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

Case No: 2020/32777

In the matter between

VARIOUS PARTIES ON BEHALF OF MINORS	First to Twelfth Applicants
[redacted]	Thirteenth Applicant
and	
ANGLO AMERICAN SOUTH AFRICA LIMITED	Respondent
and	
AMNESTY INTERNATIONAL	First *Amicus Curiae*
THE SOUTHERN AFRICA LITIGATION CENTRE	Second *Amicus Curiae*

WRITTEN SUBMISSIONS OF THE FIRST AND SECOND *AMICUS* CURIAE

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A. INTRODUCTION

1. The central issue before this Court is whether to certify a class action brought by children and women of child-bearing age ("***Applicants***") who reside in the Kabwe District of Zambia and report suffering injury from lead exposure. Applicants ascribe the source of the lead pollution in Kabwe to the Broken Hill Mine ("***the Mine***") that was in operation for most of the 20th century.

2. Applicants allege that Anglo American South Africa Limited ("***Respondent***") operated, managed and advised the Mine from 1925 through 1974 and that the majority of the lead produced over the Mine's lifespan was extracted during that time period.[1]

3. Through this class action, Applicants seek compensation for Respondent's alleged breach of what Applicants have identified as a "duty of care to protect existing and future generations of residents of Kabwe against the risks of lead pollution arising from the Mine's operations".[2]

4. Amnesty International Charity ("***Amnesty***") and The Southern African Human Rights Litigation Centre Trust ("***SALC***") (collectively referred to as "***amici***") have sought admission as *amici curiae* to submit this joint written legal submission which they believe will assist the Court in its adjudication of this application for class certification. The *amici*'s submission seeks to analyse both domestic norms and international human rights law and standards crucial for the Court's assessment.

5. While the *amici* do not take a position on the underlying questions of fact and law in dispute, they note that international experts including the United Nations Special Rapporteurs on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment ("***UN Special Rapporteur on the Environment***") and on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes ("***UN Special Rapporteur on Toxics***") have pointed to Kabwe as an

[1] Applicants' Founding Affidavit, paras 27 – 28.
[2] Applicants' Founding Affidavit, para 32.

emblematic ‘sacrifice zone’, describing the city as one of “the most polluted places on Earth” plagued by a “severe environmental health crisis”.[3]

6. The Special Rapporteurs have explained that ‘sacrifice zones’ are “place[s] where residents suffer devastating physical and mental health consequences and human rights violations as a result of living in pollution hotspots and heavily contaminated areas”,[4] and deplored that:

> “The most heavily polluting and hazardous facilities, including open-pit mines, smelters (…) tend to be located in close proximity to poor and marginalized communities . . . .
>
> **The people who inhabit sacrifice zones are** exploited, **traumatized and stigmatized**. They are treated as disposable, **their voices ignored, their presence excluded from decision-making processes and their dignity and human rights trampled upon**.”[5] (Emphasis added.)

7. Against this backdrop, this application for class certification raises key questions regarding this Court’s jurisdiction, Applicants’ right to an effective remedy and access to justice, South Africa’s duty to protect, respect and remediate human rights in the context of corporate activities and Respondent’s responsibility to remediate adverse human rights impacts associated with the operations of the Mine.

8. These Heads of Argument aim to assist this Court in adjudicating this application for class certification by setting out relevant international and constitutional legal standards regarding the obligations of States and the responsibility of business enterprises in relation to the right to remedy and access to justice in the context of transnational corporate human rights abuses.

9. These Heads of Argument are divided into five Sections:

   9.1. Part B summarises the interest of the *amici* in this matter;

[3] UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, ‘Report on the right to a clean, healthy and sustainable environment: non-toxic environment’, A/HRC/49/53 (12 January 2022), para 30.
[4] Id., para 27.
[5] Id., paras 26 – 32.

9.2. Part C analyses the applicability and importance of international human rights law and standards in the interpretation of South African law;

9.3. Part D provides an overview of the human right to an effective remedy under both international human rights law and South African constitutional principles;

9.4. Part E delineates applicable international and domestic legal frameworks on the right to remedy in the context of corporate human rights abuses. It specifically presents the extraterritorial dimension of States' duty to protect and remediate corporate human rights abuses; and companies' stand-alone responsibility to remediate such harm.

9.5. Part F details the various obstacles which victims of business-related human rights abuses face when seeking access to justice particularly in cross-border cases, hurdles Applicants face in Zambia and the opportunities offered by South Africa's class action mechanism.

B. INTEREST OF THE PARTIES

10. Amnesty is a leading non-governmental organisation representing a global movement of over 10 million people in over 150 countries and territories worldwide, who campaign for a world where human rights are enjoyed by all. Established in 1961, Amnesty is independent of any government, political ideology, economic interest or religion. Amnesty seeks to advance and promote international human rights at both the international and national levels. To this end, Amnesty monitors and reports on human rights abuses, intervenes in domestic judicial and administrative proceedings, and prepares briefings for and participates in national legislative processes and hearings.

11. Amnesty has been campaigning on business and human rights issues since the 1990s and has developed specific expertise in standards of conduct that companies are required to adhere to under international human rights norms. Amnesty investigates the role of companies implicated in human rights abuses around the world, and advocates for corporate accountability and wider changes to the laws, policies and practices needed to address the root causes of harmful corporate behaviour.

12. Amnesty has documented and extensively reported on the legal, practical and structural obstacles which victims and survivors of corporate harm face to access justice in both States where companies are incorporated, registered, domiciled or headquartered ("***home States***") and States where companies operate either directly or through business relationships and where harm may occur ("***host States***").[6]

13. Amnesty has shared its expertise on international human rights norms with South African courts in the past and was granted permission to intervene in *Minister of Home Affairs and Others v Tsebe and Others*,[7] among others.

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[6] See e.g. Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy*, POL 30/001/2014 (7 March 2014), available at https://www.amnesty.org/en/documents/pol30/001/2014/en/, pp 113-198 ("***Injustice Incorporated***"); Amnesty International and the Business & Human Rights Resource Centre, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse*, POL 30/7037/2017 (4 September 2017), available at https://www.amnesty.org/en/documents/pol30/7037/2017/en/, pp 3-5, 11, 19 ("***Creating a Paradigm Shift***"). See also Amnesty International, *On Trial: Shell in Nigeria, Legal Actions Against The Oil Multinational*, AFR 44/1698/2020 (10 February 2020), available at https://www.amnesty.de/sites/default/files/2020-02/Amnesty-Bericht-Nigeria-Shell-on-trial-Februar-2020-ENG.pdf ("***Shell on Trial***"); Amnesty International, *Nigeria: No Clean-Up, No Justice: An evaluation of the implementation of UNEP's environmental assessment of Ogoniland, nine years on*, AFR 44/2514/2020, (27 June 2020), available at https://www.amnesty.org/en/documents/afr44/2514/2020/en/; Amnesty International, *Negligence in the Niger Delta: decoding Shell and Eni's poor record on oil spills*, AFR 44/7970/2018, (16 March 2018), available at https://www.amnesty.org/en/documents/afr44/7970/2018/en/; Amnesty International, *Decades of neglect, years of waiting: It's time to clean up Ogoniland's oil pollution*, AFR 44/8530/2018 (2 June 2018), available at https://www.amnesty.org/en/documents/afr44/8530/2018/en/; Amnesty International, *A Toxic Legacy: The Case for a Medical Study of the Long-Term Health Impacts of the Trafigura Toxic Waste Dumping*, AFR 31/7594/2018 (January 30, 2018), available at https://www.amnesty.org/en/documents/afr31/7594/2018/en/; Amnesty International, *Too Toxic To Touch? The UK's response to Amnesty International's call for a criminal investigation into Trafigura Ltd.*, EUR 45/2101/2015 (23 July 2015), available at https://www.amnesty.org/en/documents/eur45/2101/2015/en/; Amnesty International, *Clean it up: Shell's false claims about oil spill response in the Niger Delta*, AFR 44/2746/2015 (3 November 2015), available at https://www.amnesty.org/en/documents/afr44/2746/2015/en/; Amnesty International, *'30 years is too long to get justice'*, ASA 20/035/2014 (30 November 2014), available at amnesty.org/en/documents/asa20/035/2014/en/ ("***30 years is too long***"); Amnesty International, *Bad information: Oil spill investigations in the Niger Delta*, AFR 44/028/2013 (7 November 2013), available at https://www.amnesty.org/en/documents/afr44/028/2013/en/; Amnesty International, *The toxic truth: About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire*, AFR 31/002/2012 (25 September 2012), available at https://www.amnesty.org/en/documents/afr31/002/2012/en/; Amnesty International, *Bhopal: Justice Delayed, Justice Denied: Background briefing on the criminal prosecutions in India and the failure to bring the prosecutions to an end 25 years on*, ASA 20/024/2009 (27 November 2009), available https://www.amnesty.org/ar/documents/ASA20/024/2009/en/; Amnesty International, *Union Carbide Corporation (UCC), DOW Chemicals and the Bhopal Communities in India – The Case*, ASA 20/005/2005 (21 January 2005), available at https://www.amnesty.org/en/documents/asa20/005/2005/en/; Amnesty International, Summary of Clouds of Injustice – Bhopal Disaster 20 years on, ASA 20/104/2004 (29 November 2004), available at https://www.amnesty.org/en/documents/asa20/104/2004/en/ ("***Summary of Clouds of Injustice***").

[7] 2012 (5) SA 467 (CC).

14. SALC is a non-governmental organisation based in Johannesburg. SALC promotes and advances human rights and the rule of law in southern Africa, primarily through strategic litigation and by providing capacity-strengthening support to local and regional lawyers and community-based organisations.

15. One of SALC's principal objectives is to ensure that southern African states, including South Africa, are fully aware of, and comply with their obligations under domestic, regional and international law. SALC uses strategic litigation, research, capacity building and advocacy as methodologies to achieve its objectives. Of particular relevance to this matter is SALC's programmatic focus on international justice and business and human rights.

16. SALC has litigated as a party and intervened as *amicus curiae* before the courts of South Africa in several cases that raise issues regarding the application of international law.

17. SALC has been admitted as *amicus curiae* in numerous matters concerning the protection, fulfilment and realisation of rights contained in the South African Constitution, including but not limited to: *State v Okah*;[8] *Law Society of South Africa and Others v President of the Republic of South Africa and Others*;[9] *Democratic Alliance v Minister of International Relations and Cooperation and Others*;[10] *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others*;[11] *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another*;[12] *Consortium for Refugees and Migrants in South Africa v President of the Republic of South Africa and Others*;[13] *Rodrigues v National Director of Public Prosecutions and Others*;[14] *and Qwelane v South African Human Rights Commission and Another*.[15]

[8] 2018 (1) SACR 492 (CC).
[9] 2019 (3) SA 30 (CC).
[10] 2017 (3) SA 212 (GP).
[11] 2016 (3) SA 317 (SCA).
[12] 2015 (1) SA 315 (CC).
[13] 2014 ZAGPPHC 753 (26 September 2014).
[14] [2021] 3 All SA 775 (SCA); 2021 (2) SACR 333 (SCA).
[15] 2021 (6) SA 579 (CC).

18. Amnesty and SALC have a distinct and substantial interest in the subject matter of this application for class certification as South Africa's class action mechanism offers a unique avenue for collective redress, regionally, to communities affected by the long-term adverse health and environmental impacts of business-related human rights abuses, particularly in cases involving South African companies.

C. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS IN SOUTH AFRICA

19. As set out in section 39(1)(*b*) of the 1996 Constitution of the Republic of South Africa, South African courts are required to consider international law when interpreting the Bill of Rights. Section 233 of the Constitution sets out that when a South African court interprets any legislation, it prefers a reasonable interpretation that accords with international law over any alternative interpretation that is inconsistent with international law. Under section 232 of the Constitution, customary international law is law in South Africa if it is not inconsistent with the Constitution or national legislation.

20. The Constitutional Court has affirmed the importance of international law in *Glenister v President of the Republic of South Africa and Others*[16] and confirmed that South Africa's failure to comply with international agreements may result in incurring responsibility under international law. Specifically, Ngcobo CJ enunciated the significance of international law to the Constitution:

> "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law (…) These provisions [Sections 39(1)(*b*) and 37(4)(*b*)(i)] of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."[17]

21. South African courts have adopted a wide interpretation of the term 'international law', encompassing binding and non-binding norms, including decisions by international and regional courts, human rights treaties, decisions and publications of human rights treaty bodies and United Nations ("***UN***") mandate

[16] 2011 (3) SA 347 (CC), paras 92, 95 and 102.
[17] *Glenister*, para 97.

holders.[18] The Constitutional Court further emphasised in *S v Makwanyane and Another* that both binding and non-binding international law instruments may be used "as tools of interpretation"[19] and that South Africa's international obligations co-exist with its regional human rights obligations.[20]

22. Both international and regional human rights law and standards are key normative frameworks that should guide South African courts when considering alleged violations of the Bill of Rights. Indeed, if a duty is imposed by an international instrument, for it not to be rendered nugatory, content must be given to it.[21] On this basis, South Africa courts are bound by international law and obliged to give effect to the provisions of international norms and standards as they relate to the current application before this Court.[22]

D. THE HUMAN RIGHT TO AN EFFECTIVE REMEDY

23. As enshrined in both the Constitution and international law, all victims and survivors of human rights abuses have a right to an effective remedy. The *amici* submit that this Court's decision to grant or deny this application for class certification will affect the Applicants' right to remedy. Therefore, in this section the *amici* will first discuss the sources and elements of the right to an effective remedy under international law (D.I), before presenting its bases and scope under South African law (D.II).

I. International Human Rights Law

a. Sources of the right to effective remedy under international law

24. The right to an effective remedy for victims and survivors of human rights abuses stems from a general principle of international law that every breach gives rise to an obligation to provide a remedy.[23] It is a core tenet of international human rights

[18] *S v Makwanyane and Another* 1995 (3) SA 391 (CC), para 35.
[19] *Makwanyane*, para 35.
[20] *Gumede v President of Republic of South Africa and Others* 2009 (3) SA 152 (CC) para 55.
[21] *DE v RH* 2015 (5) SA 83 (CC), para 49.
[22] *Glenister*, para 192.
[23] *Chorzów Factory (Germany v Poland*), 1928 PCIJ (ser A) No. 17, para 73 ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"). See also Article 3(d), UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006, Art. 3(d) ("The obligation to respect, ensure respect for and implement international

law[24] that is enshrined in customary international law.[25] The right to an effective remedy is guaranteed by several international and regional human rights instruments, including binding treaties South Africa has acceded to.[26]

25. Article 8 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted [to them] by the constitution or by law".[27] Further, Article 2(3) of the International Covenant on Civil and Political Rights emphasises that States must "ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial … authorities … and … develop the possibilities of judicial remedy".[28] Similarly, the UN Convention on the Rights of the Child,[29] particularly relevant in this dispute given the profile of Applicants, provides that State parties must take "all appropriate measures to

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human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: […] Provide effective remedies to victims, including reparation...").

[24] UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (10 May 2016), A/HRC/32/19, para 6.

[25] *Prosecutor v André Rwamakuba*, Case No. ICTR-98- 44C, Decision on Appropriate Remedy, para 40 (31 January 2007); *Prosecutor v André Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, paras 23-5 (13 September 2007); and *Cantoral-Benavides v Perú*, 2001 Inter-Am. Ct. H.R. (ser.C) No. 88, para 40; M.C. Bassiouni, *International Recognition of Victims Rights,* 6 Human Rights Law Review (2006) at 206-207.

[26] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III ("***UDHR***") Article 8; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p 171 ("***ICCPR***") Article 2(3); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p 3 ("ICESCR") Article 2 (acceded on 12 January 2015); UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p 195 ("***ICERD***") Article 6 (acceded on 10 December 1998); UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p 13 ("***CEDAW***") Article 2 (acceded on 15 December 1995); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p 85 Article 14 (acceded on 10 Dec 1998); Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 Article 25; Organisation of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969 Article 7(1)(a); Organisation of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Article 47 (acceded on 9 July 1996); European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02 Articles 12 and 23; League of Arab States, *Arab Charter on Human Rights*, 15 September 1994; and UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147, 21 March 2006.

[27] UDHR, Article 8.

[28] ICCPR, Article 2(3). *See also* ICERD, Article 6; UN General Assembly, *Convention Against Torture*, 10 December 1984 (acceded on 10 December 1998), Article 4.

[29] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p 3 ("***CRC***").

promote physical and psychological recovery and social reintegration of a child victim of … any form of … abuse"[30] and give children "an opportunity to be heard through judicial proceedings".[31]

26. While the International Covenant on Economic Social and Cultural Rights, and the UN Convention on the Elimination on the All Forms of Discrimination Against Women do not include specific provisions on the right to an effective remedy, treaty bodies interpreting both instruments have clarified that States' obligation to take all appropriate measures to implement treaty rights, encompasses the duty to provide "judicial or other effective remedies".[32] The UN Committee on the Elimination of Discrimination against Women has specifically stated that:

> "Without reparation, the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; … and bringing to justice the perpetrators of violations of human rights of women."[33]

27. Similarly, Article 7(1)(a) of the African Charter on Human and People's rights ("***African Charter***") provides that "[e]very individual shall have the right to have his cause heard" which comprises "[t]he right to an appeal to competent national organs against acts violating fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force". The African Commission on Human and Peoples' Rights ("***African Commission***") has held that a right to remedy "can be generated implicitly and automatically by the numerous rights protected by the Charter".[34] Such a view is further supported by the African Commission's Principles and Guidelines to a Fair Trial and Legal Assistance in Africa which explicitly state that "everyone has the right to an effective remedy by

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[30] CRC, Article 39.
[31] CRC, Article 12.
[32] UN Committee on Economic, Social and Cultural Rights, General Comment 3 on the nature of States parties obligations (Art. 2, par. 1), paras 3, 5; UN Committee on the Elimination of Discrimination against Women, General Recommendation 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paras 30 – 32. See generally Injustice Incorporated, p 18.
[33] See also UN Committee on the Elimination of Discrimination against Women, General Recommendation, para 32.
[34] *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, African Commission on Human and People's Rights, Communication 259/2002, 24 July 2013, para 78.

competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter".[35]

28. Finally, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa requires State parties to "provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated".[36]

b. Elements of the right to effective remedy under international law

29. The right to an effective remedy has both procedural and substantive dimensions[37] and is comprised of three core elements: (i) access to justice, (ii) adequate, effective and prompt reparations for harm suffered (including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) and (iii) access to information concerning violations and reparation mechanisms.[38]

30. For remedies to be effective, they should be affordable, adequate and timely.[39] Remedies should also be accessible, i.e. victims and survivors must have practical and meaningful access to a procedure capable of ending and repairing the effects of the abuses they endured.[40] In the case of *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon*, the African Commission held that an effective remedy is one that "not only exists *de facto*, but that also is accessible to the party concerned and is appropriate".[41]

31. The UN Special Rapporteur on Toxics has also stressed that "[t]o be effective, remedies should be appropriately adapted for vulnerable groups, such as

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[35] African Commission on Human and People's Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', 2003, Section C.
[36] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Article 25(a).
[37] UN Working Group on Business and Human Rights, Report on human rights and transnational corporations and other business enterprises (18 July 2017), A/72/162, para 14 ("***Report on Access to Effective Remedies***").
[38] See UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147, 21 March 2006, Principle 11 "Victims right to remedies." See also Injustice Incorporated, p 19.
[39] Report on Access to Effective Remedies, paras 32 and 34.
[40] Injustice Incorporated p 19 (citing UN Basic Principles on Right to Remedy 2(b), 3(c), 11(a), 12, 19).
[41] *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon*, African Commission on Human and People's Rights, Communication 272/03, 25 November 2009, para 128.

children, taking into account their special needs, risks and evolving development and capacities".[42]

II. South African law on effective remedy

32. Section 38 of the Constitution states that anyone "has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights". Section 34 of the Constitution states that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

33. In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd*,[43] the Constitutional Court held that the constitutional right to an effective remedy as required by the rule of law is entrenched in section 34 of the Constitution.

34. In *Fose v Minister of Safety and Security*,[44] the Constitutional Court held that "an appropriate remedy must mean an effective remedy". Ackermann J stated:

> "[W]ithout effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated."[45]

35. The *amici* submit that the core elements of the right to remedy under both international and constitutional law should be central to the adjudication of the application for class certification before this Court.

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[42] UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, *Report on the human right to an effective remedy: the case of lead-contaminated housing in Kosovo* (4 September 2020), A/HRC/45/CRP10, para 5.
[43] 2005 (5) SA 3 (CC), para 50.
[44] 1997 (3) SA 786 (CC), para 69.
[45] Ibid.

E. THE RIGHT TO EFFECTIVE REMEDY IN THE CONTEXT OF BUSINESS-RELATED HUMAN RIGHTS ABUSES

36. In the context of business-related human rights abuses, States and corporate actors have different duties and responsibilities to observe to uphold victims' right to an effective remedy. The *amici* will first present States' obligations to protect, respect and remediate business-related human rights abuses prescribed by international human rights law and standards (E.I.A) and explain the extraterritorial dimension of State duties (E.I.B). Second, the *amici* will set out companies' responsibility to remediate adverse human rights impacts associated with their activities or business relations (E.II.A) and explain why the South African Bill of Rights imposes obligations upon corporations both domestically and extraterritorially (E.II.B).

I. State Duties

37. As Amnesty's research has shown, while business enterprises operate across State borders with ease, State borders often present institutional, political, practical and legal barriers both to corporate accountability and to redress for the victims of corporate human rights abuses.[46] Multinational corporate groups can undermine human rights in different jurisdictions in numerous ways. For example, the decisions made by a company's branch based in one State can lead directly to human rights abuses in another, or a company may contract with another entity in another State whose operations on its behalf can result in abuses.[47]

38. Because of the multi-jurisdictional nature of corporate networks, human rights advocates have argued that victims of corporate human rights abuses should have increased options for seeking redress in States other than host states, where the abuses occurred. In the absence of laws with extraterritorial effect or States' exercise of extraterritorial jurisdiction, victims of human rights abuses associated with the operations of multinational companies can be denied an effective remedy.[48]

[46] Injustice Incorporated, p 21.
[47] Injustice Incorporated, p 22.
[48] Injustice Incorporated, p 23.

a. States' duty to protect against and remediate business-related human rights abuses

39. States have an obligation, under international law, to respect, protect and fulfil human rights. The UN Guiding Principles on Business and Human Rights ("***UN Guiding Principles***")[49] have explicitly recognised that such duty applies in the context of corporate activities. [50]

40. The UN Guiding Principles were endorsed by the UN Human Rights Council on 16 June 2011 through a unanimous resolution. They are a key internationally recognised standards for both States and corporate actors to observe in the context of business-related human rights abuses and should guide this Court's adjudication of this application for class certification.

41. The UN Guiding Principles specifically require States to take "appropriate steps to prevent, investigate, punish and redress" corporate harm within their territory and/or jurisdiction.[51] When human rights abuses occur within their territory and/or jurisdiction, States must "take appropriate steps to ensure, through judicial [or other appropriate means], that … those affected have access to effective remedy".[52]

42. The UN Working Group on Business and Human Rights ("***Working Group***")[53] — a UN Special Procedure first established by the Human Rights Council in 2011 to promote, disseminate and implement the UN Guiding Principles — has acknowledged that the adverse impacts of business activities affect women and girls "differently and disproportionately"[54] and urged States to:

> "Ensure that all necessary judicial, administrative, legislative or other steps that they take to provide affected persons with access to effective remedies

[49] United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* A/HRC/17/31 (21 March 2011).
[50] UN Guiding Principles, General Principles, p 6.
[51] UN Guiding Principles, Principle 25.
[52] UN Guiding Principles, Principle 25.
[53] The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights) is also mandated to exchange and promote good practices and lessons learned on the implementation of the UN Guiding Principles, and to assess and make recommendations thereon.
[54] UN Working Group on Business and Human Rights, *Report on the Gender dimensions of the Guiding Principles on Business and Human Rights*, A/HRC/41/43 (23 May 2019), para 2.

> for business-related human rights abuses are **gender-transformative**."[55] (Emphasis added.)

43. In the context of 'sacrifice zones' such as Kabwe, UN Special Rapporteurs on the Environment and Toxics have stressed that States:

> "[M]ust ensure that victims of the effects of hazardous substances and wastes have access to an effective remedy, including remediation, health care, compensation and a guarantee of non-repetition, among others, and must reduce systemic obstacles, including the burden of proof and causation, among others, that prevent victims of toxic exposure from accessing remedies."[56]

44. The Working Group has observed that "[effective remedies for business related human rights abuses] **should result in some form of corporate accountability** and vice versa" (emphasis added).[57] However, cross-border cases can increase the risk of inaction and impunity for victims and survivors of corporate harm because systems of accountability tend to operate predominantly within state borders, often failing to track the global nature of corporate operations.[58] The UN High Commissioner for Human Rights has pointed out that:

> "The prevailing lack of clarity across jurisdictions about the roles and responsibilities of different interested States in cross-border cases create a significant risk that no action will be taken, leaving victims with no prospect of remedy. Against that background, various human rights treaty bodies have recommended that **home States take steps to prevent business-related human rights abuses by business enterprises domiciled in their jurisdiction**."[59] (Emphasis added.)

b. <u>The extraterritorial dimension of States' duty to remediate corporate harm</u>

45. States have an obligation to regulate the conduct of non-State actors who are under their control in order to prevent them from causing or contributing to human

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[55] Id., para 49.
[57] Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Guidelines for Good Practices, A/HRC/36/41 (20 July 2017), para 111(h) ("***Report on Good Practices***").
[57] Report on Access to Effective Remedies, para 80.
[58] Creating a Paradigm Shift p 3.
[59] UN Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19 (10 May 2016), para 24.

rights abuses.[60] Regarding corporate actors, international human rights law has been increasingly interpreted as requiring States in whose territory or jurisdiction corporations are domiciled or headquartered to take measures to ensure that these corporations do not cause or contribute to human rights abuses abroad.[61] The Working Group has stated that:

> "States have a duty to cooperate and collaborate with their peers to plug gaps in victims' quests to seek effective remedies against business enterprises . . . .
>
> States act extraterritorially in many areas within the parameters of international law and there are no sound reasons why they should hesitate to do so in the field of business and human rights."[62]

46. The extraterritorial dimension of States' duty to protect and remediate human rights has been recognised by a growing body of authoritative legal opinion, jurisprudence and international law scholars.[63]

47. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights ("***Maastricht Principles***") — adopted in 2011 by a group of experts on international law — codify and clarify the existing content of extraterritorial State obligations to realise economic, social and cultural rights. The Maastricht Principles highlight that States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct.[64]

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[60] Injustice Incorporated p 24.
[61] Injustice Incorporated p 24.
[62] Report on Access to Effective Remedies, paras 61-64.
[63] See e.g. ICJ, Legality of the Threat or Use of Nuclear Weapons; Advisory Opinion, 8 July 1996, para 29; International Court of Justice, The Corfu Channel Case (UK v. Alb.), Merits Judgment of 9 April 1949, pp 18, 22. Victor Saldano v. Argentina, Inter-American Commission on Human Rights, 11 March 1999, Report No.38/99, para 17. See UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4, 11 August 2000, para 39; UN Committee on the Rights of the Child, General Comment 16, paras 38-43; UN Committee on Economic, Social and Cultural Rights, general comment No. 24. See generally The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (28 September 2011) ("***Maastricht Principles***").
[64] Maastricht Principles, Principle 13.

48. A consequence of the extraterritorial dimension of the State's obligation to protect human rights includes an obligation to ensure remedy for abuses that occur outside its territory — where these abuses were reasonably foreseeable, and the State has the legal capacity to act to prevent the abuse. The Maastricht Principles clarify that:

> "[W]here the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, **any State concerned must provide remedies to the victim**."[65] (Emphasis added.)

49. The Maastricht Principles provide that to give effect to this obligation, States should:

> "(i) Seek cooperation and assistance from other concerned States where necessary to ensure a remedy, (ii) **ensure remedies are available for groups as well as individuals** and (iii) ensure the participation of victims in the determination of appropriate remedies ..."[66] (Emphasis added.)

50. The view of UN treaty bodies and special procedures is clear on home States' obligation to regulate the conduct of multinational companies outside their own borders and remediate corporate harm. The UN Committee on Economic Social and Cultural Rights has stated that States should:

> "**[t]ake steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction**, without infringing the sovereignty or diminishing the obligations of the host States" (emphasis added).[67]

51. In the context of the human right to health, the UN Committee on Economic Social and Cultural Rights has also emphasised that States:

> "[H]ave to respect the enjoyment of the right to health in other countries, and to **prevent third parties from violating the right in other countries if they**

[65] Id., Principle 37.
[66] Ibid.
[67] UN Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, E/C.12/2011/1 (12 July 2011), para 5.

> **are able to influence these third parties by way of legal or political means**, in accordance with the Charter of the United Nations and applicable international law."[68] (Emphasis added.)

52. The UN Committee on the Rights of the Child has also repeatedly called on home States to establish and implement regulations and administrative measures to ensure that companies respect human rights, particularly the rights of the child, in their operations abroad, and to provide for appropriate oversight, monitoring and accountability mechanisms.[69]

53. The Working Group has further made it clear that:

> "As part of their extraterritorial obligation to respect, protect and fulfil human rights, **States should provide access to effective remedies even to foreign victims** in appropriate cases. Doing so will be consistent with States signalling to enterprises 'domiciled in their territory and/or jurisdiction' to 'respect human rights throughout their operations'."[70] (Emphasis added.)

54. Similarly, the UN Special Rapporteur on Toxics has stressed that: "States must ensure that corporations in their territory are accountable for abuses abroad, including by **enabling foreign victims to bring claims for abuses**" (emphasis added).[71]

c. States' exercise of extraterritorial jurisdiction

55. Human rights cases that involve multinational corporations are increasingly being brought to court in companies' home States, or States other than the one where victims and survivors suffered harm.[72] Such proceedings often raise legal

[68] UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4, 11 August 2000, para 39.
[69] See Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations, New Zealand, UN Doc CRC/C/NZL/CO/3-4, 11 April 2011, para 23; Concluding Observations, Denmark, UN Doc CRC/C/DNK/CO/4, 7 April 2011, para 30; Concluding Observations, Italy, UN Doc CRC/C/ITA/CO/3-4, 31 October 2011, para 21; Concluding Observations, Sweden, UN Doc CRC/C/OPSC/SWE/CO/1, 23 January 2012, para 21; Concluding Observations, Australia, UN Doc CRC/C/AUS/CO/4, 28 August 2012, para 28; and Concluding Observations, Turkey, UN Doc CRC/C/TUR/CO/2-3, 20 July 2012, para 23.
[70] Report on Access to Effective Remedies, paras 64-65.
[71] Report on Good Practices, para 108.
[72] Injustice Incorporated, p 122.

challenges, particularly regarding home States' jurisdiction to hear disputes regarding harm that occurred abroad.

56. States exercise jurisdiction based on international legal rules[73] and international law does not prohibit the exercise of extraterritorial jurisdiction in civil matters, "so long as there is a recogni[s]ed basis of personal jurisdiction over the defendant".[74] It is well-established that States can exercise jurisdiction over individuals or companies that are nationals of that State. 'Corporate nationality', for the purposes of civil litigation, is generally defined by reference to the place of incorporation or the "real seat" of a company.[75]

57. Civil claims against multinational companies for their alleged involvement in or responsibility for, harms suffered abroad can be vulnerable to dismissal on jurisdictional grounds, particularly when corporate respondents raise defenses related to a business' corporate form (e.g. 'corporate veil' defenses) or the forum chosen for adjudication (e.g. *forum non conveniens*).[76] Such dismissals are often based on erroneous assumptions about host States.[77] In scenarios where legal action in the home State may have been the only route to seek justice and reparation, dismissal of the claim may, in practice, end all hopes for remedying the abuse caused by the accused multinational corporation.[78]

58. Over the past decade, various national courts have exercised jurisdiction in civil lawsuits brought against companies domiciled, headquartered or incorporated in their territory in connection with harm that occurred beyond their borders, sometimes ascribed to the operations of subsidiaries, companies of the same group or business partners.

59. In *Oguru et al. v Shell,*[79] the Court of Appeal in the Hague held that Dutch Courts had jurisdiction to adjudicate the civil lawsuit brought in 2008 by four Nigerian farmers supported by the civil society organisation Milieudefensie against the oil

[73] Injustice Incorporated, p 127.
[74] Injustice Incorporated, p 127.
[75] Injustice Incorporated, p 127.
[76] Injustice Incorporated, p 127.
[77] Injustice Incorporated, p 127.
[78] Injustice Incorporated, p 122.
[79] *Oguru et al. v Shell*, Case n° 200.126.804 and 200.126.834 (29 January 2021). See Shell on Trial p 20.

company Royal Dutch Shell ("***Shell***") and its Nigerian subsidiary Shell Petroleum Development Company ("***SPDC***") for damages to fishponds and land caused by oil spills in the villages of Goi, Ikot Ada Udo and Oruma between 2004 and 2007. In 2009, Shell had filed a motion arguing that Dutch courts lacked jurisdiction over the actions of its Nigerian subsidiary. After several years of court battle, in 2021 the Hague Court of Appeal found SPDC liable for the spills and ordered the subsidiary to compensate claimants.[80] The Court also held that Shell owes a duty of care to the villagers affected by the spills and found the parent company liable (together with its subsidiary) for any failure to prevent future oil spills.

60. In *Vedanta Resources PLC and another v Lungowe and others*,[81] courts in the United Kingdom allowed a group of over 20000 Zambian villagers (including 642 children) to sue the copper producer Konkola Copper Mines Plc and its parent company in the United Kingdom, Vedanta Resources, alleging that their land and water streams had been damaged by toxic waste from the Nchanga copper mine. Shortly after claimants filed their lawsuit in 2015, both corporate respondents applied to challenge the jurisdiction of English courts. In a watershed ruling issued in 2019, the United Kingdom's Supreme Court held that the case could be brought against Vedanta in English courts because the parent company of Konkola arguably owed the villagers a duty of care.[82] Relevant to the current dispute, the Supreme Court focused on the public commitments that the parent company made regarding their subsidiaries and the communities in which they operate. Notably, it ruled that a company might "incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so".[83] In such circumstances, judges found that it could be the very fact that a company failed to live up to its public commitment that may present the breach of duty.[84] Furthermore, the Supreme Court received claimants' arguments concerning the risks that justice would be denied before Zambian courts due to lack of funding

[80] Business and Human Rights Resources Centre, *Shell lawsuit (re oil pollution in Nigeria)*, available at: https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-pollution-in-nigeria/.
[81] *Vedanta Resources PLC and another v Lungowe and others Plc* [2019] UKSC 20. See also See Shell on Trial p 22; Business and Human Rights Resource Centre, *Vedanta Resources lawsuit (re water contamination, Zambia)*, available at: https://www.business-humanrights.org/en/latest-news/vedanta-resources-lawsuit-re-water-contamination-zambia/.
[82] Ibid.
[83] *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2019] UKSC 20, at 53.
[84] Shell on Trial p 22.

and limited availability of legal expertise for such a mass delict case.[85] The *amici*'s submission echoes such concerns.

61. Two years later, in *Okpabi v Royal Dutch Shell*[86] the United Kingdom Supreme Court reaffirmed that a British parent company may owe a duty of care towards persons affected by the operations of its foreign subsidiary. The Court found that the Ogale and Bille communities can bring their legal claims for clean-up and compensation against Shell and its Nigerian subsidiary. In 2015 the two communities in the Niger Delta commenced legal actions in the UK, alleging serious environmental damage stemming from oil pollution. For years, Shell has contested these claims and successfully argued that the case should be dismissed on jurisdictional grounds.[87] The Supreme Court's ruling opened a path to expanding case law affirming United Kingdom courts' jurisdiction to adjudicate dispute related to UK companies' extraterritorial conduct.

62. The international norms and precedents outlined above illustrate that home States such as South Africa have a duty to regulate the conduct of companies domiciled or registered in their jurisdiction and to protect against and remediate business-related human rights abuses connected with their activities abroad. States have increasingly been willing to exercise jurisdiction over cases seeking remediation for such corporate harm.

63. The *amici* submit that this Court should draw from such international law principles and jurisprudence to assess this application for class certification.

II. Corporate Responsibility

64. Businesses' responsibility to respect human rights and remediate corporate abuses associated with their activities are distinct from the State duties outlined

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[85] *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20, paras 88-101; *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, at 88 – 101.

[86] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3. See also Business and Human Rights Resource Centre, *UK Supreme Court in Okpabi Clarifies Parent Company Duty of Care Toward Persons Allegedly Harmed by Subsidiaries* (21 February 2021), available at: https://www.business-humanrights.org/en/latest-news/uk-supreme-court-in-okpabi-clarifies-parent-company-duty-of-care-toward-persons-allegedly-harmed-by-subsidiaries/.

[86] [87] *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2019] UKSC 20, at 89.

above. In this section, the *amici* will analyse businesses' responsibility under international human rights standards (E.II.a) and demonstrate how it complements positive and negative obligations imposed on corporate actors by South Africa's Bill of Rights (E.II.b).

a. International human rights standards on corporate responsibility

65. There is clear international consensus that companies should respect all human rights.[88] This responsibility was expressly recognised by the UN Human Rights Council when it endorsed the UN Guiding Principles.[89]

66. The UN Guiding Principles set a standard of conduct that many companies have adhered to through their own rules of self-regulation and internal policies. For example, Respondent has made such public commitments. Among other company governance policies, Respondent's Group Human Rights policy provides that:

> "Our commitment to human rights is … expressed through our being a signatory to the United Nations Global Compact and the Voluntary Principles on Security and Human Rights (VPSHR), and through being a **supporter of the UN Guiding Principles on Business and Human Rights**.[90] (Emphasis added.)

67. Under the UN Guiding Principles, companies have a responsibility to respect all human rights wherever they operate, including throughout their operations and supply chains. The corporate responsibility to respect human rights is independent of States' own human rights obligations.[91]

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[88] UN Guiding Principles, General Principles ("business enterprises [are] specialized organs of society performing 'specialized' functions, required to comply with all applicable laws and to respect human rights").

[89] Human Rights Council, *Human Rights and Transnational Corporations and other Business Enterprises*, Resolution 17/4, UN Doc A/HRC/RES/17/4, 6 July 2011.

[90] Anglo-American's Group Human Rights Policy (Version 2, 2018), available at: https://www.angloamerican.com/~/media/Files/A/Anglo-American-Group/PLC/sustainability/approach-and-policies/social/hr-policy-document-english.pdf.

[91] The UN Special Rapporteur on Toxics has emphasised that: "The State's duty to prevent childhood exposure to toxics is mirrored by the responsibility of businesses to prevent childhood exposure to hazardous substances and wastes. The responsibility of businesses to respect children's rights exists independently of and does not diminish the obligations of the State". See UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, *Report on toxics and children's rights*, A/HRC/33/41 (2 August 2016), para 63.

68. Principle 11 of the UN Guiding Principles provides that companies should both "avoid infringing on the human rights of others" and "address adverse human rights impacts with which they are involved". This responsibility requires companies to adapt their practices and policies to account for groups disproportionately affected by business-related human rights abuses such as Applicants who are children[92] and women.[93]

69. Companies' responsibility to respect human rights requires businesses to: (i) avoid causing or contributing to adverse human rights impacts through their own activities and (ii) seek to prevent or mitigate adverse human rights impacts directly linked to their operations.[94] It is clear that "causality between the activities of a company and the adverse impact is **not** a factor in determining the scope of [a company's responsibility]" (emphasis added).[95]

70. Companies' responsibility to respect all human rights includes the right to an effective remedy.[96] Business enterprises have an independent but complementary role to play in realising effective remedies.[97]

71. Principle 22 of the UN Guiding Principle provides that "where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation". A company cannot, by definition, meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation.[98]

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[92] See generally UNICEF, UN Global Compact and Save the Children, Children Rights and Business Principles (2012). See also, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on the impacts of toxics and pollution on children's rights*, A/HRC/33/41 (2 August 2016) ("The State's duty to prevent childhood exposure to toxics is mirrored by the responsibility of businesses to prevent childhood exposure to hazardous substances and wastes. The responsibility of businesses to respect children's rights exists independently of and does not diminish the obligations of the State."), para 63.
[93] UN Working Group on Business and Human Rights, *Report on the Gender dimensions of the Guiding Principles on Business and Human Rights*, A/HRC/41/43 (23 May 2019), Commentary to UN Guiding Principle 11.
[94] UN Guiding Principles, Principle 13.
[95] Office of the United Nations High Commissioner for Human Rights, Frequently Asked Questions about the Guiding Principles on Business and Human Rights, HR/PUB/14/3 (2914), Question 32, p 32 ("***UN Guiding Principles FAQ***").
[96] Report on Access to Effective Remedies, para 65.
[97] Id., paras 14, 65.
[98] UN Guiding Principles FAQ, Question 35, p 36.

72. The Working Group has stressed that "**[b]usiness enterprises should provide for, or cooperate in the provision of, gender-transformative remedies** where they identify that they have caused or contributed to adverse human rights impacts", keeping in mind the "differentiated intersectional impacts on women and their human rights" (emphasis added).[99]

73. The Children's Rights and Business Principles developed by the United Nations Children's Fund and the UN Global Compact in 2012 also urge businesses to "[e]nsure the rights of children, their families and communities are addressed in … remediation for environmental and health damage from business operations".[100]

74. In the context of 'sacrifice zones' such as Kabwe, the UN Special Rapporteur on Toxics has emphasised that:

> "**[When] new information of hazards in products comes to light** or environmental contamination results that requires remediation, **businesses** have a responsibility to prevent and **mitigate impacts as quickly as possible, even if the State has not yet given orders to do so**."[101] (Emphasis added.)

75. Companies' responsibility to remediate applies to past harm and cannot be absolved through mere changes in ownership. In that respect, the UN Special Rapporteur on Toxics has urged States to "[e]nsure that corporate structures and acquisitions do not prevent victims from accessing justice or remedy for human rights abuses linked to toxic exposure".[102]

76. Amnesty's research has unravelled how multinational companies can weaponise their ownership structure to escape accountability for past human rights abuses. The Bhopal industrial disaster is a particularly illustrative case that Amnesty has been documenting and campaigning on for decades.[103] In December 1984, a

[99] UN Working Group on Business and Human Rights, *Report on the Gender dimensions of the Guiding Principles on Business and Human Rights*, A/HRC/41/43 (23 May 2019), paras 43 – 44.
[100] UN Global Compact, UN Children's Fund, Save the Children, Children's Rights and Business Principles, Principle 6.
[101] Report on Good Practices, para 86.
[102] Id., para 109.
[103] See e.g. 30 years is too long; Amnesty International, *Bhopal: Justice Delayed, Justice Denied: Background briefing on the criminal prosecutions in India and the failure to bring the prosecutions to an*

toxic gas leak escaped from the Union Carbide pesticide factory in the central Indian city of Bhopal.[104] Within three days, as many as 10,000 lay dead.[105] In the following years, more than 20,000 died as a result of the leak and about half a million people were exposed to hazardous levels of toxins, many suffered debilitating illnesses or developed disabilities for life.[106] Almost immediately after the leak, the Indian authorities laid criminal charges against Union Carbide India Limited (UCIL), its American parent company Union Carbide Corporation (UCC), UCC's then Chief Executive Officer (CEO) Warren Anderson, and eight Indian UCIL employees.[107] However, a few years after the disaster, UCC sold its shares in UCIL and walked away from Bhopal, leaving behind a heavily contaminated factory site and an already battered community to cope with the pollution. In 2010 — i.e. 26 years after the disaster — seven UCIL employees were convicted of causing death by criminal negligence.[108] But UCIL's parent company, US-based UCC, remains an absconder from justice until this day. In 2001, UCC was bought by another US company, Dow Chemical Company, who has done nothing to ensure that its subsidiary face criminal charges.[109]

b. Corporate duties derived from the South African Bill of Rights

77. In accordance with existing international human rights standards, the Constitution imposes obligations on corporate actors derived from the Bill of Rights. The *amici* submit that both the horizontal and extraterritorial application of the Bill of Rights are instrumental in the realisation of the right to remedy in the context of corporate human rights abuses.

a. *Horizontal dimension of the Bill of Rights*

78. Section 8(2) of the Constitution states that:

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end 25 years on, ASA 20/024/2009 (27 November 2009), available https://www.amnesty.org/ar/documents/ASA20/024/2009/en/; Amnesty International, *Union Carbide Corporation (UCC), DOW Chemicals and the Bhopal Communities in India – The Case*, ASA 20/005/2005 (21 January 2005), available at https://www.amnesty.org/en/documents/asa20/005/2005/en/; Summary of Clouds of Injustice.

[104] 30 years is too long p 2.

[105] Ibid.

[106] Id., pp 3, 6.

[107] Id., p 3.

[108] Ibid.

[109] Ibid.

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and nature of any duty imposed by the right."

79. Section 8(2) of the Constitution imposes human rights obligations on private actors such as the Respondent and therefore creates a horizontal dimension to the application of the Bill of Rights between private parties. As Moseneke DCJ has pointed out, it is the horizontal application of the Bill of Rights that can prevent the creation of a legal vacuum with no accountability and thereby enforce the right to effective remedy:

> "**[P]rivate power cannot be held to be immune from constitutional scrutiny. This is particularly so**, as we have already seen, when private power approximates public power or has a wide and public impact. But the horizontal application of rights and values may also be invoked even in a dispute between two private parties with no public ramification. This must be so because all rights conferred by our Constitution should be capable of full vindication. **Everyone, whether faced with a big corporation or his or her neighbour only, is entitled to effective relief in the fact of an unjustified invasion of a right expressly or otherwise conferred by the highest law in our law**."[110] (Emphasis added.)

80. Based on the wording of section 8(2), Courts have to apply a two-prong test to assess the application of the Bill of Rights to juristic persons and assess: (i) whether any provision of the Bill of Rights is applicable, and (ii) which right(s) and associated duties of the said right(s) are at stake.

81. In *Khumalo and Others v Holomisa*[111] the Constitutional Court confirmed, for the first time, the direct application of a provision of the Bill of Rights under section 8(2) to owners of a South African newspaper holding that:

> "Given the intensity of the constitutional right in questions [right to freedom of expression], coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear

[110] D Moseneke, 'Transformative constitutionalism: its implications for the law of contract', *Stellenbosch Law Review* 20.1 (2009): 3-13, p 12.
[111] 2002 (5) SA 401 (CC).

> that the right to freedom of expression is of direct horizontal application in this case as contemplated by Section 8(2) of the Constitution."[112]

82. In *Daniels v Scribante and Another*,[113] the Constitutional Court emphasised that the questions of whether and to what extent a provision of the Bill of Rights applies to a juristic person depends on the nature of the right, its history, its purpose as well as the "potential of invasion of that right by persons other than the State or organs of State".[114] The Court clarified that:

> "[T]he purpose of Section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right."[115]

83. In a matter where no government actor is engaged, courts must "consider whether a given provision of the Bill of Rights binds the 'conduct' of the natural or juristic party against whom the provision is being invoked".[116] The purpose of section 8(2) is clear: to prevent a space where juristic persons can violate or infringe human rights and not be held accountable. Madlanga J has confirmed this assertion, stating that:

> "Simply put: if we refuse to impose human rights obligations on private persons [including juristic persons] for fear of interfering with their autonomy, we risk maintaining a perverse status quo which entrenches a social and economic system that privileges the haves, mainly white people in the South African context. **By imposing certain human rights obligations on private individuals and companies**, we acknowledge that our current social and economic realities have arisen out of our perverted past and cannot be sanitised."[117] (Emphasis added.)

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[112] Id. para 33. For the imposition of constitutional obligations upon private parties see also *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) para 66; *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) para 131.
[113] 2017 (4) SA 341 (CC).
[114] Id. para 39 referring to *Khumalo v Holomisa* para 33.
[115] Id. para 44, quoting *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) para 58.
[116] S Woolman & M Bishop *Constitutional Law of South Africa* 2 ed (2005) p 34.
[117] M Madlanga, 'The human rights duties of companies and other private actors in South Africa', *Stellenbosch Law Review* 29.3 (2018) pp 359-378, 368.

84. The *amici* submit that there are provisions in the Bill of Rights that can impose both negative obligations (i.e. a duty to prevent or abstain from conduct that might interfere with a right determined by the Bill of Rights) and positive obligations (i.e. a duty for the juristic person to work towards the achievement of that right).

85. In *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others*, the Constitutional Court confirmed that section 8(2) may impose negative obligations upon a juristic person.[118] In that case, the Court pointed out that a trust had the constitutional obligation "not to impair the learners' right to a basic education".[119]

86. In *Daniels v Scribante and Another*, the Constitutional Court further confirmed that through section 8(2), section 25(6) of the Constitution imposes obligations upon the juristic person.[120] The Court further acknowledged the possibility that under section 8(2) of the Constitution, positive obligations could emerge when holding that:

> "What is paramount [for the determination of whether a positive obligation exists] includes: what is the nature of a the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state' and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons [including juristic persons] are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; Section 8(2) does envisage that."[121]

87. With respect to the dispute underlying the application before this Court, the *amici* submit that a few provisions of the Bill of Rights could impose obligations upon the Respondent, including:

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[118] *Juma Musjid* paras 60, 62-65; see also *Pridwin* paras 107, 180, 196.
[119] *Juma Musjid* para 65.
[120] *Daniels v Scribante* paras 38-39.
[121] *Daniels v Scribante* paras 39 and 40. In support of positive obligations that derive from the Bill of Rights see also the analysis of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) by M Madlanga 'The human rights duties of companies and other private actors in South Africa', *Stellenbosch Law Review* 29.3 (2018) pp 359-378, p 371.

- Section 10 on the right to inherent human dignity;
- Section 12(2) on the right to bodily and psychological integrity;
- Section 24(a) on the right to an environment that is not harmful to one's health or well-being; and
- Section 34 on access to the courts.

88. South African courts have further explained the ambit of the rights entrenched in the Bill of Rights and affirmed that:

88.1. The Constitution enshrines most of the rights in the Bill of Rights in everyone and as such rights apply to **everyone** except those specifically reserved for citizens. The *amici* submit that the rights implicated in this case are not ones reserved only for citizens.[122]

88.2. Human dignity is a foundational value of the Bill of Rights and the source of other personal rights.[123] Human dignity has no nationality. It is inherent in all people, regardless of one's citizenship status.[124]

89. The jurisprudence on section 8(2) clearly sets out under which circumstances the Bill of Rights can impose both positive and negative obligations upon corporations.[125] The *amici* submit that such obligations apply wherever a South African company operates.

b. *Extraterritorial application of the Bill of Rights*

90. The *amici* submit that neither section 8(1) nor section 8(2) of the Constitution conditions the imposition of obligations on private actors deriving from the Bill of Rights to South Africa's territorial borders.[126]

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[122] Rights reserved for citizens are political rights in section 19; citizenship rights in section 20; the right to a passport and to enter, remain and reside in the Republic in sections 21(3) and 21(4); freedom of trade, occupation and profession in section 22; while certain labour rights in section 23 are qualified as being available to smaller groups of people than 'everyone'.
[123] *Makwanyane* para 144.
[124] *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) para 25.
[125] For a detailed analysis of the jurisprudence by the Constitutional Court that supports the view that the Bill of Rights may impose positive and negative obligations upon corporations see B Meyersfeld, 'The South African Constitution and the human-rights obligations of juristic persons' *South African Law Journal* 137.3 (2020): 439-478; see also M Madlanga 'The human rights duties of companies and other private actors in South Africa', *Stellenbosch Law Review* 29.3 (2018), pp 359-378.
[126] Sections 8(1) and (2) of the Constitution.

91. The Constitutional Court's jurisprudence confirms this approach. In *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening)*,[127] the Constitutional Court ruled, with respect to the conduct of state authorities that:

> "The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights."[128]

92. The Constitutional Court is clear that there can be no legal vacuum where actors that bear obligations under the Bill of Rights can infringe the constitutional rights of others and that those who have suffered the infringement must be granted an effective remedy. *Mohamed* demonstrates that the application of the Bill of Rights is not limited to South African nationals nor to the territory of South Africa, if subjected to State power.[129]

93. With respect to obligations deriving from the Bill of Rights, in *Kaunda and Others v President of the Republic of South Africa*,[130] the Constitutional Court limited the extraterritorial application of the Bill of Rights to circumstances "where laws of a [S]tate are applicable to nationals beyond the [S]tate's borders, but only if the application of the law does not interfere with the sovereignty of other states".[131] While *Kaunda* limited the extraterritorial application of the Bill of Rights in cases where such conduct interferes with the sovereignty of another State, it left the door open for an extraterritorial application with respect to section 8(2) of the Constitution in specific circumstances. The Court concluded that:

> "There is a difference between an extraterritorial infringement of a constitutional right by an organ of state bound under section 8(1) of the Constitution, or by **persons bound under section 8(2) of the constitution**, in circumstances which do not infringe the sovereignty of a foreign state, and an obligation on our government to take action in a foreign state that interfered directly or indirectly with the sovereignty of that state. Claims that

[127] 2001 (3) SA 893 (CC).
[128] Id., para 71.
[129] S Woolman & M Bishop *Constitutional Law of South Africa* 2 ed (2005), p 116.
[130] 2005 (4) SA 235 (CC).
[131] Id., para 44.

> fall in the former category raise problems with which it is not necessary to deal now. **They may, however, be justiciable in our courts, and nothing in this judgment should be construed as excluding that possibility**."[132] (Emphasis added.)

94. The dissenting judgment in the same case by O'Regan and Makgoro JJ further explained extraterritoriality and stated that:

> "[T]he extraterritorial application of the provisions of the Bill of Rights will be limited by the international law principle that the provisions will only be enforceable against the government in circumstances that will not diminish or impede the sovereignty of another state. The enquiry as to whether the enforcement will have this effect will be determined on the facts of each case. As a general principle, however, **our Bill of Rights binds the government even when it acts outside South Africa**, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state."[133] (Emphasis added.)

95. The dissenting judgment makes clear that there should be no loopholes from accountability for obligations that derive from the Constitution.

96. In line with *Kaunda*, if the Bill of Rights binds the government even when it acts outside South Africa, there is no reason why South African corporations acting outside South Africa should be exempted from complying with obligations imposed through section 8(2) of the Constitution.

97. While the majority judgment in *Kaunda* did not address extraterritoriality issues with respect to section 8(2) in detail, it emphasised that extraterritorial conduct in a foreign state could be "justiciable" if such proceedings would not infringe another State's sovereignty.[134] In this context, neither the wording of section 8(2), nor any other constitutional provision, suggests a territorial limitation with respect to obligations the Bill of Rights can impose on corporations. Therefore, the *amici* submit, South African courts can apply the Bill of Rights to assess the conduct of

[132] Id. para 45.
[133] Id. paras 228-229.
[134] Id. para 45.

South African corporations abroad, as long as such application would not constitute an infringement upon another State's sovereignty.

98. In this matter, the alleged misconduct might constitute an infringement upon the right to bodily integrity under section 12(2) and/or the right to an environment that is not harmful to health and well-being under section 24(*a*). If a South African company were to violate those rights domestically or outside South Africa's territorial borders, South African courts should, pursuant to both international standards and constitutional law principles, provide an avenue for victims of such corporate harm to seek an effective remedy.

F. ACCESS TO JUSTICE

99. Rights-holders affected by the adverse human rights impacts of corporate activities can face significant hurdles to obtain a remedy, due to gaps in applicable legal regimes, challenges with access to information, lack of awareness of avenues for redress, the complexity and technicality of large corporate structures, fear of reprisals, or the scarcity of funding for private law claims.[135] Such challenges are exacerbated in cross-border cases, where both home and host States can present distinct but equally thorny challenges for victims and survivors of business-related human rights abuses.[136]

100. The UN Special Rapporteur on Toxics has deplored that:

> "**Most victims of toxic exposures have neither access to justice nor an effective remedy** ... Major obstacles to accountability and remedy include the unreasonably high burden of proof, the long latency periods for consequences to manifest in some cases and the difficulty in establishing causation; substantial information gaps with respect to the identification of hazards, measurement of exposure and specification of the epidemiological

[135] UN Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19 (10 May 2016), paras 4-5.
[136] Creating a Paradigm Shift p 3; UN Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19 (10 May 2016), paras 4-5. See generally, Injustice Incorporated (2014).

impacts; possible exposure to a multitude of different substances and over a lifetime."[137] (Emphasis added.)

101. In 'sacrifice zones' such as Kabwe, UN Special Rapporteurs on the Environment and Toxics have identified access to justice as an "essential component of the rule of law and a means by which victims of toxics can actively claim the entire range of rights they hold, including the right to access to an effective remedy".[138] They have urged States "to enable people and peoples to claim and defend their rights against the threats of toxic and otherwise hazardous substances and wastes".[139] To do so, "States must reduce systemic obstacles, including the burden of proof and causation, among others, that prevent victims of toxic exposure from accessing remedies".[140]

102. As Amnesty's research has demonstrated, victims and survivors of corporate harm may choose to pursue legal action in the courts of a company's home State because they have determined that they are more likely to achieve justice in that forum than in the host State. This is particularly the case where the host State's justice system suffers from corruption, inefficiency, severe delays, lack of independence or other factors that undermine justice.[141]

103. In adjudicating this application for class certification, this Court should consider the unique value of class actions to adjudicate certain human rights disputes (F.I), take into account well-documented hurdles Applicants face in the host state – Zambia – to pursue legal action against Respondent (F.II) and assess the extent to which South Africa's class action mechanism could support Applicants' access to justice (F.III).

[137] UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, *Report on the human right to an effective remedy: the case of lead-contaminated housing in Kosovo* (4 September 2020), A/HRC/45/CRP10, para 8.
[138] Id., para 5.
[139] Report on Good Practices, para 111(h).
[140] Ibid.
[141] Injustice Incorporated p 117.

I. Collective Action and Group Claims Under International Human Rights Standards

104. The inadequacy of options to aggregate civil claims for compensation, or lack thereof, can be a key practical and procedural barrier for victims of corporate harm to access judicial remedies.[142] Collective action or group claims can drastically reduce legal costs (spread over a large group of claimants) and significantly "improv[e] access to justice in practice especially in cases where the financial value of individual awards may not be high".[143]

105. Under the UN Guiding Principles, States are required to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses.[144] The commentary to Principle 26 explicitly addresses the issue of access to justice in the context of class actions by stating that:

> "Practical and procedural barriers to accessing judicial remedy can arise where, for example … [t]here are **inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures)**, and this prevents effective remedy for individual claimants."[145] (Emphasis added.)

106. Furthermore, the denial of recognition of a class on the basis of national origin could amount to a violation of States' obligation to ensure access to justice in addition to a failure to ensure non-discrimination and equality before the law. In its General Comment 32 on access to justice, the UN Human Rights Committee has emphasised that:

> "A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to [the right of access to courts and tribunals and equality before them] . . . . The guarantee prohibits any distinctions regarding access to courts and

[142] See European Law Institute, *Business and Human Rights: Access to Justice and Effective Remedies* (2022), p 31.
[143] Dr. J Zerk, *Corporate Liability for Gross Human Rights Abuses a fairer and more effective system of domestic law remedies*, Report prepared for the Office of the UN High Commissioner for Human Rights (February 2014), pp 82, 96.
[144] UN Guiding Principles, Principle 26.
[145] UN Guiding Principles, Commentary to Principle 26.

tribunals that are not based on law and cannot be justified on objective and reasonable grounds. **The guarantee is violated if certain persons are barred from bringing suit** against any other persons such as **by reason of** their race, colour, sex, language, religion, political or other opinion, **national or social origin**, property, birth or other status."[146] (Emphasis added.)

107. Other courts have certified international class actions and exercised jurisdiction over extraterritorial corporate human rights abuses to provide a forum for marginalised groups to seek justice. Of particular relevance here, is the case of *Smin Tit, Hoy Mai and Others v Mitr Phol Co. Ltd.* (2020)[147], where the South Bangkok South Civil Court in Thailand granted an application for class certification brought by more than 700 Cambodian families suing Thai sugar giant Mitr Phol, after being forcibly evicted from their homes between 2008 and 2009.[148] In this unprecedented transboundary human rights class action in Southeast Asia,[149] the court of first instance had denied claimants' application on the basis of practical considerations including the villagers' lack of Thai language skills, their capacity to comprehend court orders effectively and the alleged practical difficulty of posting notices to the rural addresses of the claimants in Cambodia.[150] The decision recognising class action status allowed claimants to advocate as a group, ensuring access to justice through collective action and preventing the laborious and costly process of bringing hundreds of individual lawsuits.[151]

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[146] UN Human Rights Committee, General Comment 32, CCPR/C/GC/32 (23 August 2007), para 9.
[147] *Cambodia: Challenging Mitr Phol land grab and Bonsucro greenwashing*, available at: https://www.inclusivedevelopment.net/cases/cambodia-mitr-phol-sugarcane-land-grab/f.
[148] Amnesty International, *Cambodia/Thailand: Court ruling on Mitr Phol watershed moment for corporate accountability in SE Asia* (31 July 2020), available at: https://www.amnesty.org/en/latest/news/2020/07/court-ruling-mitr-phol-case-watershed-moment-for-se-asia-corporate-accountability/.
[149] Asian Forum for Human Rights and Development, *Thai Appeal Court decision paves the way for Asia's first transboundary class action on human rights abuses* (31 July 2020), available at: https://www.forum-asia.org/?p=32339.
[150] Amnesty International, *Amicus Curiae in the case of Hoy Mai & Others vs. Mitr Phol Co. Ltd.*, ASA 39/2753/2020 (20 July 2020), available at: https://www.amnesty.org/en/documents/asa39/2753/2020/en/
[151] Asian Forum for Human Rights and Development, *Thai Appeal Court decision paves the way for Asia's first transboundary class action on human rights abuses* (31 July 2020), available at: https://www.forum-asia.org/?p=32339.

II. Limits to Access to Justice in Zambia

108. The *amici* submit that Applicants face a number of limitations and challenges to access to justice inherent to Zambia's justice system.

109. While section 87(7) of Zambia's Mines and Mineral Development Act No. 11 of 2015 provides that a group of persons can bring a claim "in the interest of, or on behalf of a group or class of persons whose interest are affected", there is no procedure or case law in Zambia creating a mechanism akin to opt-out class actions.

110. Furthermore, contingent fee arrangements are prohibited in Zambia. Thus, low-income and vulnerable communities face significant challenges to accessing legal representation for complex mass delict cases due to costs and lack of funding. Zambia's Supreme Court affirmed this prohibition in *Kuta Chambers v Concillia Simbulo*.[152]

111. Even where claimants are able to commence collective legal proceedings (such as representative actions), Zambian courts are not allowed to adjudicate overarching issues of fact and law that may be common to a large group of claimants seeking individual compensation. For example, in *Kankola Copper Mines and Others v James Nyansulu and Others*,[153] Zambia's Supreme Court held that:

> "Our view is that this was a representative action as clearly shown by the contents of the Statement of the claim … The twelve medical reports were produced by the main Respondent in this matter, Mr James Nyansulu who should have equally produced the medical forms for the remainder of the 1,989 Respondents. There was, therefore, no credible medical evidence showing that the 1,989 Respondents suffered any injury because of the pollution."[154]

[152] *Kuta Chambers (Sued as a Firm) v Simbulo (suing as Administratrix of The Estate of The Late Francis Sibulo)* (Appeal 122 of 2012) SZC Selected Judgment No. 36 of 2015 [2015] ZMSC 75 (12 November 2015).
[153] *Kankola Copper Mines and Others v James Nyansulu and Others* (Appeal 1 of 2012) [2015] ZMSC 33.
[154] Id. at J17, J27.

112. In environmental litigation in particular, the requirement for claimants to produce expert evidence is another significant challenge for low-income claimants given the limited litigation funding in Zambia. In *Besnson Shamilimo and 41 Others v Nitrogen Chemicals of Zambia Limited*,[155] the High Court of Zambia confirmed that the respondent company was negligent when it failed to provide adequate warning about the dangers of radioactive materials and to provide protective clothing to its employees who worked in its gasification plant. However, the court concluded that there was no evidence produced to show that the respondent's negligence was responsible for the sickness or death of its employees. The High Court noted that:

> "Proving that the plaintiffs were exposed to radiation may have required specialised examination, which is not readily available but it is their case and **the burden lays on them**. In the absence of any direct link between the illness and the radiation, [the court] cannot attribute liability to the defendant."[156] (Emphasis added.)

113. The limitations and challenges for victims of corporate human rights abuses to access justice in Zambia have further been confirmed by the United Kingdom Supreme Court in *Vedanta Resources Plc & Another v Lungowe and Others* (referenced in Part E.I.c. above).[157] In *Vedanta*, the Supreme Court confirmed the decision by the court *a quo* that there was a "real risk that substantial justice would be unavailable" based on the practicable impossibility of funding such group claims where the claimants were all in extreme poverty" and due to "the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively".[158] With respect to Zambian jurisprudence, the Supreme Court further confirmed that conditions such as the funding restrictions would constitute an issue in terms of access to justice.[159]

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[155] *Besnson Shamilimo and 41 Others v Nitrogen Chemicals of Zambia Limited* 2007/HP/0725; *Dors Chisambwel & 95 Others v NFC Africa Mining Plc* 2014HK/374; *Kankola Copper Mines and Others v James Nyansulu and Others* (Appeal 1 of 2012) [2015] ZMSC 33.
[156] Id. at J24.
[157] *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20, paras 88-101.
[158] Id., para 89.
[159] Id., paras 89-101 referring to *Kankola Copper Mines and Others v James Nyansulu and Others* (Appeal 1 of 2012) [2015] ZMSC 33, at J17, J27; *Besnson Shamilimo and 41 Others v Nitrogen Chemicals of Zambia Limited* 2007/HP/0725, at J24.

III. Class Actions in South Africa

114. Prior to 1994, class actions were foreign to South African law and judges took a cautious approach to standing. Traditionally, a litigant would have to show personal interest in the case or be formally joined as a party. South Africa has not promulgated any class action legislation to date, however, the jurisprudence of the Supreme Court of Appeal and Constitutional Court have taken significant steps in developing a framework for group claims to be heard in South Africa. In this context, section 38(*c*) of the Constitution provides the foundation for class actions to be brought in South Africa, stating that:

> "[A]nyone listed in this Section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are - (*c*) anyone acting as a member of, or in the interest of, a group or class of persons . . . ."

115. Despite the relatively recent development of class actions in South Africa, class actions have already proved to be a valuable vehicle for redress in matters affecting a large number of claimants.[160]

116. South African courts "were [initially] reluctant to permit class actions that were not aimed at a vindication of rights that are contained in the Bill of Rights".[161] However, "subsequent cases indicat[e] that class actions can also be instituted for civil damages' and that the courts 'have increasingly taken a more generous approach to the consideration of certification of class action applications".[162]

117. While section 173 of the Constitution states that South African courts have the inherent power to protect and regulate their own process and the process of certification falls under section 173 of the Constitution, it must be guided by the interests of justice.[163] In *Mukaddam v Pioneer Foods (Pty) Ltd and Others*, the Constitutional Court confirmed that with respect to section 34 read with section 38 of the Constitution, "there can be no justification for elevating requirements for

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[160] J Handmaker 'Introduction to Special issue: Class action litigation in South Africa' *South African Journal on Human Rights* 37:1, at 4-5.
[161] MR Phooka 'The development of class action in South Africa: Where are we through case law?' *South African Journal on Human Rights* (online publication) 11 January 2022.
[162] Ibid.
[163] See *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) para 37.

certification to the rigid level of prerequisites for the exercise of the power [under section 173] conferred without restrictions".[164] The Constitutional Court further concluded that section 173 of the Constitution "does not limit the exercise of the power nor does it lay down any condition, except what is done must be in the interests of justice".[165]

118. Finally, there is no prohibition on transnational class actions or certification of classes of non-nationals under South African law. Given the critical role of equality in the Constitution, such a blanket prohibition may not pass constitutional muster and may in fact be contrary to section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 that both list nationality as a prohibited ground for discrimination.

G. CONCLUSION

119. This Court's decision to grant or deny this application for class certification will have direct repercussions on Applicants' right to an effective remedy, guaranteed by international human rights law and South Africa's constitutional protections.

120. The *amici* submit that as the home State in this dispute, South Africa's duty to remediate the alleged corporate harm forming the basis of this dispute, requires, at a minimum, its courts to provide judicial remedies to give victims of human rights abuses associated with the activities of South African companies access to justice

121. Furthermore, the *amici* submit that section 8(2) of the Constitution imposes obligations upon corporations such as the Respondent that apply beyond South Africa's territorial borders.

122. In light of South Africa's duties under international law, its imperative to prevent accountability gaps under its constitutional framework, and obstacles to justice faced by Applicants in Zambia, the *amici* submit that South Africa is an appropriate forum for Applicants to seek justice for the alleged long-term health and environmental impacts of the Mine that they ascribe to Respondent's activities in Zambia. This Court should exercise jurisdiction over this matter and,

[164] Ibid.
[165] Ibid.

provided Applicants meet other requirements for class certification, allow this class action to proceed for the underlying issues of fact and law common to the proposed classes to be adjudicated collectively by South African courts.

KARABO VAN HEERDEN

Counsel for the First and Second *Amicus* Applicants

Chambers, Sandton

9 May 2022