrates all of the above points: that the CCL's argument is disconnected from the High Court's judgment, which judgment carefully applied the law that bound it, and that there was no *"reverse onus"* or evidentiary burden placed on the appellants.

65.1. The CCL cites *Borealis* in support of its contention that the High Court impermissibly imposed an onus or evidentiary burden on the appellants in respect of Anglo's defence of *novus actus interveniens*.[124]

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[121] See para 279 p 55 of Anglo's main heads of argument.

[122] See, for example, paras 23 p 5 and paras 210 to 212 pp 40 to 41 of Anglo's main heads of argument.

[123] Record vol 41 pp 6814 to 6818.

[124] CCL written submissions para 44 p 15 citing *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm) para 43, which held that:

65.2. But the High Court did nothing of the sort.

65.3. The High Court carefully considered the documents and reports on which the appellants relied.[125] It was on the basis of those documents that the Court held that the "*[appellants] have failed to advance any evidence of knowledge of harm to an unborn class living in townships yet to be formed to make up the Kabwe district"*.[126] It held further that the appellants' case was "*bereft of any specification of what Anglo is said to have done wrong, because they fail to say what the reasonable miner in Anglo's shoes would have done differently*".[127]

65.4. The appellants did not (and could not) contest the evidence adduced in Anglo's answering affidavit on the ZCCM's reckless conduct in operating the Mine between 1974 and its closure; the subsequent ongoing failure by ZCCM and the Zambian government to rehabilitate the Mine; instead selling off the Mine and surrounding property and permitting mining and scavenging activities to continue to this day. Anglo thus made out an uncontested case that this conduct was the real cause of the appellants' damages. The appellants quibble with the legal relevance of these facts, but not their existence.

65.5. The appellants thus failed to articulate a basis for certain elements of Anglo's alleged liability, and failed to advance evidence on others. No reverse onus or evidentiary burden was applied.

65.6. It was in this context that the High Court held that, based on the undisputed evidence, Anglo could not be said to be *prima facie* liable for the alleged harms. But most importantly, this, it said, was "*regardless of whether this is due to a* novus actus *absolving Anglo of potential liability or foreseeability*".[128]

"First, although an evidential burden rests on the defendant insofar as it contends that there was a break in the chain of causation, the legal burden of proof rests throughout on the claimant to prove that the defendant's breach of contract caused its loss."

Page 1-45 of CCL Bundle of Authorities

[125] High Court judgment paras 117 to 133 record vol 41 pp 6807 to 6813.

[126] High Court judgment para 140 record vol 41 p 6816. Emphasis added.

[127] High Court judgment para 142 record vol 41 p 6817. Emphasis added.

[128] High Court judgment para 144 record vol 41 pp 6817 to 6818.

The flawed premise of the CCL's argument

66. The CCL's case rests on the flawed premise that it may be in the best interests of the child to certify a case in which there is no *prima facie* case on the facts or arguable case on the law. This premise is wrong for two reasons.

67. First, if the High Court had certified a hopeless case, it would in effect be rendering the claims of an estimated 140,000 women and children *res judicata* because the class action is doomed to fail.

68. If anything it will permanently close the door on the claims they assert against Anglo, it is this prospect – not non-certification before the matter becomes *res judicata*.

69. The interests-of-justice test as developed and applied by our courts does not only protect defendants and the courts. It also protects would-be class members. Amongst others, it protects them from hopeless claims being litigated on their behalf in circumstances in which they may never have expressed consent to join the class, as would be the case in the proposed opt-out first phase of the proposed class action. The triability criterion, as applied by the High Court, therefore protects child class members' rights.

70. The notion that careful scrutiny of the interests-of-justice test protects the best interests of the child was considered by the High Court. It expressly recognised its duty as the upper guardian of the child's best interests and how this imposed a heightened duty on it to ensure that the claim is adequately pursued and the children's financial interests therein protected. It said that this was particularly so here where the "*purported claims of thousands of Zambian children may be rendered* res judicata *by an action in a foreign jurisdiction*".[129]

71. The High Court – again applying binding precedent – recognised that to certify a class action contrary to the interests of justice "*is not only adverse to Anglo's interests: It undermines the [appellants'] access to justice*".[130]

72. This accords with the Constitutional Court's judgment in *Mukaddam*. The Court held that courts' procedural rules – including the process for class certification – *"facilitate access to*

[129] High Court judgment para 81 record vol 41 p 6791.

[130] High Court judgment para 337 record vol 41 p 6886.

courts rather than hinder it".[131] It held that *"[p]ermitting a class action in some cases may … be oppressive and as a result inconsistent with the interests of justice"*.[132]

73. Second, thousands of vulnerable and child litigants seek access to justice from South African courts every day. If the courts were to place a "*ghost in the machinery of justice*"[133] in the form of an untriable claim – particularly one of the scale and complexity envisaged here – it would crowd out and delay access to justice for other vulnerable and child litigants, including those with good claims.

74. That is a significant threat in this case, given the scale of the proposed class action, as the High Court recognised. The Court referred to the appellants' own claim in argument that it would take ten years for their legal team simply to take instructions from every member of the proposed classes.[134] As the Court held: *"[i]f this is so, it would take much longer for a South African court to assess the claim of each class member in the second stage [of the proposed class action]."*[135]

75. Certification of an untriable claim would therefore undermine not only the best interests of would-be class members but also the best interests of other child litigants in the South African courts.

There is no denial of access to justice

76. The CCL's remaining references to principles of children's rights either find no application in this case or do not support the argument for certification.

77. The CCL argues that the best interests or paramountcy principle imposes substantive, procedural and interpretive obligations on the courts.[136] The CCL says that children's rights require that the courts consider the effect of their decisions on children's lives; treat children fairly and equitably; enable children's access to collective complaints such as class actions; recognise children's standing and right to be heard in proceedings affecting them; enable

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[131] *Mukaddam* para 32.

[132] *Mukaddam* para 38.

[133] *De Bruyn* para 300.

[134] High Court judgment para 337 record vol 41 p 6886.

[135] High court judgment para 337 record vol 41 p 6886.

[136] CCL written submissions para 10.

additional assistance to children where required; and prefer interpretations of law that favour children's best interests.[137]

78. But these principles do not lend any support to the implication of the argument advanced by the CCL that the High Court infringed children's rights in refusing certification.

    78.1. The High Court afforded the child appellants access to South Africa's class action certification proceedings through their guardians. No child was denied access to the court process on the basis of incompetence or standing. Nor did the High Court refuse any child the right to be heard, as explained.

    78.2. The Court noted that there was no impediment to the child class representatives' suitability to act as class representatives.[138]

    78.3. The High Court referred to sections 10 and 14 of the Children's Act,[139] section 28(2) of the South African Constitution as well as applicable international instruments that guaranteed the child's right to bring a matter to court and to participate in court proceedings.[140]

The High Court considered the best interests of the child

79. The CCL wrongly contends that the High Court did not consider the best interests or any rights of children.[141] But such a contention is a caricature of the careful judgment of the High Court.

80. The High Court went into extensive detail on the harm that is caused to children by lead exposure and their unique susceptibility to exposure.[142] It accepted the appellants' evidence on these harms as a matter of fact. What the High Court did not accept, however,

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[137] CCL written submissions paras 13, 14, 17.1 to 18, 27, 28, 31 and 32.

[138] High Court judgment para 22 record vol 41 p 6773.

[139] Children's Act 38 of 2005.

[140] High court judgment paras 22 to 23 record vol 41 p 6773.

[141] CCL written submissions para 43 p 13.

[142] High Court judgment paras 3 to 4 record vol 41 p 6766:

> *"Young children, whose brains and bodies are still developing, are especially susceptible to lead poisoning due to their hand-to-mouth and object-to-mouth contact, their habit of crawling and failure to wash their hands regularly. In children with iron and/or calcium deficiency, a condition prevalent in low-income nations like Zambia, lead absorption can be even higher. In fact, the incidence of lead poisoning in children under 3 years old in Zambia's mining town Kabwe (Kabwe), is among the highest in the world."*

was that the appellants had made out a *prima facie* case that Anglo could be held responsible for harm caused to the appellants by lead exposure.

81. The High Court specifically considered the children's best interests when assessing various criteria in the interests-of-justice test. By way of example:

    81.1. The Court specifically noted its role as the upper guardian of the child's best interests.[143]

    81.2. It said that its duty to scrutinise the funding arrangements (as considerations in the interests of justice test) was, if anything, heightened in order to protect the child litigants.[144]

    81.3. The Court also considered the opt-out class action's impact on child class members,[145] something the CCL itself deems an important issue in its submissions.

The High Court considered intergenerational justice

82. The CCL says that the High Court infringed the best-interests principle by failing to consider intergenerational justice.[146] But this too is an unfair construal of the judgment. The High Court did consider the issue and made several findings on it.

83. The appellants' case for Anglo's past conduct to be a basis for liability for harms suffered by women and children today failed because, amongst other matters, the appellants could not show on a *prima facie* basis that the harms were foreseeable, that Anglo breached the prevailing standard of reasonableness applicable during the relevant period, or that Anglo caused the alleged harms.

84. In addition, the High Court made several findings on the particular problems with *"intergenerational justice"* in the appellants' case. It is certainly not the case that the High Court ignored the issue of intergenerational justice. It was very much alive to the issue. It held as follows:

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[143] High Court judgment para 81 record vol 41 p 6791.

[144] High Court judgment para 81 record vol 41 p 6791.

[145] High Court judgment para 22 record vol 41 p 6773.

[146] CCL written submissions para 72.

84.1. "*In this application the applicant seek permission to advance an untenable claim that would set a grave precedent. The precedent is that a business could be held liable half a century after its activities have ceased, to generations not yet born, as a result of being tested against future knowledge and standards unknown at the time*."[147]

84.2. *"[T]he applicants seek to establish a duty of care generations into the future; a feature of their case for which they quote no precedent. The lack of precedent is indicative of the difficulties, for obvious reasons, of establishing a duty of care to those whose very existence is as yet unknown."*[148]

84.3. *"[The applicants] have not cited any precedent in which an alleged historical polluter was held liable in tort for negligence because it owed a duty of care to those who had not yet been born at the time it allegedly polluted. I agree with counsel for Anglo that the limited legal precedents available indicate that establishing such an intergenerational duty of care is untenable, as damage to subsequent generations and decades into the future could not have been foreseen."*[149]

85. The High Court did consider intergenerational justice. It just did not consider this issue to favour the appellants. The CCL has not advanced argument or precedent showing that an intergenerational duty of care overrides the duty of a High Court to assess the evidence on triability, or lightens the standards of certification that were binding upon the High Court when discharging its certification discretion. And the CCL has not shown that such an intergenerational duty was in existence for Anglo at the relevant time fifty to 100 years ago, or that such a duty should today be recognised in the absence of showing the normal prerequisites for tortious liability.

The availability of other avenues for redress

86. The CCL says that the High Court failed to consider the specific obstacles faced by children to access court and obtain an effective remedy.[150] The CCL argues that the Court ought to

[147] High Court judgment para 339 record vol 41 p 6887.

[148] High Court judgment para 149 record vol 41 p 6819.

[149] High Court judgment para 158 record vol 41 pp 6822 to 6823.

[150] CCL written submissions para 63 p 21.

have considered that a class action adjudicated in a South African court is the only realistic forum identified by the appellants, absent which they cannot obtain substantial justice.[151]

87. Anglo disputes that class action proceedings in South Africa are the only available form of redress for the appellants.[152]

88. Nonetheless, the CCL's submissions ignore the content of the High Court's judgment.

89. The High Court explicitly accepted the appellants' submission that "*class action proceedings of this nature are the only realistic and appropriate method of determining these disputes*".[153] It considered this submission in the appellants' favour in ruling on the issue of commonality, a component of the interests-of-justice test.

90. The fact, however, that a class action may be the only option available to pursue a claim is not sufficient in our law to obtain certification – regardless of whether or not the class members may include children. In *CRC Trust*, the SCA accepted that if the case was not certified the proposed classes' claims would not be *"capable of being pursued at all*".[154] The SCA nonetheless refused to certify the national complaint for the proposed second class.

The opt-in process

91. The benefits that the CCL highlights for an opt-in procedure in the second phase of the litigation applies equally to the first phase of the litigation. The CCL's contention therefore supports the argument made in paragraphs 330 to 348 of Anglo's main heads of argument that it is not in the interests of justice to certify this class action on an opt-out basis at any stage. As Anglo has argued, the appellants' opt-out approach "*would result in many class members who are children participating in the litigation without proper, informed consent*".[155]

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[151] CCL written submissions para 63.3 p 22.

[152] See paras 351 to 352.2 pp 75 to 76 of Anglo's main heads of argument.

[153] High Court judgment para 43 vol 41 p 6780.

[154] *CRC Trust* para 19.

[155] Answering affidavit para 62.5 core bundle vol 4 p CB669.

Conclusion

92. Contrary to the CCL's submissions,[156] the extent of the papers and submissions in this application is not an indication that the bar for triability has been set too high:

    92.1. The fact that this case is complex and voluminous is not a sign that *"[s]omething has gone wrong with the architecture of class certification proceedings"*.[157] It is a result of the fact that the appellants (and their lawyers and foreign funders) chose to bring an exceedingly ambitious application, which of necessity was complex and voluminous. Anglo was entitled to respond to an application of this scale with answering papers of similar scale. The appellants then chose to put up a replying affidavit of hundreds of pages, paired with an additional ten replying expert reports. If anyone is to be faulted for the amount of paper in this matter, it is the appellants.

    92.2. What the expansive record and submissions made in both the High Court and in this Court do show is that the South African courts' certification procedure in fact fulfilled any access-to-justice rights the child appellants may hold in South Africa. The appellants have been spared no resources by either their foreign funders or the South African courts (at the expense of South African taxpayers). They have been heard and afforded access to South Africa's class certification procedure. They have been afforded an extensive opportunity to make their case. They simply failed to meet the already low bar for triability.

    92.3. It was entirely appropriate for the appellants and Anglo to adduce the necessary evidence and argument to prove or disprove the triability of this case, and in doing so they enabled the High Court to test whether to let a case of exponentially larger magnitude proceed to trial. In this case, assessing 15,000 pages of evidence in eight days of argument forestalled the necessity for a trial court in due course to hear hundreds or even thousands of days of evidence. The "*architecture of class certification proceedings"* functioned exactly as intended in *CRC Trust* and *Mukaddam.*

93. Whatever right the appellants may have to access the class action procedure in South Africa is not a right to succeed in a hopeless claim. A child's best interests are also not

[156] CCL written submissions paras 1 to 2.

[157] CCL written submissions para 2.

protected by certifying a class action in which there is no case to answer on the appellants' own evidence, even on a *prima facie* basis.

E. THE *AMICI* SHOULD NOT BE PERMITTED TO PRESENT ORAL ARGUMENT

94. Under Rule 16(8) of this Court's rules, the default position is that an *amicus* has no right to present oral argument. It must obtain special permission from the Bench to do so.[158]

95. An *amicus* seeking permission to make oral argument "***must*** *set out the grounds therefor in its written argument"*.[159] Whether permission is given to make oral submissions *"will depend upon [the Bench's] assessment of whether those submissions can add anything to an argument already before it in written form"*.[160]

96. Anglo's submission is that none of the *amici* should be permitted to present oral argument.

97. While the CCL asked for permission to make oral submissions in its application to be admitted as an *amicus*, it did not set out the grounds therefore in its written argument (or even in its application to be admitted as an *amicus*). It follows that the CCL's request to present oral argument does not get out of the starting blocks. In any event, in its written argument the CCL – in support of its main contentions for a child-centred approach to certification – repeatedly invokes what the appellants have already said in their heads of argument.[161] Any augmentation by the CCL of what the appellants argue, including about the best interests of the child,[162] does not require oral argument; and those submissions

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[158] Rule 16(8) provides as follows:

> "An *amicus curiae* shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument."

[159] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) para 26 (underlining added).

[160] *Id* para 27.

[161] For example, see para 45 of the CCL written submissions: *"As the appellants point out, requiring a high threshold for proof of a cause of action raising a triable issue, without the benefit of discovery, pre-trial evidence gathering and oral evidence, has severe implications for access to justice. It is also dangerous to the administration of justice, increasing time spent by courts on interlocutory issues, increasing the risk of conflicting findings between the prima facie views expressed by the certifying court and the eventual trial court, and risking that well-heeled litigants exhaust the resources of those proposing to represent a class"*. See also para 54: *"The High Court's approach has significantly departed from the low threshold fixed by this Court for the triability factor. As the applicants canvass in their submissions, the High Court departed markedly from what ought to have been a high-level assessment of triability"*. And at para 61: *"The appellants have already pointed out that this finding is in conflict with the findings of the court in Nkala …"*.

[162] The appellants' heads of argument already deal with the best interests of the child in fulsome detail – see for instance paras 47 to 48 and 243.

that do not simply repeat what the appellants say, are already contained in the CCL's written submissions.

98. While the submissions of both the Special Procedures and AI and SALC attempt to justify being permitted to present oral argument, neither cogently explain how those submissions can add anything to their written argument (which is the core factor governing whether they get permission):

98.1. The Special Procedures do not even attempt to do so. They merely refer to *"the importance of the matters in issue in this appeal"*, and claim that their arguments are *"novel"* and *"likely to be of assistance"*.[163]

98.2. AI and SALC's justification is vague:

98.2.1. They argue that *"the brevity of these written submissions means that there are areas of law that may require more detailed explication"*,[164] but do not explain what these areas are or how it would be fair or permissible to expand on "*other [unidentified] areas of law*" orally.

98.2.2. AI and SALC also argue that oral argument would give them an opportunity to *"clarify ambiguities and address counter-arguments raised in [the written responses of the parties]"*. They provide no further specificity. If this argument were accepted, every *amicus* would always want an opportunity to orally make a further response to the responding written argument made by the parties.

99. In this case, the *amici* should not be permitted to make oral argument for the following reasons:

99.1. First, each set of *amici* has made thorough written submission, to which the parties will make a thorough written response.

99.2. Second, not even the *amici's* written argument adds novel or helpful considerations:

[163] Special Procedures written submissions para 53.

[164] AI and SALC written submissions para 68.

99.2.1. The CCL's written contribution revolves around children's rights. The appellants' affidavits[165] and written argument[166] already contain submissions on this issue. The High Court considered the issue of children's rights in detail.[167]

99.2.2. The Special Procedures centre their written submissions on the UN Guiding Principles, the fact that Anglo has endorsed them, and the claim that Anglo should not be opposing certification as a result. These issues were specifically traversed in the appellants' founding affidavit.[168]

99.2.3. AI and SALC focus on the proposition that non-certification constitutes a denial of access to justice. But this is a central theme of the appellants' heads of argument before this Court.[169]

99.3. Third, this is an exceedingly voluminous, complex appeal. The parties have a great deal to get through in their oral argument. Permitting the *amici* to make oral argument (which would require a response from the parties) is not an efficient use of the limited time of the Bench.

99.4. Fourth, the parties' legal teams have the necessary expertise in international law, constitutional law, and children's rights.[170] Should this Court have any questions on these issues that remain after having perused the parties' and the *amici*'s written submissions, the parties' counsel can answer them.

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[165] Founding affidavit core bundle vol 1 pp CB129 to CB 130 paras 287 to 289; p CB143 para 318.

[166] Appellants main heads of argument paras 160 and 250.

[167] See paragraphs 79 to 81.3 above.

[168] Founding affidavit core bundle vol 1 p CB28 paras 38 to 41.

[169] See appellants heads of argument paras 253 to 257.

[170] The appellants refer, as part of their justification for certification, to their *"skilled, multi-jurisdictional team of lawyers"* (appellants main heads of argument para 249.2), to the *"specific capacity and expertise to act for the communities in Kabwe"* held by their legal team (para 294), to the fact that their *"[c]ounsel team includes senior members who were involved in either the silicosis litigation … or the Nkala silicosis class action for several years, and, as a team, has the expertise and experience to deal with all foreseeable issues in the proposed class action"* (para 297), and to the fact that *"Leigh Day is a leading UK firm specialising in mass tort, personal injury, environmental and human rights litigation in jurisdictions across the world, including South Africa"* (para 298). The parties' heads of argument contain extensive submissions on access to justice, international law and children's rights.

M du P VAN DER NEST SC

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24 March 2025