

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

CASE NO: 48226/12

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

TREATMENT ACTION CAMPAIGN NPC

First Applicant

SONKE GENDER JUSTICE NPC

Second Applicant

In re: the matter between –

BONGANI NKALA AND FIFTY-FIVE OTHERS

Applicants

and

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

Respondents

REPLYING AFFIDAVIT

I, the undersigned,

ANELE BOYCE YAWA

do hereby make oath and state:

- 1 I am the deponent to the founding affidavit in this application for admission as *amici curiae* (“this application”). I am duly authorised to depose to this replying affidavit on the applicants’ behalf.

- 2 The contents of this affidavit fall within my personal knowledge, except where otherwise stated or indicated by the context, and are to the best of my belief both true and correct. Where I make legal submissions, I do so on the advice of the applicants’ legal representatives.

- 3 My failure to deal with any specific averment or contention contained in the answering affidavits must not be understood as a concession of the correctness of such averment or contention.

- 4 I have read and had regard to the answering affidavits filed in this application on behalf of –
 - 4.1 the first, second, fourth to eighth, and 32nd respondents in the main application (“the Harmony respondents”), as deposed to by **MELANIE LAUBSCHER** (“Laubscher”);

 - 4.2 the 13th to 19th, 30th and 31st respondents in the main application (“the Gold Fields respondents”), as deposed to by **FIKILE FORTUNATE ZONDI** (“Zondi”); and

 - 4.3 Anglo American South Africa (“Anglo American”), the 27th

respondent in the main application, as deposed to by **STUART McCAFFERTY** (“McCafferty”).

5 In this affidavit, I continue to refer to the applicants as the TAC and Sonke. I refer to the Harmony respondents, the Gold Fields respondents and Anglo American collectively as the “*amicus* respondents”.

INTRODUCTION

6 This application was brought after the TAC and Sonke were only able to secure the consent of the applicants in the main application (“the class action applicants”) to be admitted as *amici curiae* (“*amici*”). As I indicated in my founding affidavit, all of the respondents who replied to the request for admission refused to grant consent, with Simmer and Jack Mines Limited – the 24th respondent – failing to respond at all.

7 Of the 32 respondents in the main application, notices of intention to oppose were filed on behalf of 25: the *amicus* respondents, and the 20th, 21st, 25th and 26th respondents. The notices of opposition filed on behalf of the 25th and 26th respondents were subsequently withdrawn (on 11 February 2015), with the notices of opposition filed on behalf of the 20th and 21st respondents being withdrawn on 23 February 2015. Copies of the relevant withdrawals are attached as annexures “**RA1**” and “**RA2**”.

8 Nevertheless, only Anglo American, the Harmony respondents and the

Gold Fields respondents delivered answering affidavits purporting to set out the basis upon which this application is being opposed. Of these, only the Gold Fields respondents had originally provided a reason for the refusal to grant consent – the alleged failure of the letter seeking consent to indicate “*the required criteria for admission as an amicus*”.

9 Before turning to deal, to the extent necessary, with the answering affidavits *ad seriatim*, I deal with the following seven issues:

9.1 First, the interests that the TAC and Sonke seek to protect and advance by seeking admission as *amici* in the main application;

9.2 Second, the nature of the *amicus* respondents’ opposition to this application, and the particular role played by *amici* in matters raising constitutional issues;

9.3 Third, why it is incorrect to characterise the main application as being nothing more than a “*procedural device*”;

9.4 Fourth, the purpose served by notification in terms of rule 16A and the issues in respect of which admitted *amici* may advance submissions;

9.5 Fifth, the relationship between the legal issues identified by SECTION27 in the letter seeking consent (“the consent letter”)

and the founding affidavit;

9.6 Sixth, the reasons for seeking to introduce the expert evidence, and how such evidence differs from what is already contained in the record of proceedings; and

9.7 Finally, the *amicus* respondents' assertions that they are entitled to answer the substance of the expert affidavits in the event the TAC and Sonke are admitted as *amici*.

10 Thereafter, to the extent necessary, I address specific allegations made in the three affidavits *ad seriatim*.

INTERESTS THAT TAC AND SONKE SEEK TO PROTECT AND ADVANCE

11 The applicants' interests in the constitutional issues raised in the main application are set out at paragraphs 13 to 24 of my founding affidavit. While the *amicus* respondents are correct to point out that both the TAC and Sonke have particularly focused mandates, they fail to appreciate what is stated at paragraph 23 in particular:

“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.”

12 In particular, they fail to recognise the centrality of human rights to the work of the TAC and Sonke, and the implications for the applicants' focused mandates of –

12.1 the fundamental rights at issue in the main application;

12.2 the positive and negative obligations that such rights impose on both public and private persons; and

12.3 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.

13 In disputing that the TAC and Sonke have any interests in the main application, the Harmony and Gold Fields respondents collectively focus on three broad allegations in particular: 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. Anglo American does not dispute the applicants' interests.

14 I have been advised that it matters not whether the mandates of the TAC and Sonke expressly include any focus on silicosis, or whether the

organisations have experience in – or are contemplating – class action litigation. On the contrary, what matters is their interest in the development and application of the law dealing with class actions in a manner that advances the public interest by ensuring that rights can be vindicated and realised, including in circumstances where rights have been violated by private parties.

- 15 In addition, what the *amicus* respondents fail to mention – but is evident from the case law – is that 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* to assist in the development and interpretation of class action law.
- 16 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.
- 17 In any event, as is clear from annexure “**RS27**” to Richard Spoor’s replying affidavit in the main application, there is a direct link between TB and silicosis. At paragraph 31 of that annexure (at page 4498 of the

record), Professor Rodney Ehrlich notes that “*it is uncontroversial that silicosis increases the risk of tuberculosis.*” In addition, he submits – at paragraph 33 (at page 4500 of the record) – that there is an “*elevated risk of mortality from tuberculosis among silicotics relative to non-silicotics.*”

18 Put simply, an interest in the prevention and treatment of TB includes an interest in the prevention of silicosis. And contrary to what the *amicus* respondents’ answering affidavits allege, the prevention and treatment of TB is central to the HIV work of both the TAC and Sonke.

19 Finally, the *amicus* respondents raise some objections regarding the references in my founding affidavit to the applicants’ involvement in litigation. My references to the TAC’s litigation history – both as *amicus* and applicant – were not intended to suggest that this qualifies the organisation as an expert in litigation in any way. Instead, the references were included for a threefold purpose:

19.1 First, to show that participation in litigation is an integral part of the TAC’s work;

19.2 Second, to highlight that the Constitution and the rights it entrenches are always a central feature of the TAC’s cases; and

19.3 Third, to indicate that the TAC’s mandate is not limited to

working directly on HIV and TB, but also includes a focus on broader issues that have a direct or indirect impact on the prevention and treatment of HIV and TB.

- 20 In addition, the founding affidavit makes it plain that the TAC and Sonke recognise “*the role that litigation may play to effect social change*”. Implicit in this recognition is an appreciation of the broader societal impact of any particular case, beyond the specific rights and interests that the litigating parties may seek to protect or advance.

NATURE OF THE OPPOSITION TO THIS APPLICATION AND THE ROLE OF *AMICI* IN MATTERS RAISING CONSTITUTIONAL ISSUES

- 21 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 would unnecessarily burden the court and the parties. But the opposition of the *amicus* respondents is premised on a misunderstanding of the role of an *amicus* in matters raising constitutional issues.

- 22 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 –

- 22.1 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;

22.2 its proposed legal submissions –

22.2.1 are fundamentally different from those that any of the parties seek to make; and

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

22.3 its proposed factual submissions –

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

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

22.4 its admission would not “inconvenience” the parties in any way.

23 What the *amicus* respondents have apparently failed to appreciate is that the primary role of the *amicus* – as recognised by the Constitutional Court in *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* (2013 (2) SA 620 (CC) at paragraph 26) – is to promote and protect the public interest in two key ways:

- 23.1 First, “*by ensuring that courts consider a wide range of options and are well informed*”; and
- 23.2 Second, “*by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues.*”
- 24 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 interested party 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.
- 25 For some time, our courts have recognised the important contribution that *amici* have made – and continue to make – to their jurisprudence. Recognising that the resolution of constitutional issues invariably has an impact that extends well 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.
- 26 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.

- 27 The Gold Fields respondents provide a clear example – at paragraphs 19 (page 7) and 93 (page 32) of Zondi’s affidavit – of their unduly narrow approach. Zondi submits that the class action applicants have already identified and discussed the relevant case law on class actions and section 173, and that the TAC and Sonke “*do not suggest that they are in a position to contribute additional authorities on this issue*”. In the result, Zondi submits, the aspirant *amici* have nothing new to add, and the court does not need their assistance to apply the identified case law.
- 28 What is new from the organisations’ perspectives is not the identification of well-known Constitutional Court and Supreme Court of Appeal decisions on which the class action applicants already rely, but rather the applicant *amicus*’s interpretation of certain aspects of these decisions that have yet to be developed further. This includes, but is not limited to, the proposed legal submissions on class actions against private parties under section 38(c) of the Constitution to which McCafferty refers.
- 29 I understand that the court has a discretion to refuse or grant an application for admission “*upon such terms and conditions as it may determine*”, and is empowered under rule 16A(9) to “*dispense with any of the requirements of [rule 16A] if it is in the interests of justice to do so*”. In other words, it is for the court to make a determination – guided by the interests of justice – as to whether it would be assisted if it were to

permit the interested party to be admitted as *amicus*.

30 I have been advised that in exercising its discretion, a court ought not to place the bar at the level the *amicus* respondents suggest. To do so would be to deprive the court of a wide range of helpful legal and factual submissions sought to be adduced by parties without any direct or substantial interest in the particular outcome of the relevant proceedings.

31 In any event, I persist in submitting that the TAC and Sonke have an interest in many of the constitutional issues raised in the main application, and that the submissions they seek to make are –

31.1 relevant to the proceedings;

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

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

THE MAIN APPLICATION IS NOT SIMPLY A PROCEDURAL DEVICE

32 The *amicus* respondents seek to strip the main application of any substance, characterising it as a mere procedural device:

- 32.1 Laubscher's affidavit, for example, expressly states that "[t]he Harmony respondents do not accept that the issues [identified in the rule 16A notice] are in fact "constitutional" ones" (at footnote 2, paragraph 11, page 13). While not expressly stated, the Harmony respondents appear to have adopted the view – as have their fellow *amicus* respondents – that the process of certification is nothing more than a technical exercise.
- 32.2 In dealing with the relevance of the evidence that the TAC and Sonke seek to introduce, Laubscher fails to recognise the centrality of the right of access to courts in the certification process. Instead, she adopts a narrow, technical approach to the process of class certification, seemingly without regard for the implications that are likely to flow should individual claims have to be instituted instead of a class action.
- 32.3 Zondi's affidavit refers to the main application as one in which the relief sought is "*purely procedural*". In making this allegation (at paragraphs 5 and 9, pages 3 to 4), she relies on the founding papers in the main application. At paragraph 11 (pages 4 to 5) she goes further, drawing a link between the court "*granting purely procedural relief*" and what she refers to as a "*procedural hearing*". Implicit in her approach is that the issue of class certification is purely procedural in nature.

- 32.4 McCafferty's affidavit goes further, expressly making the claim (at paragraph 11, page 4) that "[t]he main application is only a procedural device to determine whether a class action should be certified or whether individual members of the class should exercise their rights to institute action separately." This view of the certification process fails to appreciate the implications that are likely to flow in the event individual members of the class are required to act separately.
- 32.5 In particular, McCafferty – in dealing with the legal submissions the TAC and Sonke intend to address if admitted as *amici* – makes reference to the organisations' "*intention to deal with certain areas of procedural law*" (at paragraph 19, page 8). In his view, issues such as "*the nature and framework of the law on class actions*" and "*the requirements to be met for certification*" are merely procedural in nature.
- 33 While the class action applicants to describe the relief sought in the main application as "*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. On the contrary, I have been advised that 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.

34 In short, 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 they be compelled to “*exercise their rights to institute action separately*”, as the respondents in the main application would have it, they are unlikely to be able to litigate at all. It is this possibly of a denial of justice that has spurred the TAC and Sonke into action.

NOTIFICATION IN TERMS OF RULE 16A AND MAKING SUBMISSIONS ON CONSTITUTIONAL ISSUES RAISED IN PROCEEDINGS

35 Central to the Harmony and Goldfields respondents’ opposition to the admission of the TAC and Sonke as *amici* is that the two organisations’ submissions 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.

36 In what follows below, I explain below why such an approach is patently untenable, and why the TAC and Sonke are entitled to have regard to various aspects of the Constitution that bear on the interpretation of the “*constitutional issues*” to which rule 16A(2) refers.

The respondents’ approach

37 After characterising the “*constitutional issues*” identified in the rule 16A notice, which she refers to collectively as “*the notified constitutional issues*”, Laubscher sets out the basis for the Harmony respondents’ allegation that the TAC and Sonke have no real interest in any of these issues. Thereafter, in answering my founding affidavit, she further alleges that the “*perspective which [the TAC and Sonke] seek to bring to the main application ... cannot facilitate a resolution of any of the notified constitutional issues.*”

38 Zondi also makes reference to the constitutional issues identified in the rule 16A notice, seemingly in an attempt to characterise the legal submissions the TAC and Sonke seek to advance – if admitted as *amici* – as falling outside of what any *amicus* may consider. For example, she makes the point that “*sections 9, 26 and 28 of the Constitution form no part of the Rule 16A notice*” (as paragraph 54, page 18). I had identified the rights in the Constitution dealing with equality, housing and children as amongst those that the TAC and Sonke have an interest in ensuring “*are respected, protected and fulfilled*”.

39 McCafferty does not rely on this point. He appears to accept, correctly I have been advised, that an admitted *amicus* may advance such legal submissions as are relevant to the determination of the issues before, as well as helpful to, the court. That said, the TAC and Sonke do not agree with McCafferty that their proposed legal submissions do not satisfy the

requirements for admission as *amici*.

40 The approach adopted by the Harmony and Gold Fields respondents – as reflected in Laubscher’s and Zondi’s affidavits respectively – fails to appreciate the different purposes served by rules 16A(1) and 16A(2), and how they relate to each other. In short, 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).

41 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 issues for consideration. One such issue is considered by McCafferty at paragraph 25 of his affidavit (at pages 14 to 15): the argument as to “*whether there was a need for the applicants to seek certification, or whether the class action could have been brought directly under section 38(c) of the Constitution.*” I deal with this issue in the next part of this affidavit.

THE CONSENT LETTER AND THE FOUNDING AFFIDAVIT

42 McCafferty notes that “*the TAC and Sonke appear to have abandoned the more specific (and far-reaching) legal submissions they*

foreshadowed in their letter to the parties to the main application". In particular, he refers to some of the legal issues identified in paragraph 10 of the consent letter dealing with class actions brought directly under section 38(c) of the Constitution. He characterises these arguments as "*some radical development of the procedural law*", acknowledging that they are indeed "*novel contentions*".

43 In referring to these arguments, McCafferty makes two fundamental errors: first, he suggests that by raising these issues, the TAC and Sonke were suggesting "*that the applicants mistakenly sought to utilise certification proceedings*", and that it would have been a better choice for them to have proceeded directly under section 38(c); and second, that the TAC and Sonke have now abandoned the issues.

44 The TAC and Sonke recognise why the class action applicants launched the main application, and support their decision to have adopted this cautious approach in the circumstances. In large part, this is because the section 38(c) submissions are indeed novel, and have yet to be considered and pronounced upon by any superior court. In any event, saying that the class action applicants could have proceeded in another way does not in any way suggest that they ought to have done so, or that their failure to have done so should prejudice them.

45 I have been advised that should the section 38(c) submissions contemplated in the consent letter be accepted, then certification ought

to follow as a matter of course. At issue then would be the terms and conditions of such certification, including – for example – the boundaries of the certified classes. In this regard, the consent letter speaks about section 173 of the Constitution and how it “*enables a court to regulate its own process to deal with class actions brought directly under section 38(c) of the Constitution.*”

46 Contrary to what McCafferty states at paragraph 26 of his affidavit (page 15), the TAC and Sonke have not “*fundamentally recast the submissions they intend to make in the [main] application*”. Instead, the section 38(c) issues remain an integral part of the legal submissions the two organisations intend to advance if admitted as *amici*. In particular, they fall within the issues identified in paragraphs 26.1, 26.1.2 and 26.2 of the founding affidavit:

46.1 “*The framework of class action law in South Africa*”;

46.2 “*Where this matter fits in the class action framework that the applicants advance in legal submissions*”; and

46.3 “*How section 173 enables a court to regulate its own processes to deal with all class actions*” (emphasis added).

47 Under the rubric of the section 38(c) issues, the consent letter identified three other legal issues that the TAC and Sonke intended to consider if

admitted as *amici*. Subject to some modification, all of these issues were repeated in my founding affidavit: section 173 and the regulation of a court's process to deal with class actions; the nature and historical role of the gold mining industry, and their implications for the horizontal application of certain constitutional rights; and corporate accountability and the right to an effective remedy under international law.

REASONS FOR INTRODUCING EXPERT EVIDENCE AND WHY IT IS NEW

48 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.

49 In what follows below, I deal first with 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, I explain why the *amicus* respondents are wrong to allege that there is nothing new in these affidavits. In any event, they undermine their own arguments when they raise concerns regarding the need to respond to this alleged large body of evidence. If it is irrelevant or already part of the record, as they allege, there should be no need to answer any further.

Relevance and utility of the expert affidavits

50 The founding affidavit identifies the key issues addressed in the expert affidavits. In addition, it explains – at paragraphs 34 and 35 – why the evidence in the expert affidavits is directly relevant to the determination of the two legal issues identified in paragraphs 33.1 and 33.2. 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

51 In his affidavit, Wilson focuses on five issues that I submit will assist the court to understand the proposed classes better. 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 (“ODIMWA”); he explains what this means for an effective remedy to secure access to justice. 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.

52 In short, Wilson’s evidence is central to providing a comprehensive

account of the context within which the 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. On their approach, the impact of non-certification on the members of the proposed classes appears to be equally irrelevant.

53 The following examples are instructive:

53.1 Laubscher denies – at paragraph 48.1 (page 59) – that Wilson’s evidence is relevant to either of the two main issues identified in his affidavit. In particular, she makes it clear at paragraph 48.2 that the Harmony respondents consider the context as irrelevant.

53.2 While the main focus of Zondi’s affidavit insofar as it addresses Wilson’s evidence is on the alleged lack of novelty, she makes it clear that his evidence will not assist in determining the main application (paragraph 83, page 28). She too asserts that his evidence is irrelevant.

53.3 McCafferty goes further, accusing the TAC and Sonke of seeking to introduce Wilson’s evidence purely to put a “*particular ‘spin’*” on “*basic propositions*” that are already part of the record. He submits that the evidence is irrelevant. In his view, history

and context are equally irrelevant (paragraph 45, page 33).

Dean Peacock's affidavit

54 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. In drawing on his experience and expertise, as well as published research on *"the care economy in the context of HIV/AIDS in South Africa"*, Peacock provides the court with a fresh perspective and particular focus that is largely absent from the record of proceedings.

55 As they did with Wilson's affidavit, the *amicus* respondents seek to deny the relevance of context. Thus according to Laubscher (paragraph 75.1, page 77), *"[e]ven if it is accepted that women bear a disproportionate burden of caring for the young, sick and old, this state of affairs does not justify aggregation in the absence of commonality."* On the contrary, she alleges – at paragraph 75.2 (pages 77 to 78) – that this *"militates against the class actions sought to be instituted and conducted by the applicants for class certification."*

56 In considering Peacock's evidence, Zondi goes even further, asserting that Sonke's admission as *amicus* *"will burden the certification court with societal considerations well beyond the wide-ranging and important issues already properly before court"*. In support of her claim that this

would invite *“the certification court to address matters within the remit of other arms of government”*, she submits that it is impermissible *“[t]o engage in this exercise when expert bodies like the Commission for Gender Equality ... is not even joined”* (paragraph 90, page 31).

57 In contrast to Zondi, McCafferty submits that *“neither the basic argument by Mr Peacock nor the essence of his evidence is novel or of assistance to the Court beyond the [class action] applicants’ own submissions”* (paragraph 60, page 40). In other words, Peacock is making legal and factual submissions that are already before the court. That said, McCafferty joins his fellow deponents in denying the relevance of Peacock’s evidence.

58 What these parts of the answering affidavits show is that the *amicus* respondents would have this court decide the main application without any consideration of context. According to the Gold Fields respondents in particular, this court should not even contemplate the likely social consequences of its decision. It is precisely to bring such information to the court’s attention that the applicants seek to introduce Peacock’s expert evidence.

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. 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, the main focus of his affidavit is not on binding international law, but rather key parts of two documents – his final report as Special Rapporteur, and the UN guiding principles – that deal with the need for corporate accountability at the international level. In short, his submissions provide a further dimension to the context within which the key issues in the main application are to be decided.

61 At no point does Grover submit, as the *amicus* respondents suggest, that the main application concerns corporate accountability in the absence of an appropriate domestic legal framework. Yet much of the opposition to his evidence is based on this mischaracterisation of his submissions. For example –

61.1 Laubscher deals extensively – at paragraphs 40 to 43 (pages 51 to 57) – with the main application being based on domestic remedies under the common law, statute and the Constitution, in an attempt to explain why Grover's reference to the international framework for corporate accountability is somehow irrelevant and unhelpful;

- 61.2 Zondi states that the legal issue addressed in Grover’s affidavit “*is not relevant to the certification application, because neither the certification application nor the class action it contemplates involves ‘holding foreign transnational corporations accountable’*” (paragraph 72, page 24); and
- 61.3 McCafferty, in submitting that “*this case does not concern any of the topics with which Mr Grover’s affidavit (or its annexures) deals*” (at paragraph 36, pages 19 to 26), goes to great lengths to distinguish the main application from the range of issues Grover addresses.
- 62 The *amicus* respondents all dispute the relevance of Grover’s evidence on the basis that they are not multinationals. The Harmony respondents, for example, describe the respondents in the main application as “*South African companies with local operations*” (at paragraph 38.1, page 50). Similarly, Anglo America describes the respondents as “*domestic companies*”, none of whom “*has sought to escape liability by alleging that South African courts have no jurisdiction over them or that South African law does not apply to them*” (paragraph 36.1, page 20).
- 63 These submissions fail to recognise one of the purposes served by the applicants seeking to admit Grover’s evidence (which includes examples of multinational corporations avoiding legal liability by refusing to accept

responsibility for acts or omissions of their subsidiaries). It is not about which company ought to be held to account, but rather about 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.

64 In the main application, some of the respondents have used corporate restructuring and related arguments in an attempt to avoid legal liability. For example, AngloGold Ashanti Limited (“AGA”) – the 11th respondent – goes to great lengths in its answering affidavit (at paragraph 27, pages 82 to 85) to make the argument *“that AGA could not be exposed to liability for ... acts or omissions on mines which took place outside the period when AGA owned such mines.”*

65 And in this application, Anglo American – in dealing with the relevance of key parts of Wilson’s evidence – submits that *“many (if not most) of the respondents [in the main application] were not in existence during the time relevant to the establishment of the migrant labour system or the pass laws”* (at paragraph 49, page 34). Put differently, Anglo American seeks to rely on current corporate structuring arrangements to avoid liability for the acts and/or omissions of its predecessors.

Conclusion on the relevance and utility of the expert affidavits

66 Perhaps most telling is McCafferty’s submission at paragraph 36.5 of his

affidavit (page 21) that the main application “*does not concern the applicants’ ‘access to remedy’.*” In alleging that it is “*common cause that any class members have access to delictual remedies whether (procedurally) through a class action or through other forms of civil suits*”, he makes it clear why the expert evidence the TAC and Sonke seek to adduce ought to be admitted. Put simply, this case is about access to justice for all by way of a class action, or the denial of justice to those who will never be in a position to pursue “*other forms of civil suits*”.

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

67 The *amicus* respondents oppose the admission of Grover’s affidavit on two grounds: first, that it does not constitute evidence; and second, that it is irrelevant to the main application. I have already addressed both of these issues in the previous section. What they do not suggest is that the submissions he makes have already been addressed by the class action applicants.

68 Similarly, none of the *amicus* respondents opposes Peacock’s evidence on the basis that it has already been addressed by the class action applicants. At best, McCafferty makes the point – at paragraph 59 of his affidavit (page 40) – that Spoor makes a similar argument to Peacock. In the result, I only address the evidence contained in Wilson’s affidavit in this part of the reply.

- 69 In objecting to the introduction of Wilson's evidence in the manner that they have, the *amicus* respondents seem to suggest an unattainable standard: that each fact canvassed in the submissions of *amici* must somehow be new. I have been advised 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 are already contained in the record of proceedings.
- 70 In certain circumstances, such a standard would require the expert to compare his or her evidence to that which is already contained in the 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.
- 71 I have been advised 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.
- 72 Wilson's evidence focuses on the socio-economic conditions of former mineworkers and their families. The *amicus* respondents' objection to

this evidence on the basis of novelty 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. I deal with each of these issues in turn.

The Roberts affidavit

73 In pointing out that Roberts canvasses evidence on the socio-economic conditions of mineworkers, all of the *amicus* respondents refer to the following study upon which Wilson relies: “The Hidden Epidemic Amongst Former Mineworkers: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa.” Laubscher refers to Wilson’s reliance on this study at paragraph 55 (page 70) of her affidavit. Zondi does the same at paragraph 84 (page 29) of her affidavit, as does McCafferty at paragraph 53.2 (page 36) of his.

74 Roberts does not consider much of the detail of her study in the affidavit she deposed to on behalf of the class action applicants. Instead, she relies on the study as support for the various expert opinions she offers. In particular, she cites her own study for the following purposes:

74.1 To show that rates of occupational lung disease meeting the criteria for statutory compensation have been underestimated (paragraph 4);

- 74.2 To show that the health of black gold miners was not studied while the men were on the mines, and that there was no follow-up of black gold miners after they left the mines (paragraph 7);
- 74.3 To show that the migrant labour system, together with the latency in the development of occupational disease, has largely hidden the burden of disease in rural South Africa (paragraph 9);
- 74.4 To show that many black mineworkers were unaware of, and ill-prepared to participate in, the statutory compensation scheme (paragraph 10);
- 74.5 To show that many black mineworkers are unable to work or access medical services (paragraph 11);
- 74.6 In support of the allegation that the gold mining industry “externalized” the costs of inadequate ventilation and dust control, which is alleged to have caused the occupational disease of workers, to mineworkers and their families in certain rural areas of South Africa (paragraph 11);
- 74.7 In support of the allegation that officials of the Chamber of Mines have attempted to discredit valid medical studies documenting the epidemic rates of occupation lung disease amongst black

gold mineworkers (paragraph 15); and

- 74.8 To show that many black gold mineworkers did not receive an exit medical exam when leaving employment (paragraph 17).
- 75 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.
- 76 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

- 77 The *amicus* respondents submit that much of Wilson's evidence is 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.

78 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. I 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.

79 Wilson also canvasses evidence dealing with the size and geographic sources of the labour force. In response, McCafferty points to the affidavits of Spoor and Nindi – at paragraph 51 (page 35) – to suggest that this evidence is redundant. In her affidavit on behalf of the Gold Fields respondents, Zondi makes a similar claim (at paragraph 80, page 27), submitting that Wilson's evidence is not materially different from that contained in the affidavits of Abrahams, Roberts, Spoor and Nindi.

80 While there are some overlaps between Wilson's evidence and the affidavits to which McCafferty and Zondi refer, there are – more

importantly – clear differences, both in terms of content and emphasis. The following examples, considered in light of what is contained in paragraph 75 below, are instructive:

- 80.1 Many of Zondi's references to the Abrahams, Roberts and Spoor affidavits lead to no more than general statements that many or most black mineworkers came from the "homelands" or neighbouring countries. McCafferty makes a similar, unhelpful reference to Spoor's affidavit.
- 80.2 Zondi's reference to Nindi includes a reference to annexure "**SN2**" at page 1583 of the record of proceedings – a study on the prevalence of occupational disease among men from Botswana who were formerly employed in gold mines in South Africa. This study establishes that prior to the mid-1970s, no more than 30% of the black labour force came from within South Africa, with that percentage growing significantly thereafter.
- 80.3 McCafferty's reference to Nindi's affidavit includes a reference to annexure "**SN3**" at page 1583 of the record of proceedings – a study of the prevalence of occupational lung disease in the Libode District in the Eastern Cape. This study briefly summarises the wax and wane of the black labour force from 1910 to 1996. It goes no further.

- 80.4 McCafferty's reference to Nindi's affidavit also includes a reference to annexure "SN28" at page 1814 of the record of proceedings – an annual report from 1984 of the Ernest Oppenheimer Hospital containing information as to the geographic origin of its patients. Very little detail in this regard is provided in the annual report.
- 81 In contrast to the evidence identified by Zondi and McCafferty, 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. In the result, it is sufficiently new to satisfy the novelty requirement.
- 82 I have been advised that it is not necessary for me to deal with each example the *amicus* respondents provide in support of their submission that to the extent that Wilson's evidence may be relevant, it is redundant. I submit that what I have shown in the preceding paragraphs is sufficient to make the point that the mere existence of some (minimal) degree of overlap between his affidavit and what is already contained in the record of proceedings does not assist the *amicus* respondents. On the contrary, the overlap supports my 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.

ANSWERING THE SUBSTANCE OF THE EXPERT AFFIDAVITS

- 83 The notice of motion in this application, which is dated 11 December 2014, provides in relevant part as follows (emphasis added):

***“TAKE NOTICE FURTHER THAT** in the event that you wish to oppose the relief sought in this notice of motion, you are required within five (5) days after receipt of this application to file a notice of intention to oppose.*

***TAKE NOTICE FURTHER THAT** any party in the main application is entitled to answer the allegations contained in the evidence that forms part of this application by 16 February 2015.*

***TAKE NOTICE FURTHER THAT** the in the event any answering affidavit is delivered, the applicants will file their replying affidavit(s) by 9 March 2015.”*

- 84 The notice of motion therefore gave the opportunity to any party in the main application, and not just those parties opposing the admission of the TAC and Sonke as *amici*, the opportunity to file an answering affidavit dealing – amongst other things – with the substance of the expert affidavits.

- 85 Ordinarily, a party seeking to oppose an application to be admitted as *amicus* would – in terms of rule 16A(7)(a) – be given five court days to file an answering affidavit. In this case, parties were given 42 court days to answer. In addition, rule 16A does not expressly make provision for

the filing of a replying affidavit. In this case, the TAC and Sonke were given 15 court days to do so.

86 The notice of motion included these timelines based on the agreements I have been advised were reached at a case management meeting held before the Deputy Judge President of this Court (“the DJP”) on 25 November 2014. The minutes of that meeting (including the “Timeline for Certification”), as sent to the DJP on 9 December 2014, record as follows:

86.1 The application for the admission of *amici* was to be filed by 12 December 2014, with “*any evidence sought to be adduced in the main application [to] be included in full*” (paragraph 4.1);

86.2 Answering affidavits in the application for the admission of *amici* were to be filed by 16 February 2015, and were “*to include [any] answer to the substance of any evidence sought to be admitted by the amici*” (paragraph 4.2); and

86.3 Should there be a need to file any replying affidavits in the application for the admission of *amici*, these are to be filed by 9 March 2015 (paragraph 4.3).

87 Ms Umunyana Rugege, an attorney with SECTION27 who attended the case management meeting on behalf of the applicants (together with

counsel), has deposed to an affidavit in which she confirms the correctness of these minutes insofar as they reflect the agreements reached at the meeting before the DJP.

88 In her affidavit, which is attached as annexure “**RA3**” (and includes a copy of these minutes), Rugege explains why the parties were given a relatively lengthy period to answer. Amongst other things, she submits that the lengthy time period given for the preparation of answering affidavits recognised the need to address the substance of the applicants’ expert affidavits.

89 Yet the *amicus* respondents proceed on the basis that the parties agreed to a different timetable, which sees each of the respondents in the main application having an opportunity to respond to the substance of the expert affidavits in the event the TAC and Sonke are admitted as *amici*.

90 In particular, McCafferty states that the class action applicants and Anglo American “*agreed that, if the application by the prospective amici curiae should succeed, then [Anglo American] would be required to file a substantive affidavit in response to the evidence.*” In this regard, he refers to email correspondence between his offices and those of Richard Spoor Inc., attached to his affidavit as annexure “**SM1**”.

91 If the applicants were to be admitted as *amici*, which I submit would be appropriate in the circumstances, the further exchange of affidavits as

contemplated by the *amicus* respondents would place the remainder of the timetable under significant pressure. In part, this is because heads of argument are to be filed by any admitted *amicus* on 8 June 2015. If a decision on this application were to be made by Friday, 17 April 2015 (being the end of the week in which the application is to be argued, if necessary), this would leave only 33 court days for the further exchange of affidavits (answering and replying) and heads of argument.

92 McCafferty recognises this danger when he submits – at paragraph 15 (page 6) – that *“a substantive reply to the evidence ... will not only require time and other resources, but may either delay the main application or may burden it to an extent that is not warranted by the relevance (if any) of the evidence to the two questions this Court needs to answer in the main application.”* Thus having “declined” the “invitation” to deal with the substance of the expert affidavits, Anglo American seeks to rely on the need to deal with the evidence at a later point as a basis for refusing to admit the evidence.

93 In principle, the TAC and Sonke are not opposed to any party in the main application – including the class action applicants (should they so choose) – dealing with the substance of the expert evidence. However, this cannot be done in a manner that compromises the process leading up to the hearing in the main application, or the organisations’ right to reply. In the result, I submit that the respondents’ failure to comply with the timetable as agreed before the DJP means that they will have a very

short time period within which to answer the substance of the expert affidavits, should they so choose. This is of their own making.

94 Despite repeated references to the length of the applicants' papers, the three expert affidavits collectively run to a total of 62 pages (plus annexures). Of the 62 pages, only 43 contain expert evidence: paragraphs 14 to 88 of Wilson's affidavit; paragraphs 16 to 31 of Peacock's affidavit; and paragraphs 16 to 43 of Grover's affidavit. The repeated reference to the record of proceedings being burdened with this evidence should therefore be seen for what it is: a scaremongering tactic devoid of any substance.

95 In any event, the *amicus* respondents have all repeatedly submitted that to the extent that the expert evidence is new, it is irrelevant, and to the extent that such evidence may be relevant, it is not new. In the result, it beggars belief why the respondents may need "*to brief their own experts on international law, history, economics and gender relations*" (McCafferty at paragraph 15, page 6).

96 I now proceed to respond seriatim to the answering affidavits of the *amicus* respondents. The core of my response has been set out above, and all allegations in the affidavits of the *amicus* respondents that are inconsistent therewith are denied. In the section below, I respond only to the particular allegations that call for a response beyond this.

AD SERIATIM REPLY TO LAUBSCHER'S AFFIDAVIT**Ad paragraph 5**

97 I have been advised that the *Plascon Evans* rule does not recognise a respondent's bare denial of contentions in this manner. In the result, any contentions made in my founding affidavit that are not addressed in the answer are to be deemed to be admitted.

Ad paragraphs 8 to 10

98 I understand that a person whose interest in a matter is such that he or she may be joined as a party may find it difficult to be admitted as *amicus*. In particular, I have been advised that a court is unlikely to admit as *amicus* a person whose position is better suited to a litigant.

Ad paragraph 13

99 The consent letter speaks for itself. Read as a whole, it makes it clear that the TAC and Sonke did not seek the parties' consent solely to make submissions in respect of the notified constitutional issues, but rather to address the constitutional issues raised in the main application (whether directly or by necessary implication).

Ad paragraph 15

100 The “*alleged interests*” identified in this paragraph do not do justice to the depth and richness of the applicants’ areas of work. While the TAC’s mandate may focus on the prevention and treatment of HIV and TB, with Sonke’s focusing on the promotion of gender equality and human rights, both mandates are significantly broader. In particular, neither organisation’s work is limited to advocacy.

Ad paragraph 22.1

101 It matters not whether the affidavits of Grover, Wilson and/or Peacock could have been included as part of the class action applicants’ papers. They were not included. In addition, the fact that Roberts is an existing expert witness in the main application does not mean that those aspects of her published research upon which she does not rely in her affidavit cannot be considered in the manner done by Wilson.

Ad paragraph 23.2

102 It is not for Laubscher to recommend how best the interests of the TAC and Sonke should be advanced. In suggesting that the TAC and Sonke could share their views with the class action applicants’ legal teams, Laubscher implies that the applicants have no separate interests to protect simply because they support certification and the consideration of the transmissibility of damages question at the certification stage.

Ad paragraph 24

103 Should this application be granted, it would be appropriate to award costs in favour of the TAC and Sonke. 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. However, should the application for admission be unsuccessful, it would be appropriate for the court not to make any order as to costs.

104 I have been advised that no costs orders should ordinarily be made in respect of the participation of an admitted *amicus*.

Ad paragraph 27.3

105 The only reference to constitutional damages in my founding affidavit is contained in paragraph 7, in which I quote the relevant parts of the rule 16A notice. I therefore do not understand on what basis Laubscher alleges that the "*TAC and Sonke labour under the misapprehension that the possibility of constitutional damages is a topic which they bring to the debate*". It is not even an issue in respect of which the aspirant *amici* have indicated any intention to make legal submissions.

Ad paragraph 27.5

106 Given the position adopted by McCafferty in respect of the section 38(c) issues raised in paragraph 10 of the consent letter, I am somewhat taken aback by Laubscher's assertion that the letter "*makes plain that TAC and Sonke have nothing of relevance to say that is not already said in the certification proceedings*", and that the TAC's and Sonke's contributions would be superfluous. In addition, no party has sought to consider the international perspective on the right to an effective remedy.

Ad paragraph 27.7

107 Not only did the Harmony respondents advise that they would not consent to the admission of the TAC and Sonke as *amici*, but they failed to provide any reason for their opposition at that stage. At minimum, their failure to explain their refusal to consent was unreasonable.

Ad paragraph 28.1 and 29.1

108 On the one hand, the Harmony respondents complain about the volume of paper in this application; on the other, they "invite" the TAC to produce its memorandum of incorporation as part of its replying papers, and Sonke to produce its memorandum of incorporation and constitution as part of its reply. While no purpose can be served by doing so, copies of the TAC's memorandum of incorporation and Sonke's memorandum of

association are attached as annexures “RA4” and “RA5”.

Ad paragraphs 29.3 and 29.4

109 It is patronising in the extreme for the Harmony respondents to suggest how best Sonke should advance its interests and the interests of the constituencies on whose behalf it acts. By suggesting the particular role they do, the Harmony respondents indicate their failure to appreciate the nature and work of a human rights organisation such as Sonke. In their view, Sonke appears as nothing more than a service provider.

Ad paragraph 31.6

110 Laubscher does not appreciate that the interpretation and application of section 173 of the Constitution is itself a constitutional issue. In the result, it matters not whether the provision was identified in the rule 16A notice. It was raised directly by the class action applicants, and therefore falls within rule 16A(2)'s contemplation of “*a constitutional issue raised in [the] proceedings*”.

Ad paragraph 31.7

111 As my founding affidavit indicates, I am an adult male.

Ad paragraphs 31.9 to 31.11

112 The approach adopted in these paragraphs, if accepted, would mean that a court would be denied the opportunity to consider relevant international law sought to be adduced by an aspirant *amicus* in circumstances where the issue had not be identified by any party. Yet section 39(1)(b) of the Constitution requires a court, when interpreting the Bill of Rights, to consider international law.

Ad paragraph 31.12

113 The TAC and Sonke seek to provide the international law and policy context within which sections 34 and 38 of the Constitution (amongst others) are to be considered and interpreted. No other party has sought to do this.

Ad paragraph 40.1.1

114 The contents of this paragraph is indicative of the Harmony respondents' general failure to recognise the constitutional rights at issue in the main application. For example, they appear unable to appreciate that the right to health – and the positive and negative obligations it imposes – has any implications for the alleged breaches.

Ad paragraph 44.2

115 While the class action applicants may indeed have *“marshalled a formidable legal and medical team that is adequately resourced to conduct the main application and any class action that may follow”*, they would not similarly be able to secure such legal and other representation in the event certification is denied. At best, only some of them – and not others within the proposed classes – would be able to continue in their quest to vindicate their rights and secure appropriate compensation.

Ad paragraph 53.1

116 Central to the main application is a consideration of the impact of any denial of certification on the rights of former mineworkers and their families. It is precisely because of the socio-economic circumstances in which they find themselves that they have no option – if they are to have any hope of pursuing their claims for compensation successfully – but to be included as part of a certified class.

Ad paragraph 53.4

117 The fact that *“Wilson’s views are consistent with and could have been presented in support of the case advanced by the existing [class action] applicants”* is not something which ought to count against the TAC and Sonke’s application for admission as *amici*. On the contrary, the fact that

his expert evidence supports the class action applicants' case – by adding to what is already contained in the record of proceedings – is indicative of its relevance and utility.

Ad paragraphs 57, 59 and 60

118 While I do not agree with Laubscher's analysis of the Roberts study on which Wilson relies, I do not understand how she can say that "*the study undermines the case for certification*", and yet – at the same time – persist in claiming that Wilson's evidence is not relevant to the main application. If the study is indeed problematic, as she alleges, it ought to be brought to the court's attention.

119 The contents of these paragraphs reflect a failure to appreciate fully that the main application is not seeking to have the classes certified to facilitate a single, comprehensive class action. Indeed, the contemplated class action – even if successful – would not on its own result in the vindication of individual claims for compensation.

Ad paragraph 68

120 As is clear from paragraph 16 of his affidavit, Peacock relies on Wilson's affidavit to the extent it addresses "*the economic conditions that affect the families of former mineworkers*". He does so in order to provide a context for the consideration of his expert evidence.

Ad paragraph 75.2

121 If *“Peacock’s reference to the hardships confronted by certain women tasked with caring for sufferers of occupational disease militates against the class actions sought to be instituted and conducted by the applicants for class certification”*, then such evidence is indeed relevant to the determination of the main application. That said, I deny that Peacock’s evidence undermines the case for certification.

Ad paragraph 78.2

122 Laubscher misunderstands Peacock’s reference to the failure of the law of delict to vest women and girls with claims in their own right for their unpaid work. He explains the reason for this reference in paragraph 30, where he draws a connection between this *“uncompensated burden”* and the need to develop the common law *“so as not to deprive them of the indirect compensation that they [would] receive by virtue of damages award[s] in favour of the primary victims.”*

AD SERIATIM REPLY TO ZONDI’S AFFIDAVIT**Ad paragraphs 21 to 24**

123 Zondi appears to misunderstand the contents of paragraph 31 of

Peacock's affidavit. The reference to "*the need for individualised claims*" was made in the context of explaining why the transmissibility of damages question ought to be decided upfront. This was done mindful of the reality that very few people would be in any position to institute such individualised claims, were this necessary to safeguard their claims.

Ad paragraph 35

124 As I indicated at paragraph 88 above, I have been advised that the *Plascon Evans* rule does not recognise a respondent's bare denial of contentions in this manner. In the result, any contentions made in my founding affidavit that are not addressed in the answer are to be deemed to be admitted.

Ad paragraph 39

125 Zondi does not appear to appreciate the import of the submission regarding the class action applicants' need to seek certification. If the TAC and Sonke are correct in this regard, it does not mean that "*the certification application is redundant.*" Instead, it means that the court's focus in the certification proceedings should shift towards the regulation of its process under section 173 of the Constitution. In other words, the question is not whether there should be a class action, but rather how and on what conditions it should proceed. As I have already indicated at paragraph 41 above, the TAC and Sonke have not "jettisoned" this issue.

Ad paragraph 48

126 None of the six cases to which I referred in paragraph 16 of the founding affidavit was concerned solely with the prevention and/or treatment of HIV or TB. Instead, even in respect of those where HIV or TB was involved, the cases concerned broader concerns. The following three examples are instructive:

126.1 The *Lee* case was focused on the circumstances in which the state could be held liable for TB contracted whilst in detention. At issue was whether the state could be held liable for its acts and omissions regarding appropriate measures to reduce the risk of prison-acquired TB.

126.2 In the *Rath* case, the High Court was asked to hold a statutory council to account for its failure to discharge its legislative mandate dealing with the availability of medicines and the regulation of the conduct of clinical trials.

126.3 The *Pharmaceutical Manufacturers* case involved a constitutional challenge brought by the pharmaceutical industry to the Medicines and Related Substances Control Amendment Act which introduced changes to the legislative regime regulating medicines.

Ad paragraph 49

127 Of the six cases, three deal expressly with access to and/or the regulation of medicines (and related matters) in general: *Cipla Medpro*, *Rath*, and *Pharmaceutical Manufacturers*. While the TAC's submissions in *Rath* and *Pharmaceutical Manufacturers* may have had a particular focus on HIV-related medicines, both interventions considered the broader implications on the right to have access to medicines in general.

128 I have been advised that Zondi's characterisation of the TAC's *amicus* intervention in the *Cipla Medpro* case is deeply flawed. In particular, what she does not recognise is that the intervention was instrumental in ensuring that our law recognises the relevance of public interest considerations in dealing with the balance of convenience test. The fact that this did not affect the outcome on the facts is not relevant.

Ad paragraph 50

129 In *Pharmaceutical Manufacturers*, the TAC was unable to obtain the consent of all the parties to be admitted as *amicus*. It was only admitted pursuant to an order of the High Court.

130 As I indicated in paragraph 17 of my founding affidavit, the matter was settled within six weeks of the TAC having been admitted as *amicus*.

Prior to then, the case had dragged on for almost three years, without any suggestion that any of the parties were willing to consider settlement.

131 No further information was provided because the case was subsequently withdrawn from the roll. That is why I referred to it by its case number and the division in which the application was filed.

Ad paragraph 54

132 While sections 9, 26 and 28 of the Constitution are not expressly mentioned in the rule 16A notice, all three of the rights are implicated in the founding papers in the main application. Given the main application's focus on sections 34 and 38, the effective realisation of the rights entrenched in sections 9, 26 and 28 constitutes a constitutional issue raised in the proceedings.

Ad paragraph 59

133 I do not understand the basis upon which Zondi submits that Wilson ought to be cross-examined on the issue to which she refers in this paragraph. Should the Harmony respondents be of the view that Wilson incorrectly characterises the relationship between the mining industry and the apartheid state, they have the right to put up expert evidence of their own. Unless and until they do so, there is no dispute in this regard.

Ad paragraph 62

134 The TAC and Sonke seek to make submissions dealing with the four legal issues identified in paragraph 26 of my founding affidavit. In so doing, they aim to assist the court in its consideration of the two questions identified in paragraph 33. My reference to “*two legal issues*” in the introduction to paragraph 33 was made in error and ought to have stated “*two legal questions*”. This is clear when one considers that paragraph 34 refers to “*the first legal question*”, with paragraph 35 referring to “*the second legal question*”.

Ad paragraph 66

135 At no point does Peacock suggest that “*claimants are likely to institute separate proceedings*”. As I indicated at paragraph 123 above, the reference to “*the need for individualised claims*” was made in the context of explaining why the transmissibility of damages question ought to be decided upfront, and that this was done mindful of the reality that very few people would be in any position to institute such individualised claims, were this necessary to safeguard their claims.

Ad paragraph 79

136 If the “*issues included in the Wilson affidavit ... are not in issue in the certification application*”, I do not understand the basis upon which the

Harmony respondents would require an opportunity to answer his evidence in the event the TAC and Sonke are admitted as *amici*. I note that Zondi appears to qualify this concession when she alleges that the issues are common cause “*for the limited purposes of certification*”. In this regard, the TAC and Sonke only seek admission as *amici* in the main application; at this stage, they do not intend to intervene in the contemplated class action.

Ad paragraph 81

137 If “*historical events of 1914, 1920 and 1946*” are indeed irrelevant, as Zondi submits, then whatever the correctness of the allegations in this regard there can be no serious concerns regarding prejudice. In any event, the Harmony respondents are entitled to answer these allegations. What they cannot do is simply deny them, without saying anything more.

Ad paragraphs 82 and 83

138 As a legally trained person, Zondi has no expertise relevant to many of the opinions she expresses in these paragraphs. She simply asserts that she has been “advised” in this regard, without stating by whom. As these submissions are not legal in nature, she could not have been advised in this regard by Gold Fields’ legal representatives (to whom she refers in paragraph 3).

Ad paragraph 85

139 At paragraph 43 of his affidavit, Wilson makes the point that he has not attached a copy of the Roberts study “[b]ecause of its length”. At no point does he suggest that this was the reason why Roberts did not attach the study to her affidavit. In any event, Wilson states that the study “*will be made available to this Court upon request.*”

Ad paragraph 94

140 As I have already indicated in paragraph 94 above, it would be appropriate for the court not to make any order as to costs should the application for admission be unsuccessful.

AD SERIATIM REPLY TO McCAFFERTY’S AFFIDAVIT**Ad paragraph 11**

141 McCafferty’s concern for the applicants regarding their alleged need “*to deal with the arguments and evidence contained in th[is] application*” are misplaced. Not only did the applicants consent to the admission of the TAC and Sonke as *amici*, but none of them chose to oppose this application. In addition, there is no suggestion that any of them will file an affidavit in answer to the evidence contained in the expert affidavits.

Ad paragraph 33.1

142 McCafferty's reference to "more 'enlightened' or 'advanced' countries" and "less 'enlightened' or 'advanced' countries" is insulting. At no point does Grover's evidence suggest that the so-called enlightened world should come to the defence of the "unenlightened". Instead, he makes the simple point that international law recognises the need to ensure corporate accountability, and this includes measures to ensure that a lack of domestic remedy should not stand in the way of accessing justice.

Ad paragraph 36.5

143 The main application is very much about the class action applicants' access to remedy. As indicated in paragraph 60 above, the main application offers a stark choice: either access to justice for all by way of a class action, or the denial of justice to those who will never be in a position to pursue "*other forms of civil suits*".

Ad paragraph 38.1

144 I have been advised that McCafferty is correct to submit that "*[n]either a party nor a prospective amicus curiae is at liberty to expect the Court or another party to trawl through reams of annexures in search of facts or arguments which support the relief sought, when those facts or arguments are not canvassed in the affidavit itself.*" Yet McCafferty

repeatedly includes each page of every annexure in his page count of the papers to which the respondents would be required to respond.

Ad paragraph 38.4

145 Grover did not address his report dealing with occupational health because it does not deal with the issues addressed in his affidavit. In any event, it is not for Anglo American to suggest which aspects of his work as Special Rapporteur Grover ought to have addressed.

Ad paragraph 50

146 Wilson's reference to the presentation he made on the invitation of the Marikana Commission of Inquiry was included in the part of his affidavit setting out his qualifications, experience and expertise. A copy of the presentation was attached merely to provide an indication of the issues he addressed. No reliance was placed on its contents. In any event, McCafferty – as an attorney – has no expertise to express an opinion on the implications of the conclusion reached by Ngonini that the absence of migration today *“is making the poor a lot worse off”*.

Ad paragraphs 61 and 62

147 McCafferty does not dispute Peacock's expertise in relation to the care economy in the context of HIV. What he does instead is submit that this

expertise is not relevant to a consideration of the impact of occupationally-acquired silicosis on the families of former mineworkers, based solely on the fact that the research conducted was specific to HIV. He does not explain why having silicosis – as opposed to an HIV-related illness – should lessen the impact of the care burden.

Ad paragraph 64

148 McCafferty does not appear to recognise the essence of the point Peacock makes: that if the question of transmissibility of damages is not determined upfront, then the only way in which rights in this regard could be secured is by way of the institution of individual actions. Should a sick miner know that the common law had not been developed in the manner suggested by the class action applicants, there would be no need for him to institute any such action to protect his dependants' rights.

Ad paragraph 68

149 Given what I have confirmed in relation to the *“novel legal submissions ... outlined in [the consent] letter”*, I trust that Anglo American will now reconsider its opposition to the application for admission as *amici*.

Ad paragraphs 69 and 70

150 I have been advised that should this application be successful, the *amicus* respondents ought to be ordered to pay the applicants' costs. I also understand that McCafferty is correct when he states that there should be no order as to costs in the event the application is dismissed.

CONCLUSION

151 In the result, I persist in submitting that the applicants have made out a case for this court to admit them as *amici* on the terms and conditions as it deems appropriate.

ANELE BOYCE YAWA

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the ____ day of _____ 2015.

COMMISSIONER OF OATHS