

**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

SUPPORTING AFFIDAVIT

I, the undersigned,

ANAND GROVER

do hereby make oath and state:

1 I am an adult male citizen of India residing at A-54, Nizamuddin East,

New Delhi, 110013, India.

- 2 I am registered with the Bar Council of Maharashtra to practice as an advocate. In terms of the Bar Council Rules, I am permitted to practice in all courts throughout India, including the Supreme Court.
- 3 I have been designated as a Senior Advocate by the Bombay High Court, which is a status comparable to Queen's counsel ("QC") in the United Kingdom and senior counsel ("SC") in South Africa.
- 4 From August 2008 to July 2014, I served as the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health ("Special Rapporteur"). I was appointed to that position, for two three-year terms, by the United Nations Human Rights Council ("the Human Rights Council").
- 5 I have been advised by SECTION27, the legal representatives of the parties seeking to be admitted as *amici curiae* ("*amici*"), of the need for – and the nature and purpose of – this application. I have also read the notice issued by the applicants in the main application in terms of rule 16A(1)(a), and the letter dated 4 November 2014 seeking the parties' consent to admit SECTION27's clients as *amici*. Copies of these two documents are attached as annexures "AN1" and "AN2".
- 6 The facts contained in this affidavit are both true and correct and, unless

the context indicates otherwise, are within my personal knowledge.

INTRODUCTION

7 Having noted the applicants' intention to be admitted as *amici* to advance legal arguments – amongst others – in respect of “[t]he necessity for corporate accountability and the right to an effective remedy under international law”, the purpose of this affidavit is threefold:

7.1 First, to bring to this Court's attention my final report as Special Rapporteur –“*The Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*” (“my final report”) – insofar as it deals with the need for corporate accountability at the international level;

7.2 Second, to address relevant aspects of the “*Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*” (“the UN guiding principles”), which were endorsed by the Human Rights Council on 6 July 2011; and

7.3 Third, to expand upon the right to an effective remedy under international law and its implications for class actions.

- 8 But before dealing with these issues, I begin by setting out my relevant experience and expertise. I submit that I am by training and experience duly qualified to express the views and opinions that I do in this affidavit.

RELEVANT EXPERIENCE AND EXPERTISE

- 9 I am the co-founder and co-director of the Lawyers Collective, a leading public interest law centre in India that focuses on human rights advocacy, public interest litigation, and the provision of free legal services to public interest litigants who would otherwise be unable to access justice. Founded in 1981, the Lawyers Collective's work includes a focus on access to treatment, other HIV-related issues and women's rights.
- 10 In addition to my Lawyers Collective's role, which includes litigation in the high courts and the Supreme Court, I run a separate practice as an advocate. In these capacities, I have argued several landmark cases in the field of public interest and human rights law. A list of these cases is included in my *curriculum vitae*, a copy of which is attached as "AN3".
- 11 In September 2014, I was appointed as Special Public Prosecutor by the Supreme Court in one of the largest anti-corruption cases in India, the *2G Spectrum* case. In India, a Special Public Protector is in charge of the conduct of a case for the prosecution in a criminal matter.
- 12 I have served as a member of a range of advisory, governance and

other structures of institutions active in the fields of HIV, health and/or human rights. Amongst others, these include –

- 12.1 the International AIDS Vaccine Initiative (as a national advisory board member);
 - 12.2 the World Care Council;
 - 12.3 the International Council of AIDS Service Organizations;
 - 12.4 the National Human Rights Commission of India (as a member of the Core Group of NGOs representatives);
 - 12.5 the National Advisory Board on HIV and AIDS set up by the former Prime Minister of India;
 - 12.6 the drafting group of the International Guidelines on Human Rights and HIV/AIDS, set up by the Joint United Nations Programme on HIV/AIDS (“UNAIDS”); and
 - 12.7 the UNAIDS Reference Group on HIV and Human Rights.
- 13 I am currently serving on the Lancet – University of Oslo Panel on Global Governance for Health, as well as the Global Commission on Drug Policy.

- 14 I have had, and continue to maintain, a long relationship with key civil society organisations in South Africa. I have followed with interest many of the constitutional and jurisprudential developments that have occurred in South Africa since the adoption and coming into force of the Constitution. My understanding of South Africa's socio-economic rights jurisprudence is reflected in my reports as Special Rapporteur.
- 15 In addition to my final report, I completed 12 reports in my capacity of Special Rapporteur, addressing a wide range of country-specific and thematic issues. For example, a report dated 15 May 2013, published as UN document A/HRC/23/41, considers the right to health of migrant workers, with a focus on the responsibilities of states and non-state actors to respect, protect and fulfil the right. A summary of these 12 reports is attached as annexure "AN4".

MY FINAL REPORT AS SPECIAL RAPPORTEUR

- 16 I submitted my final report to the United Nations General Assembly on 11 August 2014, in accordance with Human Rights Council resolutions 6/29 and 24/6. Copies of my final report and the two resolutions are attached as annexures "AN5" to "AN7"
- 17 My final report considers a number of critical elements that effect the effective and full implementation of the right to health under international

law. Amongst other things, it reaffirms the justiciability of the right to health, considers how the right is to be enforced, and deals in particular with transnational corporations.

- 18 The introduction to my final report includes a focus on the need to ensure corporate accountability (at paragraph 4):

“Globalization and market liberalization have afforded transnational corporations the opportunity to enter into domestic markets, resulting in their growing domination in world markets. While transnational corporations have the ability to influence international and domestic policies, States have been unable to regulate those corporations to prevent them from violating the right to health. The efforts that have to date been made to curb the activities of transnational corporations have been only voluntary and have not persuaded industries to prevent violations of the right to health.”

- 19 One such instrument is the UN Guiding Principles, which I discuss in further detail at paragraphs 24 to 38 below. A copy of the UN Guiding Principles is attached as annexure AN8. A copy of the Human Rights Council resolution of 6 July 2011 endorsing the UN Guiding Principles is attached as annexure “AN9”.

- 20 A key aspect of my final report’s focus – at paragraphs 37 and 38 – is the difficulty that states or individuals may have in *“hold[ing] foreign transnational corporations accountable for harmful actions that were orchestrated through their domestic subsidiary.”* With this in mind, I called for *“an international mechanism to hold them liable for human*

rights abuses.” That said, I expressly recognised the need for such a mechanism to “supplement domestic laws rather than diminish the importance of domestic law.”

21 Paragraphs 40 to 47 of my final report focus on the UN Guiding Principles, summarising the following three pillars under which the foundational and operational principles are identified and discussed:

21.1 First, the duty of the state to protect human rights;

21.2 Second, the responsibility of corporations to respect human rights; and

21.3 Third, access to remedy.

22 My final report summarised the third pillar, which is directly relevant to the main application for certification, as follows (at paragraph 42):

“The third pillar of the framework requires States to ensure individuals’ access to an effective remedy through judicial, administrative, legislative or other appropriate means when abuses occur within their territory and/or jurisdiction (principle 25). An aspect of access to remedy is that corporations should establish or participate in effective, operational-level grievance mechanisms (principle 29). Given that access to remedy is an aspect of States’ obligation to protect, however, States’ inability or unwillingness to hold transnational corporations accountable may lead to a lack of available and effective remedies against corporations.”

- 23 While the UN Guiding Principles are neither binding nor directly enforceable, they nevertheless give content to an obligation that already exists under international law – the duty of states to protect human rights.

THE UN GUIDING PRINCIPLES

- 24 The UN Guiding Principles have their genesis in the appointment in July 2005 by then United Nations Secretary-General Kofi Annan of Professor John Ruggie as his Special Representative on the issue of human rights and transnational corporations and other business enterprises (“the Special Representative”).

- 25 Ruggie’s mandate as the Special Representative is set out in resolution 2005/69 of the United Nations Commission on Human Rights. The resolution, a copy of which is attached as annexure “AN10”, details the mandate as follows:

- “(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;*
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;*
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’;*
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational*

corporations and other business enterprises;

(e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.”

- 26 On 7 April 2008, the Human Rights Council adopted the Special Representative’s report entitled “Protect, Respect and Remedy: a Framework for Business and Human Rights” (“the Framework”). The adoption of the Framework is recorded in UN document A/HRC/8/5, a copy of which is attached as annexure “AN11”.
- 27 The document presented a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors. It set out three core principles: the duty of states to protect against human rights abuses by third parties, including business; the responsibility of corporations to respect human rights; and the need for access to effective remedies. It was intended to assist all actors – governments, corporations and civil society – to limit violations of human rights, and to ensure appropriate remedies when violations occurred.
- 28 Thereafter, the Special Representative developed guidelines to flesh out, strengthen and operationalise. These guidelines are the UN Guiding Principles, which apply to all states and businesses enterprises, regardless of size, sector, location, ownership, or corporate structure.
- 29 As my final report notes with concern, corporations are playing an increasingly powerful and dominant role in the global economy. They

often influence international and domestic law-making, at times infringing on the state's policy space. In addition, many of them have undermined the rights of communities with impunity, often causing displacement, contamination of the environment, and loss of livelihoods. In addition, they have often played a central role in the violation of human rights, including the right to health of individuals and groups.

30 One such example, to which I referred in my final report, is that of the Bhopal gas leak tragedy in 1984 at the Union Carbide Corporation ("UCC") pesticide plant in India. The gas leak is considered to be one of the world's worst industrial disasters, killing an estimated more than 22,000 people. Its impact continues to be felt today, with an estimated 100,000 people continuing to suffer from related health problems.

31 Yet 30 years after the disaster, the victims and their families have yet to receive fair compensation, adequate medical treatment or rehabilitation from UCC. The plant site at Bhopal has still not been cleaned up. Despite UCC being a wholly-owned subsidiary of the US-based Dow Chemical Company ("Dow") since 2001, the latter has consistently denied responsibility for any liability. In particular, it continues to ignore calls to address what Amnesty International refers to as *"the ongoing environmental and health impacts of the disaster"*.¹

32 In order to address the power asymmetry between transnational

¹ Amnesty International, "India: court decision requires Dow Chemical to respond to Bhopal gas tragedy", available at <http://www.amnesty.org/en/news/india-court-decision-requires-dowchemical-respond-bhopal-gas-tragedy-2013-07-23>

corporations and communities, the UN Guiding Principles are grounded in recognition of the three pillars identified at paragraph 21 above:

32.1 The first pillar, to protect, reflects the existence in international human rights law of the binding obligations on states to protect individuals from third parties. This pillar requires that states adopt measures such as the development of policies and laws to hold corporations accountable.

32.2 The second pillar, to respect, reflects the responsibility of transnational corporations to avoid infringing human rights, and to address human rights violations. In particular, corporations must address adverse human right impacts caused by their activities, and take adequate measures for their prevention. In particular industries, some human rights may be at greater risk than others, requiring the focus of heightened attention.

32.3 The third pillar requires states to ensure individual access to an effective remedy, through judicial and/or other mechanisms. As already indicated, access to a remedy is also an aspect of the state's obligation to protect human rights. In other words, states should implement ways to reduce legal, practical and other barriers to access to an effective remedy.

33 An effective remedy includes both judicial and non-judicial processes,

and has both procedural and substantive aspects. In this regard, states must ensure that domestic mechanisms, when addressing business-related human rights abuses, include ways to reduce legal, practical and other barriers that could lead to a denial of access to a remedy (principle 25; commentary at page 27).

34 In particular, the commentary in the UN Guiding Principles explains that states should ensure that domestic processes do not have the effect of erecting barriers that prevent legitimate cases from being adjudicated by the courts. This is especially so if judicial recourse is an essential part of accessing the remedy, or other effective remedies are unavailable.

35 As principle 26 and the commentary (at page 29) record, barriers to an effective remedy may include the following:

35.1 the way in which legal responsibility is attributed to corporate groups under domestic civil and criminal laws, which may facilitate the avoidance of appropriate accountability;

35.2 where vulnerable groups such as migrants are excluded from the level of legal protection that applies to the wider population;

35.3 the costs of bringing claims that may go beyond being an appropriate deterrent to unmeritorious cases, and make it prohibitively expensive for legitimate claims to be brought;

- 35.4 claimants may experience difficulty in securing legal representation, due to a lack of resources and/or other incentives for lawyers to represent claimants; and
- 35.5 there may be inadequate options for aggregating claims or enabling representative proceedings, *“such as class actions and other collective action procedures.”*
- 36 A further barrier may be the difficulties that individuals face in meeting the evidential burden.² Such a barrier may be overcome by enabling group-based claims, such as class actions.
- 37 The UN Guiding Principles recognise that these barriers to access are often the result of, or compounded by, the imbalance of power in respect of financial resources and access to information and expertise. The commentary emphasises that vulnerable and marginalised populations often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from legal processes. The rights and specific needs of these populations require special attention at each stage of the remedial process.
- 38 The non-binding nature of the UN Guiding Principles has often made it difficult for individuals or groups to access effective remedies for human

² G Skinner et al, “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business” (December 2013) at page 61, available at <http://accountabilityroundtable.org/wp-content/uploads/2013/12/The-Third-Pillar-FINAL1.pdf>

rights violations committed by corporations. As my final report notes, the involvement of these corporations in multiple jurisdictions, and the difficulties attendant in holding these corporations accountable for the harmful actions of their subsidiaries, means that these corporations often evade responsibility. It is for this reason that much reliance is placed on domestic courts to provide access to such remedies.

THE RIGHT TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

39 International law recognises the right to health as a fundamental human right. Article 12 of the International Covenant on Economic, Social and Rights, which requires states to respect, protect and fulfil the right to health, provides as follows:

- “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
 - (b) The improvement of all aspects of environmental and industrial hygiene;*
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”*

- 40 The right has been elaborated upon and interpreted by the Committee on Economic, Social and Cultural Rights in General Comment no. 14 of 11 August 2000 (“General Comment 14”), a copy of which is attached as annexure “AN12”. According to paragraph 59 of General Comment 14, all victims of human rights violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction, or guarantees of non-repetition.
- 41 In addition to the right to health, the following provisions of international law instruments also recognise a right to a remedy for victims of violations of internationally-recognised human rights:
- 41.1 Article 8 of the Universal Declaration of Human Rights;
 - 41.2 Article 2 of the International Covenant on Civil and Political Rights;
 - 41.3 Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination;
 - 41.4 Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments,
 - 41.5 Article 39 of the Convention on the Rights of the Child; and

41.6 Article 7 of the African Charter on Human and Peoples' Rights.

42 These provisions are to be understood in light of the *“Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”*, adopted by the United Nations General Assembly in resolution 60/147 of 16 December 2005. A copy of this resolution is attached as annexure “AN13”.

43 These guidelines also apply to those who collectively suffered harm, including physical injury, economic loss, or a substantial impairment of their fundamental rights. As the preamble to resolution 60/147 notes:

“[I]n honouring victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law”.

CONCLUSION

44 In order to ensure access to an effective remedy, legal mechanisms must respond to the particular circumstances of those directly affected by human rights violations. To be effective, remedies must be capable of leading to an impartial, prompt and fair outcome.

45 The duty to protect human rights and the right to an effective remedy are interrelated. Under binding international law, states already have a duty

to regulate the conduct of private parties in order to fulfil their own duties to respect and protect human rights. As part of this duty, they must ensure access to an effective remedy for victims of rights violations perpetrated by non-state actors such as corporations. This requires effective domestic judicial mechanisms to be put in place, which are able to address legal, practical and other barriers to access to justice.

- 46 With this in mind, I submit that class actions are an important legal tool for holding corporations accountable. They allow for multiple individuals to have similar claims based on common questions of law and fact resolved through collective action. They do not require that all affected individuals sue, but rather allows the common action to be brought by a representative of the class, with individuals opting in or out as desired.
- 47 Without class actions, corporations could effectively be shielded from accountability, because claimants are unlikely to seek individual redress through costly legal processes. In contrast, class actions allow for the pooling of limited resources with other affected parties.
- 48 For example, homeowners in the US state of Ohio who had suffered damages due to the conduct of their mortgage lenders, sought to proceed in their action as a class. They successfully argued that they lacked the financial resources to undertake litigation individually, and that the class action would spread the costs and help them to present

their claims against lenders better.³

- 49 Finally, class actions allow affected individuals to link the alleged violator to its human rights breach through the demonstration of repeated or widespread patterns of behaviour or consequences. Such conduct may remain hidden if plaintiffs are compelled to bring their actions either individually or as part of small groups of individuals. But the possibility of this happening is minimised with the certification of a large class.

ANAND GROVER

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 _____ 2014.

COMMISSIONER OF OATHS

³ *Ohio: In re Consolidated Mortgage Satisfaction Cases*, 780 N.E.2d 556 (2002).