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

CASE NO: 48226/12

In the application for admission as *amici curiae* of –

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| **TREATMENT ACTION CAMPAIGN NPC** | First Applicant |
| **SONKE GENDER JUSTICE NPC** | Second Applicant |

*In re*: the matter between –

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| **BONGANI NKALA AND FIFTY-FIVE OTHERS** | Applicants |

and

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| **HARMONY GOLD MINING COMPANY LIMITED AND THIRTY-ONE OTHERS** | Respondents |

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## APPLICANTS' WRITTEN SUBMISSIONS

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## INTRODUCTION

1 In this application brought in terms of rule 16A(5) of the Uniform Rules of Court ("the Uniform Rules"), the Treatment Action Campaign NPC ("the TAC") and Sonke Gender Justice NPC ("Sonke") seek to be admitted as *amici curiae* ("*amici*") in the application brought by Bongani Nkala and 55

others ("the class action applicants") under consolidated case no. 48226/12 ("the main application").

2 This application was launched after the TAC and Sonke sought – but did not obtain – the consent of all the parties in the main application to be admitted as *amici*. Having been served with the application, most of the respondents in the main application filed notices of intention to oppose.[1] Some of these notices of opposition were subsequently withdrawn,[2] with only three answering affidavits eventually being filed:

2.1 One on behalf of the first, second, fourth to eighth, and 32nd respondents ("the Harmony respondents");

2.2 A second on behalf of the 13th to 19th, 30 and 31st respondents ("the Gold Fields respondents"); and

2.3 A third on behalf of Anglo American South Africa ("Anglo American"), the 27th respondent.

We refer to these respondents collectively as the *amicus* respondents.

3 In opposing this application, the *amicus* respondents seek to rely on two sets of allegations: first, that the TAC and Sonke have not satisfied the requirements for admission as *amici*; and second, that their admission

[1] Replying affidavit, para 7, page 518
[2] Ibid

would unnecessarily burden the court and the parties.

4 The opposition of the *amicus* respondents is premised on a misunderstanding of the role of an *amicus* in matters raising constitutional issues. In particular, the *amicus* respondents have adopted an approach that would appear to allow an interested party to be admitted as *amicus* only if it were able to show that –

4.1 it has a direct and substantial interest in the particular outcome of the proceedings such that it would have the necessary standing to intervene as a party;

4.2 its proposed legal submissions are –

4.2.1. fundamentally different from those that any of the parties seek to make; and

4.2.2. directly relevant to the outcome of the proceedings in which constitutional issues have been raised;

4.3 its proposed factual submissions –

4.3.1. address completely new material that none of the parties was in a position to introduce; and

4.3.2. do not in any way overlap the evidence that the parties have already adduced; and

4.4 its admission would not "inconvenience" the parties in any way.

5 The *amicus* respondents misconceive the primary role of the *amicus*. As pointed out by the Constitutional Court in *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others*,[3] that role is to promote and protect the public interest in two key ways:[4]

5.1 First, *"by ensuring that courts consider a wide range of options and are well informed"*; and

5.2 Second, *"by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues."*

6 At its core, the role of the *amicus* is to help courts to promote and protect constitutional rights. The mechanism by which this is done is to provide an opportunity for any party interested in a constitutional issue raised in existing proceedings to be admitted as *amicus* to make factual and/or legal submissions that put the court in a better position to adjudicate on these issues than would be the case were the admission denied.

7 We submit that the admission of the TAC and Sonke as *amici* would have this effect. Not only do the two organisations have an interest in many of the constitutional issues raised in the main application, but the

[3] 2013 (2) SA 620 (CC)
[4] At para 26

submissions they seek to make –

7.1 are relevant to the proceedings;

7.2 will assist the court in deciding the main application in a manner that promotes and protects the public interest; and

7.3 are sufficiently different from those of the other parties to justify the TAC and Sonke being admitted as *amici*.

8 We begin these submissions by considering briefly the nature of the main application. Thereafter, we consider the following five issues:

8.1 First, the role of the *amicus* in proceedings in the High Court in which a constitutional issue has been raised;

8.2 Second, the applicants' interests in the constitutional issues raised in the main application;

8.3 Third, how the applicants have satisfied the requirements for admission as *amici*, as contemplated by rule 16A(6);

8.4 Fourth, the basis upon which the applicants submit that the interests of justice are served by this court admitting the evidence contained in their founding papers; and

8.5 Fifth, whether costs should be awarded.

**THE NATURE OF THE MAIN APPLICATION**

9 The main application is an application for certification of a class action to be brought by victims of silicosis that was allegedly caused by the working conditions to which they were subjected by their employers in the gold mining industry.

10 The *amicus* respondents seek to strip the main application of any substance, characterising it as a mere procedural device. While the class action applicants may have described the relief sought in the main application as being purely technical, they make it plain that they do not view certification as a mere procedural device. Neither do the TAC and Sonke. Nor does our law.

11 On the contrary, the law recognises the right to litigate *"as a member of, or in the interest of, a group or class of persons"* when asserting a fundamental right, precisely because a failure to do so may limit access to justice. As Cameron JA noted in *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others*:[5]

> *"It is precisely because so many in our country are in a 'poor position to seek legal redress' and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice that both the interim Constitution and the Constitution created*

[5] 2001 (4) SA 1184 (SCA) at para 6 (footnotes omitted)

*the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons'."*

12 The TAC and Sonke see the main application as seeking relief without which most of the members of the relevant classes would be left without any substantive remedy. Put differently, should these members be compelled to institute separate actions, as all the respondents in the main application would have it, they are unlikely to be able to litigate at all. It is this possibility of a denial of justice that has prompted the *amicus* intervention of the TAC and Sonke.

**THE ROLE OF THE *AMICUS***

13 Rule 16A governs the admission of *amici* in the High Court. Insofar as an application for admission is concerned, rule 16A requires that in addition to describing its interest in the proceedings, a party wishing to be admitted as *amicus* must deal with the submissions it intends to advance. In so doing, the interested party must –

13.1 *"clearly and succinctly"* set out the submissions it seeks to advance if admitted as *amicus*;

13.2 explain why these submissions are relevant to the proceedings;

13.3 set out the *"reasons for believing that the submissions will assist the court"*; and

13.4 explain why the submissions *"are different from those of the other parties"*.

14 The reference to *"submissions"* is not limited to legal argument. In *Children's Institute*, the Constitutional Court made clear that *"rule 16A does not prohibit the introduction of evidence by an amicus in a High Court."* It noted that a High Court retains a discretion – *"guided by the interests of justice"* – to determine *"whether, and to what extent, to allow an amicus to adduce evidence in support of its submissions"*.[6]

15 In *South African Broadcasting Corporation v Avusa Ltd and Another*,[7] Willis J noted that *"the possibility that an aspirant amicus may or may not raise new or different matter is a factor to be considered, but the absence of novelty is not necessarily, and in itself, destructive of the application."* Nevertheless, we explain below that the submissions of the TAC and Sonke are indeed different from those of the other parties.

16 Rule 16A(9) expressly empowers a court to *"dispense with any of the requirements of … rule [16A] if it is in the interests of justice to do so."* In addition, rule 16A(8) contemplates any court hearing an application for admission as an *amicus* to *"refuse or grant the application upon such terms and conditions as it may determine."* The rule as a whole therefore vests the High Court with a wide-ranging discretion to admit *amici* in the

[6] *Children's Institute* above note 3 at para 39
[7] 2010 (1) SA 280 (GSJ) at para 44

interests of justice.

17 Central to the exercise of this discretion is an understanding of the role of the *amicus*. In dealing with the role of the *amicus* as contemplated by the Uniform Rules,[8] the Constitutional Court noted as follows in *Children's Institute*:[9]

> *"[T]he role of an amicus envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, rule 16A(2) describes an amicus as an 'interested party in a constitutional issue raised in proceedings'. Therefore, although friends of the court played a variety of roles at common law, the new rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. … The role of a friend of the court can … be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution."*

18 For some time, our courts have recognised the important contribution made by *amici*. Recognising that the resolution of constitutional issues usually has an impact that extends beyond the litigants in any particular case, our courts both welcome and encourage the participation of *amici* who are able to bring a public interest perspective. As the Constitutional Court stated in *Koyabe and Others v Minister for Home Affairs and*

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[8] Insofar as legal proceedings before the Constitutional Court are concerned, see *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5. The key difference between these two roles relates to the type of evidence that an *amicus* may adduce. In large part, this flows from the nature of the Constitutional Court – which ordinarily acts as a court of appeal – and the provisions of its own rules. In particular, rule 31 restricts the type of evidence that can be adduced on appeal, including by – but not limited to – an *amicus*. We deal below with the High Court's discretion regarding the admission of evidence sought to be adduced by an *amicus*.

[9] Above note 3 at paras 26 and 26 (footnotes omitted and emphasis added)

*Others (Lawyers for Human Rights as Amicus Curiae)*:[10]

> *"Amici curiae have made and continue to make and continue to make an invaluable contribution to this Court's jurisprudence. Most, if not all constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and in so far as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged."*

19 In addition, our courts have recognised that *amici* may be particularly well-placed to make submissions on background information that has not been introduced by any of the parties. In bringing such information to the court's attention, the *amicus* may assist in ensuring that the social consequences of any particular decision are well-understood.[11]

20 In addressing this issue in *Children's Institute*, the Constitutional Court referred with approval to the decision of this court in *S v Engelbrecht (Centre for Applied Legal Studies Intervening as Amicus Curiae)*,[12] in which the order had –

> *"requested 'written submissions' from the amicus curiae on the '[a]pplication of relevant research, academic scholarship and legal and juristic developments' to 'contextualise the behaviour and/or criminal actions of the accused'."*[13]

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[10] 2010 (4) SA 327 (CC) at para 80 (footnote omitted)
[11] See *Children's Institute*, above note 3 at para 22
[12] 2004 (2) SACR 391 (W) at para 37
[13] *Children's Institute*, above note 3 at footnote 21

21 The *Engelbrecht* court explained the basis for its order:[14]

> *"Intervention may ensure that the Court considers a wide range of options when coming to a decision and that it is better informed. Murray suggests that the intervener or amicus does one or both of two things: it offers a legal argument not raised by either of the parties and/or it presents factual material along the lines of placing the issues before the Court in their social context and suggesting their likely consequences."*[15]

22 In considering the role of the *amicus* under the Constitution, Budlender focuses on the non-party that *"requests the right to intervene so that it might advance a particular legal position which it has itself chosen"*:[16]

> *"This form of amicus was not permitted under the common law. This new form of amicus curiae reflects two important changes brought about by our new constitutional democratic order. First, it reflects the underlying theme of participatory democracy in the Final Constitution. In matters of broad public interest, such as the interpretation of the Final Constitution, courts are more disposed towards listening to the voices of persons other than the parties to a particular dispute. Secondly, it reflects the fact that constitutional litigation often affects a range of people and interests that go well beyond those of the parties before the court."*

23 As we explain below, the TAC and Sonke seek admission as *amici* to play such a role. In particular, they intend to assist this court in *"effectively promoting and protecting [a range of] rights enshrined in our*

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[14] *Engelbrecht*, above note 12 at para 14 (emphasis added). See also *S v Zuma* 2006 (2) SACR 257 at 261g-j.

[15] The reference to Murray is a reference to Christina Murray, "Litigating in the Public Interest: Intervention and the Amicus Curiae" (1994) 10 *SAJHR* 240 at 259, to which the Constitutional Court also referred in *Children's Institute*.

[16] Geoff Budlender, "Chapter 8: Amicus Curiae", in Woolman et al (eds.), *Constitutional Law of South Africa* 2 ed, Revision Service 1 (Juta & Co, Ltd, Cape Town: 2009) at 8—1 (footnote omitted)

*Constitution"* by not only bringing a broader public interest perspective to the key legal questions in the main application, but also by adducing evidence that seeks to place *"the issues before th[is] Court in their social context and suggesting their likely consequences."*[17]

**THE APPLICANTS' INTERESTS IN THE PROCEEDINGS**

24 Rule 16A permits *"any interested party in a constitutional issue raised in proceedings before a [high] court"* to seek the parties' consent and/or the court's permission to be admitted as *amicus*. Central to the Harmony and Gold Fields respondents' opposition is that the submissions made by the TAC and Sonke extend beyond the constitutional issues and rights identified in the rule 16A notice. On this basis, for example, the Harmony respondents submit that the applicants are not entitled to deal with sections 8(2) and 173 of the Constitution, or the timing of the transmissibility of damages question.

25 This approach fails to appreciate the different purposes served by rules 16A(1) and 16A(2), and how they relate to each other. In short, we submit that rule 16A(1) is for the benefit of potential *amici*, requiring those raising constitutional issues to bring them to the attention of the registrar for publication. In contrast, rule 16A(2) makes provision for *"any interested party in a constitutional issue raised in proceedings before a court"* to be admitted as *amicus*. There is no reference in subrule (2) to the issues notified in terms of subrule (1).

[17] *Engelbrecht*, above note 12 at para 14.

26 We submit that the Harmony and Gold Fields respondents' approach is patently untenable. Were the legal submissions of any *amicus* to be restricted to the notified issues, then a court could be deprived of hearing a range of novel legal arguments that could potentially assist it in resolving the constitutional issues for consideration, simply because the party issuing the rule 16A notice had failed fully to identify the constitutional issues raised by its application.

27 If admitted as *amici*, the TAC and Sonke intend to urge this court to do two things: first, to certify the class; and second, to deal with the transmissibility of damages question at the same time it considers the application for certification. In order to assist the court, the TAC and Sonke seek admission not only to make written and oral legal submissions, but also to introduce new evidence that is relevant to the legal questions this court is required to answer.

28 The applicants' interests in the constitutional issues raised in the main application are set out in the founding affidavit.[18] The applicants are public interest organisations with particular interests *inter alia* in public health issues relating to HIV (and tuberculosis ("TB"), in the case of TAC) and in the legal processes created by the Constitution for vindicating the rights of persons living with HIV and/or TB. In their answers, the Harmony and Gold Fields respondents point to the TAC's and Sonke's focused mandates in submitting that neither organisation

[18] Paras 13 to 24, pages 15 to 20

has the type of interest contemplated by rule 16A(2). But as the reply notes,[19] they fail to appreciate the following explanation provided in the founding affidavit:[20]

> *"Central to the work of both the TAC and Sonke is the recognition in the Constitution of a wide range of fundamental rights, and the obligations they impose – both negative and positive – on public and private persons. When read together with sections 7, 8, 34 and 38 of the Constitution, these rights not only provide substantive guarantees, but also contemplate their effective vindication and realisation."*

29 In disputing that the TAC and Sonke have any interests in the main application, the Harmony and Gold Fields respondents focus on three broad allegations in particular:[21] first, that neither organisation has any interest in litigation dealing with occupationally-acquired silicosis and/or TB; second, that neither organisation has any expertise in this field; and third, that neither organisation's constitution contemplates participation in litigation, either at all or in the form of the main application.

30 For the reasons set out in the replying affidavit,[22] there is no substance to the allegation that neither organisation has an interest in the outcome of silicosis- and/or TB-related litigation:

30.1 As is pointed out in the expert affidavit of Professor Erlich, *"it is uncontroversial that silicosis increases the risk of tuberculosis"*;[23]

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[19] Para 11, page 520
[20] Para 23, page 19
[21] Anglo American does not dispute the applicants' interests.
[22] At paras 17 and 18, pages 522 to 523
[23] Erlich para 31, main application page 4498

and

30.2 The prevention and treatment of TB is central to the HIV work of both the TAC and Sonke. [24]

31 But in any event, the focus of rule 16A is on the interest of the *amicus* in the constitutional issues raised by the litigation, not in the outcome of the litigation or its particular subject matter insofar as that subject matter is not linked to the constitutional issues the litigation raises.[25] We submit that what matters here is their interest in the development and application of the law dealing with class actions in the context of a case brought on behalf of public health victims against the private parties they allege to be responsible for their health conditions. In particular, the TAC and Sonke seek to develop the law in a manner that advances the public interest by ensuring that rights can be vindicated and realised, including in circumstances where they have been violated by private parties.

32 In addition, the allegation that neither organisation has experience in – or is contemplating – class action litigation is irrelevant for purposes of this application. As is evident from the case law, very few organisations in South Africa have experience in class actions, because this is a new and developing area of our law. It is precisely for this reason that the TAC and Sonke – as social justice organisations – decided to seek admission as *amici*.

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[24] Reply para 18, page 523

[25] Rule 16A(2) speaks of "any interested party *in a constitutional issue raised in proceedings*" (emphasis added). See also ***Children's Institute*** above note 3 at paras 26 and 27

33 The organisations' interests in this regard are clear: in seeking to make submissions to illustrate the extent to which a flexible approach to class actions is necessary, in order to provide an effective remedy for vulnerable groups that would not otherwise have access to justice, the TAC and Sonke are focused primarily on the potential long-term benefits for the constituencies they serve. This is because the outcome of the main application is likely to have a significant impact on class action law and its application to a particular set of facts.

34 Finally, the *amicus* respondents fail to recognise the role that litigation may play in advancing the applicants' express mandates, particularly insofar as the TAC is concerned. In this regard, the founding affidavit makes it plain that the TAC and Sonke recognise *"the role that litigation may play to effect social change"*.[26] Both organisations recognise the broader societal impact of any particular case, beyond the specific rights and interests that the litigating parties may seek to protect or advance.

35 In the result, we submit that the TAC and Sonke have established their interests in the constitutional issues raised in the main application, including the following which have significant implications for the organisations' mandates:

35.1 The fundamental rights at issue in the main application;

[26] Para 21, pages 18 to 19

35.2 The positive and negative obligations that such rights impose on both public and private persons; and

35.3 The provisions of sections 7, 8, 34 and 38 of the Constitution, which contemplate the *"effective vindication and realisation"* of all rights in the Bill of Rights.

**SATISFYING THE REQUIREMENTS IN RULE 16A(6)**

36 The key obligation placed on an *amicus* in any superior court is to *"offer submissions on law or relevant facts which will assist the Court in a way in which the Court would otherwise not have been assisted."*[27] In dealing with the substantive requirements for admission as *amicus* under its rules, the Constitutional Court noted as follows in *Ex parte Institute for Security Studies: In re S v Basson*:[28]

> *"Rule 10(6)(c) requires an application for admission as an amicus curiae to set out the submissions to be advanced, their relevance to the proceedings, and the reasons for believing that the submissions would be useful to the Court and different from those of the other parties to the proceedings. It is not always easy to assess these matters from mere allegations in the affidavit in support of an application for admission as amicus. Nor is it possible to assess them from a letter requesting consent to be admitted as amicus curiae. For a proper assessment of these matters to be made, the application for admission as an amicus must ordinarily be accompanied by a summary of the written submissions sought to be advanced. This will enable the Court to assess the application properly and evaluate the*

[27] *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) at para 6
[28] At para 10

> *submissions sought to be advanced in the light of the principles governing the admission of an amicus. An applicant who fails to comply with this requirement runs the risk of the application being refused if the matters required by Rule 10(6)(c) are not readily ascertainable from the application."*

37 In substance, rule 10(6)(c) of the Constitutional Court's rules largely mirrors the provisions of rule 16A(6) of the Uniform Rules (discussed above). For the reasons set out immediately below, read together with paragraphs 47 to 73 further below dealing with the basis upon which the applicants' evidence ought to be admitted, we submit that the applicants have satisfied the requirements set out in rule 16A(6).

**The submissions are set out *"clearly and succinctly"***

38 Writing for a majority of the SCA in *Phillips v SA Reserve Bank and Others*,[29] Majiedt JA considered the requirement in rule 16A(1)(b) that the notice to be given in terms of sub-rule (1)(a) *"contain a clear and succinct description of the constitutional issue concerned"*:

> *"Rule 19(3)(b) of the Constitutional Court requires that an application for leave to appeal must contain 'a statement setting out clearly and succinctly the constitutional matter raised in the decision, and any other issues including issues that are alleged to be connected with a decision on the constitutional matter'. That rule has a marked similarity to rule 16A(1)(b). It is inconceivable that, in purported compliance with the requirements laid down in Constitutional Court Rule 19(3)(b), a statement which, for example, merely declares the constitutional matter and issues to be those of constitutional invalidity would, without*

[29] 2013 (6) SA 450 (SCA) at para 74

> *more, pass muster. A brief and clear description of the constitutional matter and ancillary issues is required in my view."*

39 The applicants' intended legal submissions are set out in the founding affidavit.[30] Not only does the affidavit briefly describe the four legal issues upon which the TAC and Sonke intend to focus,[31] breaking down the first general legal issue into its three component parts,[32] but it also identifies the evidence upon which the applicants intend to rely in making these legal submissions. Read together with the expert affidavits, the founding affidavit clearly and succinctly defines the nature and ambit of the applicants' intended factual and legal submissions.

40 Yet the Gold Fields respondents submit that the TAC and Sonke ought to have summarised their legal submissions, going so far as to suggest that they ought to have disclosed the authorities on which they rely.[33] We submit that the applicants could not be expected – at this early stage in the proceedings – to expend resources on filing what amounts to concise heads of argument. If and when admitted as *amici*, they will expand upon the identified legal issues in their heads of argument.

**The submissions are relevant to the proceedings**

41 In explaining why the applicants' evidence ought to be admitted, we

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[30] At paras 25 to 29, pages 20 to 22
[31] At paras 26.1 to 26.4, pages 20 to 21
[32] Paras 26.1.1 to 26.1.3, page 20
[33] Gold Fields respondents affidavit, para 19, page 420

consider the relevance of the factual submissions.[34] Insofar as the legal submissions are concerned, the founding affidavit states as follows:[35]

> *"I have been advised that should many of the applicants' legal submissions be accepted, then – absent exceptional circumstances – this Court ought to grant certification. In that event, this Court's focus should be placed on how best to regulate its own process – in terms of section 173 of the Constitution – to deal with the class action in question. As indicated above, the TAC and Sonke also intend to address this issue."*

42 Put differently, the nub of the applicants' submissions is that a key issue for this court to decide in the main application is not whether to grant certification per se, but rather the terms and conditions under which the proposed class action is to proceed. In other words, the legal submissions – if accepted – would shift the debate and its focus significantly. In the result, the legal submissions are highly relevant.

**The submissions will assist the court**

43 By providing a more detailed and nuanced understanding of the social context within which the main application is to be decided, as well as the potential consequences for vulnerable workers and their families of any refusal to grant certification, the factual submissions contained in the expert affidavits will assist the court in the manner contemplated by this court in *Engelbrecht*.[36]

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[34] At paras 53 to 61 below
[35] At para 36, page 24
[36] See also founding affidavit, para 39.1, page 25

44 If heard, the legal submissions that the TAC and Sonke seek to advance are likely to assist this court in considering the impact of its decision not only in relation to the applicants and the classes on whose behalf they seek to proceed, but also in relation to the broader public. Given the nature and extent of the proposed legal submissions, we submit that this court will be assisted in developing and applying the law on class actions in the public interest.

**The submissions *"are different from those of the other parties"***

45 In justifying why the expert evidence ought to be admitted, we explain how the applicants' proposed factual submissions differ sufficiently from those of the other parties.[37] Insofar as the proposed legal submissions are concerned, we submit that they are likely to differ from those of the parties in at least two significant ways:

45.1 First, none of the parties appear intent on making some of the legal submissions that the TAC and Sonke seek to advance, such as the section 38(c) issue and the international law and policy angle. This much has been acknowledged by the Harmony respondents and Anglo American.[38]

[37] At paras 62 to 73 below

[38] See, for example, Harmony respondents affidavit, paras 31.9 to 31.14, pages 376 to 377 (which implicitly recognise the novelty of the international law and policy angle); Gold Fields affidavit, paras 72 to 78, pages 437 to 439 (which also implicitly recognise the novelty of the international law and policy angle); and Anglo American affidavit, para 28, pages 461 to 462 (which expressly recognises the novelty of the section 38(c) argument).

45.2 Second, while there may be some overlap with the submissions to be advanced by the class action applicants, the legal submissions that the TAC and Sonke seek to advance will focus more squarely on the relationship of the certification sought in the main application and the broader framework of class action law in South Africa.

46 While the TAC and Sonke broadly align themselves with the relief sought by the class action applicants in the main application, their primary focus is not on the specific outcome of that matter but rather the manner in which class action law in South Africa is developed and applied. In short, their proposed legal submissions are targeted at advancing the broader public interest.

**THE APPLICANTS' EVIDENCE OUGHT TO BE ADMITTED**

47 In *Children's Institute*, the Constitutional Court explained the important purpose that may be served by the High Court exercising its discretion to permit an *amicus* to adduce new evidence:[39]

> *"[A] proper interpretation of rule 16A that permits the adduction of evidence is consistent with both a textual reading of the rule as well as its underlying purpose. It also provides invaluable space for friends of the court in public interest matters and, by doing this, promotes access to the courts and ensures that courts are well informed on public interest matters when making decisions."*

[39] Above note 3 at para 34

48 That case concerned an appeal against a decision of the High Court finding that an *amicus* was not entitled under rule 16A to adduce any new evidence. In granting leave to appeal, the Constitutional Court recognised *"the significant role played by amici in the administration of justice"*, as well as the link between the *"the ability of amici to adduce evidence"* on the one hand, and their ability to *"render appreciable assistance to courts in effectively administering justice"* on the other.[40]

49 Noting that the Constitutional Court's own rules permit the introduction of some types of evidence on appeal, the Court explained why it was preferable for evidence to be introduced in the court of first instance:[41]

> *"The High Court's decision consequently leads to the paradoxical result that an appellate court may hear new evidence that High Courts may not. This cannot be the case. Courts of first instance must be permitted to admit evidence from an amicus curiae to avoid a situation where appellate courts are inundated with new evidence. In principle, courts of first instance should strive to accommodate the reception of evidence if this would be in the interests of justice. They should not knowingly leave relevant evidence that could have been received by them to be adduced at the appellate level. This is because appeals are generally limited to the record of the court below. Accordingly, the fact that the Constitutional Court, as a court of appeal, is permitted to admit evidence adduced by amici curiae further lends support to the notion that courts of first instance must be permitted to do the same."*

50 Under rule 16A, an *amicus* is not free to adduce any evidence that it so chooses. Instead, the High Court retains the discretion to determine whether to admit the evidence in question, guided by what it considers to

[40] Ibid at para 12
[41] Ibid at para 29 (emphasis added)

be the interests of justice in any particular case. The Constitutional Court explained in *Children's Institute*:[42]

> *"Of course this is not to say that amici will always be allowed to lead evidence in the course of their submissions. The admissibility in each particular case will be determined according to whether it is in the interests of justice to do so. [The Constitutional Court's] rules on the admissibility of evidence by an amicus are relatively strict and circumscribed, but that is not to say that the same criteria must be applied in the High Court. What the interests of justice will require in a particular case must be left to High Courts to decide."*

51 The expert evidence that the TAC and Sonke seek to introduce would serve a three-fold purpose: first, to provide additional support to the legal submissions advanced by the class action applicants; second, to provide an evidential base for some of the legal submissions to be advanced by the TAC and Sonke if admitted as *amici*; and third, to provide further detail of the relevant context within which the key issues in the main application are to be decided.

52 In what follows below, we consider the relevance of each of the expert affidavits, and how the evidence they contain could be of assistance to this court in determining the main application. Thereafter, we explain why the *amicus* respondents are wrong to allege that there is nothing new in these affidavits. In so doing, we show that the interests of justice are served by admitting the applicants' evidence.

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[42] Ibid at para 32

**Relevance and utility of the expert affidavits**

53 The founding affidavit identifies the key issues addressed in the expert affidavits.[43] In addition, it explains why the evidence in the expert affidavits is directly relevant to the determination of the legal issues the TAC and Sonke have identified.[44] On the assumption that such evidence is indeed relevant to the determination of these issues, then should it go beyond a mere repetition of what's already in the record of proceedings, it follows that it would be of assistance to the court.

Francis Wilson's affidavit

54 In his affidavit, Wilson focuses on five issues that will assist the court to understand the proposed classes better.[45] Amongst others, he shows how mineworkers have historically been under-compensated, highlighting the deficiencies of the Occupational Diseases in Mines and Works Act 78 of 1973 and what this means for an effective remedy to secure access to justice.[46] In addition, his evidence provides a basis for considering the potential implications of non-certification, as well as the question of the horizontal application of constitutional rights and obligations.

55 We submit that his evidence is central to providing a comprehensive

[43] Para 29 to 32, pages 21 to 23
[44] Paras 33 to 35, pages 23 to 24
[45] Para 8, pages 256 to 257; paras 14 to 88, pages 260 to 285
[46] Paras 82 to 88, pages 282 to 285

account of the context within which this court is being called upon to adjudicate the main application. In asserting that this evidence is irrelevant insofar as it adds to what is already contained in the record of proceedings, the *amicus* respondents make it plain that they do not consider the broader context to be of any relevance to the dispute over certification. This cannot be correct in relation to a remedy that has its origins in section 38 of the Constitution, which demands effective remedies for violations of fundamental rights.

56 The Harmony respondents submit that *"Wilson's views are consistent with and could have been presented in support of the case advanced by the existing [class action] applicants"*.[47] But this is not something which ought to count against the TAC and Sonke's application for admission as *amici*. On the contrary, the fact that Wilson's evidence provides support for the class action applicants' case is indicative of its relevance and utility.

Dean Peacock's affidavit

57 In his evidence, Peacock seeks to assist the court in understanding the gendered implications of non-certification and not deciding the transmissibility of damages question at this stage of the proceedings.[48] In drawing on his experience and expertise, as well as published research on the *"care economy"* in the context of the South African HIV

[47] Harmony respondents affidavit, para 53.4, page 402
[48] Paras 29 to 31, pages 331 to 333

epidemic,[49] Peacock provides the court with a fresh perspective and particular focus that is largely absent from the record of proceedings.

58 Again, the *amicus* respondents seek to deny the relevance of context. Again, we submit that this denial is misplaced, having regard to the origin of the class action remedy.

Anand Grover's affidavit

59 Grover's affidavit provides an international perspective on the need for access to a remedy to ensure corporate accountability. He cites examples of global corporate abuse of power and the absence of strong domestic legal systems as perpetuating systemic denial of access to justice for vulnerable groups.[50] In so doing, his affidavit brings to the fore and highlights an issue that has not been raised by any of the parties to the main application.

60 As Grover's introduction makes clear,[51] the main focus of his affidavit is not on binding international law, but rather key parts of two documents – his final report as United Nations ("UN") Special Rapporteur on the right to health,[52] and the UN Guiding Principles on Business and Human Rights[53] – that deal with the need for corporate accountability globally. In

[49] Paras 24 to 28, pages 329 to 331
[50] See, for example, paras 30 to 31, page 96
[51] At para 7, page 88
[52] The full title of the position is the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
[53] The full title of the document is the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*.

short, his submissions provide an international dimension to the context within which the key issues in the main application are to be decided.

61 The *amicus* respondents all dispute the relevance of Grover's evidence on the basis that they are not multinationals.[54] What these submissions fail to appreciate is that one of the reasons the applicants seek to have Grover's evidence admitted is that it shows how the legal relationship between corporate entities – such as between a multinational corporation and a current or former domestic subsidiary – may be structured in a manner that effectively limits access to justice.

**What is new in the evidence the TAC and Sonke seek to adduce?**

62 In objecting to the introduction of Wilson's evidence in the manner that they have,[55] the *amicus* respondents seem to suggest an unattainable standard: that each fact canvassed in the submissions of *amici* must somehow be new. We submit that it would be unduly onerous – and unhelpful – to expect an expert deponent to address a body of evidence relevant to any application without repeating some facts that may already be contained in the record of proceedings.

63 In certain circumstances, such a standard would require the expert to compare his or her evidence to that which is already contained in the

[54] See, for example, Harmony respondents affidavit, para 38.1, page 383; and Anglo American affidavit, para 36.1, page 466

[55] The replying affidavit makes it clear that the *amicus* respondents' opposition to the admission of the expert evidence on the basis of it not being new is limited to the evidence contained in Wilson's affidavit.

record, and to remove everything that could be considered as repetitive, even if it is integral to the novel submissions that follow. This could give rise to disjointed submissions lacking in context and clarity, which would not assist the court in any meaningful way.

64 We submit that the appropriate standard is somewhat more accommodating: that the evidence, taken as a whole, must introduce something other than what is already contained in the record of proceedings. According to this standard, evidence that builds upon and provides further detail and/or clarity in respect of what is already contained in the record would be admissible. Wilson's evidence clearly falls within this category.

65 In particular, his evidence focuses on the socio-economic conditions of former mineworkers and their families.[56] The *amicus* respondents' objection in this regard is twofold: first, that similar evidence is to be found in the affidavit deposed to by Ms Jane Roberts; and second, that similar evidence appears in the affidavits of the expectant class representatives. We deal with each of these issues in turn.

*The Roberts affidavit*

66 In pointing out that Roberts canvasses evidence on the socio-economic conditions of mineworkers, all of the *amicus* respondents refer to a

[56] Paras 28 to 81, pages 264 to 282

particular study upon which Wilson relies.[57] While Roberts relies on the study as support for the various expert opinions she offers in the affidavit she deposed to on behalf of the class action applicants, she does not consider much of the detail of her study.[58]

67 There is no denial in any of the answering affidavits filed by the *amicus* respondents that Wilson canvasses evidence from Roberts's study that she does not address in her affidavit in the main application. Put differently, they do not dispute that Wilson deals with aspects of the study that are not addressed by Roberts herself. Instead, their main contention on novelty is that the study itself is not new.[59]

68 For whatever reason, the class action applicants chose only to rely on certain aspects of the Roberts study. It does not follow that the evidence Roberts does not address in her affidavit is irrelevant. The fact that they chose not to address this evidence means only one thing: that the TAC and Sonke are now free to introduce the evidence. This they have sought to do, recognising that a single study may produce multiple, different pieces of evidence.

*The evidence in the affidavits of the expectant class representatives*

69 The *amicus* respondents submit that much of Wilson's evidence is

[57] Harmony respondents affidavit, para 55, page 70 to 71; Gold Fields respondents affidavit, para 84, page 442; Anglo American affidavit, para 53.2, pages 482 to 483
[58] Wilson's affidavit, para 43, page 271; replying affidavit, para 74, pages 546 to 548
[59] Replying affidavit, para 75, page 548

redundant – and therefore a basis for it being inadmissible – because the class representatives already deal with their individual socio-economic circumstances. The TAC and Sonke accept, as they must, that qualitative evidence of this nature is of significant assistance to the court. But that does not mean that independent evidence supporting the individual accounts should be excluded. It is not as though the *amicus* respondents admit that the evidence of the class representatives is both correct and representative of the entire would-be class.

70 Moreover, Wilson's affidavit goes further than the personal testimonies, introducing and addressing empirical evidence that not only addresses the prevalence of the conditions described in the individual accounts, but also seeks to explain their precise nature and manifestations.[60] We submit that in so doing, Wilson's affidavit provides the court with a more robust understanding of the potential consequences that are likely to follow any denial of certification.

71 Wilson also canvasses evidence dealing with the size and geographic sources of the labour force.[61] While there are some overlaps between Wilson's evidence and the affidavits to which the *amicus* respondents refer, there are – more importantly – clear differences, both in terms of content and emphasis.

72 In contrast to the evidence identified by the *amicus* respondents,

[60] Paras 32 to 81, pages 265 to 282
[61] Paras 22 to 27, pages 262 to 264

Wilson's evidence provides significant detail, deals with a different time period, and relies on different sources. Importantly, it seeks to serve a different purpose: to support and supplement the submissions he makes on the particular deprivation experienced in the former Transkei, a major labour-providing area.[62] In the result, it is sufficiently new to satisfy the novelty requirement.

73 Put simply, the mere existence of some (minimal) degree of overlap between Wilson's affidavit and what is already contained in the record of proceedings does not assist the *amicus* respondents. On the contrary, the overlap supports the applicants' submission that Wilson's evidence seeks to provide the court with a more complete picture of the relevant context already provided by the class action applicants.

**AN APPROPRIATE COSTS ORDER**

74 In *Biowatch Trust v Registrar, Genetic Resources, and Others*,[63] the Constitutional Court considered *"the proper judicial approach to determining costs awards in constitutional litigation"*.[64] In response to the parties' conflicting approaches on the question of whether costs awards in constitutional litigation should be determined by status or by issue, Sachs J – on behalf of a unanimous court – held as follows:[65]

*"In my view it is not correct to begin the enquiry by a characterisation*

[62] Paras 36 to 41, pages 267 to 270
[63] 2009 (6) SA 232 (CC)
[64] At para 1
[65] At para 16 (emphasis added)

> *of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice."*

75 In that case, which dealt with Biowatch's request for access to information held by the state, including information provided to the state in confidence by Monsanto SA (Pty) Ltd ("Monsanto"), a private party, the Constitutional Court had to address two orders dealing with costs: first, a decision to make no costs order against the state in Biowatch's favour; and second, an order directing Biowatch to pay Monsanto's costs.

76 In overturning the adverse costs order made against Biowatch in favour of Monsanto, but refusing to award costs in the other direction, Sachs J held as follows:[66]

> *"Even though it wrongly sought costs against Biowatch in the High Court, and then tenaciously defended the costs award made in its favour in the full court and in this court, Monsanto should not be ordered to pay Biowatch's costs in any of the courts. The key factor once again is that it was the failure of the State functionaries to fulfil their constitutional and statutory responsibilities that spawned the litigation and obliged both parties to come to court."*

77 In *Bothma v Els and Others*, the Court dealt with costs awards in

[66] At para 59 (emphasis added)

litigation between private parties dealing with constitutional issues:[67]

> *"[91] As with any award for costs, the award of costs in litigation between private parties where constitutional issues are raised is a matter which is within the discretion of the court considering the issue. It is a discretion which must be exercised judicially, having regard to all the relevant considerations. The general principle as far as private litigation is concerned is that costs will ordinarily follow the result. This means that when parties initiate proceedings, they take the risk that if unsuccessful they will have to pay the costs of their opponents.*
>
> *[92] This general approach has been followed in a number of cases in this court where constitutional issues had been raised in litigation between private parties. Usually these matters turned on the relationship between competing constitutional principles. The classic example was that of defamation, where the plaintiff would raise dignity and privacy interests, and the defendant would rely on free speech; see, for example, Khumalo v Holomisa. In Laugh It Off Promotions CC v South African Breweries the issue was trademark property protection versus freedom of speech. In both these matters costs followed the result.*
>
> *[93] <u>There have, however, been exceptional cases where no order as to costs has been made. A factor that has loomed large in justifying this departure from the general rule has been the extent to which the pursuit of public interest litigation could be unduly chilled by an adverse costs order</u>."*

78 On the basis of *Biowatch* and *Bothma v Els*, we submit that it would be appropriate to award costs in favour of the TAC and Sonke in the event this application is granted. Not only were the *amicus* respondents partly responsible for the need for this application (by refusing to consent to the organisations' admission as *amici*), but they have actively opposed it.

[67] 2010 (2) SA 622 (CC) at paras 91 to 93 (footnotes omitted and emphasis added)

In the circumstances, costs should follow the result.

79 However, should the application for admission as *amici* be unsuccessful, it would be appropriate for the court not to make any order as to costs. Were costs to follow the result in such a case, this would unduly chill the pursuit of similar litigation in future. It would often work to ensure that courts are denied the opportunity to be provided with useful and relevant submissions, solely because of the fear of an adverse costs order.

**CONCLUSION**

80 For the reasons set out above, the TAC and Sonke seek an order –

80.1 admitting them as *amici curiae* in the main application;

80.2 directing that the evidence that forms part of the *amicus* application be included in the record of proceedings in the main application;

80.3 granting the *amici curiae* leave to file heads of argument on the same day as the applicants in the main application;

80.4 granting the *amici curiae* leave to make oral submissions at the hearing of the main application; and

80.5 directing the first, second, fourth to eighth, 13th to 19th, 27th and

30th to 32nd respondents jointly and severally to pay the costs of the *amici curiae* in relation to the *amicus* application.

**MATTHEW CHASKALSON SC**

**ADILA HASSIM**

**JONATHAN BERGER**

**Chambers, Sandton**

**23 March 2015**