

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

Case no: 48226/12

In the application for admission as *amici curiae*

**TREATMENT ACTION CAMPAIGN NPC**

First applicant

**SONKE GENDER JUSTICE NPC**

Second applicant

In re

**BONGANI NKALA AND FIFTY-FIVE OTHERS**

Applicants

and

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

Respondents

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**GOLD FIELDS' HEADS OF ARGUMENT**  
(Enrolled for hearing on 14-15 April 2015)

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**A. Introduction**

1. These heads of argument are filed pursuant to the directive of the Deputy Judge President of 19 March 2015. They are filed on behalf of the Gold Fields respondents, comprising the thirteenth to nineteenth and thirtieth and thirty-first respondents in the certification application (collectively, “Gold Fields”).
  
2. The Deputy Judge President’s 19 March 2015 directive requires of the applicants to file their heads of argument on 23 March 2015, and of the respondents, on 25 March 2015.<sup>1</sup> In the time available we address the most material bases of opposition to the applicants’ request to be granted leave to intervene as *amici curiae*. We respectfully refer the Court to Gold Fields’ answering affidavit for a more comprehensive perspective.<sup>2</sup>
  
3. As directed in paragraph 3 of the Deputy Judge President’s directive, we accordingly indicate here<sup>3</sup> that, as far as Gold Fields is concerned, the papers filed by it (comprising one affidavit of 33 pages, with no annexures)<sup>4</sup> require to be read in full. The extent to which the four affidavits filed by the applicants, and the extensive annexures thus sought to be introduced in the certification, would be of assistance to

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<sup>1</sup> Para 3 of the letter sent to *Section 27*, the applicants’ attorneys, dated 19 March 2015.

<sup>2</sup> Record pp 414-446. In para 3 the deponent explains that submissions of a legal nature are required by the application and contents of the affidavits to which it responds. We do not follow the approach adopted in the applicants’ heads of argument, which replicate substantial parts of the affidavits (compare e.g. para 4-4.4 of the applicants’ heads of argument with Record p 524 para 22; para 64 of the applicants’ heads of argument with Record p 545 para 71; para 67 of the applicants’ heads of argument with Record p 548 para 75; para 68 of the applicants’ heads of argument with Record p 548 para 76; para 69 of the applicants’ heads of argument with Record p 548 para 77; para 70 of the applicants’ heads of argument with Record p 549 para 76; para 72 of the applicants’ heads of argument with Record p 551 para 81; para 73 of the applicants’ heads of argument with Record p 551 para 82). Where appropriate, and possible (in the limited time available), we refer to some of the more material parts of the applicants’ heads of argument.

<sup>3</sup> The directive does not appear to contemplate that this be indicated in a practice note.

<sup>4</sup> As indicated, this affidavit is found at Record pp 414-446.

the Court seized with the certification application, is one of the crucial questions for consideration in this application. Those parts of the papers would accordingly have to be read in their entirety,<sup>5</sup> unless the applicants relinquish reliance thereon.

4. In essence, Gold Fields opposes the application for intervention as *amici curiae* on the basis that the threshold criteria are not satisfied. In what follows we demonstrate this with reference only to the relevant criteria. We will focus particularly on the requirement that the intended submissions would be *different* from those of the other parties.<sup>6</sup> It is in this respect that, we submit, the application is especially lacking, and that the bases relied on are so generic and lacking in particulars that the application could be applied to any matter involving fundamental rights.<sup>7</sup>

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<sup>5</sup> Accordingly, subject to any indication to the contrary by the applicants (who are responsible for this material) most of Record pp 1-342 needs to be read. Furthermore, subject to other parties' indication to the contrary, Gold Fields' position is that only the answering affidavits themselves (without the very limited annexures introduced in answer, being annexure "SM1" and "SM2" to Anglo American South Africa's answering affidavit) and the replying affidavit itself (without annexures, one of which comprising a supporting affidavit – itself introducing an annexure) need to be read. Accordingly, on the basis and for the reasons aforesaid, the following parts of the record need *not* be read:

<u>Item</u>	<u>Description of document</u>	<u>Pages</u>
43	Annexure "SM1" to Anglo American South Africa's answering affidavit: Email correspondence dated 11 and 12 December 2014 between Webber Wentzel and Richard Spoor Inc	492-494
44	Annexure "SM2" to Anglo American South Africa's answering affidavit: Report of the UN Special Rapporteur on the right to health	495-515
46	Annexure "RA1" to the applicants' replying affidavit: DRD Gold Limited and East Rand Proprietary Mines Limited's notice of withdrawal of opposition	577-582
47	Annexure "RA2" to the applicants' replying affidavit: Village Main Reef Limited and Buffelsfontein Gold Mines Limited's notice of withdrawal of opposition	583-587
48	Annexure "RA3" to the applicants' replying affidavit: Supporting affidavit of the applicants' attorney	588-591
49	Annexure "URI" to the applicants' attorney's supporting affidavit: Timeline for certification application	592-595
50	Annexure "RA4" to the applicants' replying affidavit: First applicant's memorandum of incorporation	596-625
51	Annexure "RA5" to the applicants' replying affidavit: Second applicant's memorandum of association	626-642

<sup>6</sup> Uniform Rule of Court Rule 16A(6)(b); Supreme Court of Appeal Rule 16(6)(c).

<sup>7</sup> See founding affidavit Record p 20 para 25; TAC and Sonke's heads of argument paras 23, 26, 27, 42 and 45.2.

5. The extensive nature of the substantive application is a matter of record;<sup>8</sup> is common-cause; and is not repeated here – despite being an important consideration.

6. Our submissions follow the scheme set out in the above table of contents.

**B. The nature and (changing) scope of this application**

7. This application concerns the intended intervention by two NGOs (the Treatment Action Campaign NPC and Sonke Gender Justice NPC, “TAC” and “Sonke” respectively) into a certification application aimed at authorising a class action. If admitted, the applicants do not intend to participate in the class action itself.<sup>9</sup> Instead, the would-be *amici*’s intended involvement is restricted to what the applicants in the certification application themselves consider “*purely procedural*” preparatory proceedings.<sup>10</sup>

8. The ultimate question in the certification proceedings is whether the Court should grant leave for the institution of a class action *in the terms sought by the applicants for certification*. The applicants for certification did not seek to contend that a certification application was not necessary. Quite to the contrary: they accepted the

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<sup>8</sup> For a short summary, see e.g. Record pp 416-417 paras 6-11, indicating the factual complexity and extensiveness of the papers: 4 750 pages comprising expert medical and mining evidence, historical data, and personal detail of many individuals.

<sup>9</sup> This is now expressly recorded in TAC’s and Sonke’s practice note (s.v. “nature of the motion” on p 3 of the practice note, which contains no paragraph numbers).

<sup>10</sup> Record p 427 para 43. The current applicants seek to distance themselves from this description of the application in which they seek to intervene (para 10 of TAC and Sonke’s heads of argument). They rely in this regard on a *dictum* from *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo* 2001 (4) SA 1184 (SCA) at para 6. That *dictum* deals with the constitutional right to participate in litigation as a member of a class, as contemplated by section 38(c) of the Constitution. Neither the availability of class actions nor any direct reliance on section 38(c) of the Constitution is in issue in the substantive application, however. Accordingly, also this attempt by the applicants to circle back to section 38(c) – which TAC and Sonke rightly did not invoke in their founding papers – is misdirected.

position that certification is essential, and that the class action requires the Court's authorisation (and *inter alia* the Court's sanction of contingency fee agreements and the appropriateness of the class representatives and their lawyers).

9. Accordingly the certification application asserted no direct reliance on section 38(c) of the Constitution. It accepted the need to apply for certification, and expressly asked the Court to certify a class action.
10. Yet the aspirant *amici* requested the consent of the parties to the certification to intervene to address *inter alia* this non-issue: whether certification was necessary, contending (or, at least, implying) that certification was redundant.<sup>11</sup> Taken to its logical conclusion, this contention would render the certification application moot, and therefore liable to be dismissed.<sup>12</sup>
11. Unsurprisingly, this self-contradicting stance (by would-be *amici* purporting to support the application for certification) was not adopted in the TAC's and Sonke's founding affidavit. When this was pointed out by the respondents in their answering affidavits filed in this application,<sup>13</sup> TAC and Sonke suddenly contended that they do in fact rely on this basis in support of their application for intervention.<sup>14</sup> Thus, in reply TAC and Sonke purported to exhume an issue not pleaded in their founding

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<sup>11</sup> Record p 42 para 10, recording that the TAC and Sonke "intend[ed] to consider 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."

<sup>12</sup> See e.g. *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* 2013 (3) SA 315 (SCA), in the context of a dismissal of an appeal on the basis of mootness.

<sup>13</sup> Record p 425 para 39.

<sup>14</sup> Record p 535 para 46, contending that the applicants' reliance on section 38(c) is somehow foreshadowed in paras 26.1, 26.2 and 26.3 of the founding affidavit. This is not correct. Nor does it comply with the Constitutional Court's standard for accuracy in pleading in constitutional litigation, articulated precisely in the context of raising constitutional issues for purposes of *amici* interventions: *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) at paras 24-25.

affidavit.<sup>15</sup> Significantly, they did so in an after-thought attempt to satisfy a material threshold requirement for intervention as *amicus*: novelty.

12. Now, in their heads of argument,<sup>16</sup> TAC and Sonke reveal that their compliance with the novelty criterion indeed relies on section 38(c). This despite it forming no part of their founding affidavit (or, for that matter, any of the four affidavits filed in support of their application).
13. In their heads of argument TAC and Sonke also adopt another position not pleaded in their founding affidavit. It is that Rule 16A(9) of the Uniform Rules of Court, on which this application is based,<sup>17</sup> empowers a court to dispense with the threshold requirements for intervention as *amicus*.<sup>18</sup> The founding affidavit made out no case for dispensing with any of the requirements set out in the Rule. Having asserted compliance with Rule 16A(9) in their founding affidavit, the applicants now preface their argument in support of the contended compliance by referring to the Court's power to dispense with the requirements of Rule 16A.<sup>19</sup>
14. Nonetheless, even in their heads of argument no case is made out for exercising the Court's discretion to dispense with the threshold requirements. It is, specifically, not contended that it is in the interests of justice to do so. Because the non-compliance with the requirements bears adversely on the interests of justice (in that it burdens the Court and the parties, and does not assist the Court), this standard is not satisfied.

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<sup>15</sup> This is, of course, impermissible: Cilliers *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> ed (Juta & Co, Cape Town 2009) at 440.

<sup>16</sup> Para 45.1 of the applicants' heads of argument.

<sup>17</sup> Record p 8 para 3.

<sup>18</sup> Para 16 of the applicants' heads of argument.

<sup>19</sup> Paras 15 and 16 of the applicants' heads of argument.

C. **TAC's and Sonke's application fails to satisfy the threshold requirements for admission as *amicus curiae***

15. As mentioned, this application is governed by Rule 16A of the Uniform Rules of Court.<sup>20</sup> The applicants correctly do not assert any reliance on the common law.<sup>21</sup> Thus the judgment in *S v Engelbrecht (Centre for Applied Legal Studies intervening as amicus curiae)*,<sup>22</sup> which expressly records that it concerns intervention under the common law<sup>23</sup> (in that case, at the Court's own request),<sup>24</sup> and on which the applicants rely,<sup>25</sup> does not assist them.<sup>26</sup>

(1) The legal requirements

16. Rule 16A(5) requires an applicant for admission as *amicus curiae* to
- (a) demonstrate an interest in the underlying proceedings (i.e. the substantive certification application, *in casu*);
  - (b) set out clearly and succinctly the submissions it intends to advance were it to be admitted;
  - (c) set out clearly and succinctly the relevance of its intended submissions to the underlying proceedings;

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<sup>20</sup> *Children's Institute v Presiding Officer, Children's Court, Krugersdorp* 2013 (2) SA 620 (CC) at para 7.

<sup>21</sup> Para 1 of the applicants' heads of argument itself records that "this application is brought in terms of Rule 16A(5) of the Uniform Rules of Court", and para 13 recognises the application of the requirements under Rule 16A.

<sup>22</sup> 2004 (2) SACR 391 (W).

<sup>23</sup> *Id* at para 25.

<sup>24</sup> *Id* at paras 19-20.

<sup>25</sup> Paras 20, 21, 23 and 43 of the applicants' heads of argument.

<sup>26</sup> For a judgment demonstrating the limited application of *Engelbrecht* (which Satchwell J herself reiterated was not intended to have any precedential effect), see e.g. *S v Zuma* 2006 (2) SACR 257 (W) at 364A*ff*. In *Zuma* Van der Merwe J distinguish *Engelbrecht*.

- (d) set out clearly and succinctly its reasons for believing that the intended submissions will assist the Court in determining the substantive proceedings; and
- (e) set out clearly and succinctly its reasons for believing that its intended submissions will be *different* from those advanced by the incumbent parties.<sup>27</sup>

17. In short, what is required is that an aspirant *amicus* advances “new and relevant perspectives”.<sup>28</sup> It is only “insofar as” the would-be *amici*’s putative participation satisfies this twofold requirement that “their participation ... is to be welcomed and encouraged.”<sup>29</sup> Applying this approach, in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* the Constitutional Court itself declined to consider an issue raised by an *amicus* which raised issues which did not concern the incumbent applicants, who enjoyed full legal representation.<sup>30</sup> The same applies in the certification application.<sup>31</sup>
18. In *Koyabe* the Constitutional Court confirmed and applied its previous judgment in *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign*.<sup>32</sup> In the latter judgment it was held that -

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<sup>27</sup> The emphasis on *different* is ours. Rule 16A(6) requires that an application for intervention as *amicus curiae* “(a) briefly describe the interest of the *amicus curiae* in the proceedings; (b) clearly and succinctly set out the submissions which will be advanced by the *amicus curiae*, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are **different** from those of the other parties; and (c) be served upon all parties to the proceedings.”

<sup>28</sup> *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at para 80, emphasis added.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Id* at para 81.

<sup>31</sup> Record p 416 para 7.

<sup>32</sup> 2002 (5) SA 713 (CC).

“The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.”<sup>33</sup>

19. But even where the proposed evidence “*is not irrelevant*” and “*might have been useful in educating the Court about [pertinent] conditions*”, if “*the evidence on record [i]s sufficient for [a Court] to understand [the conditions]*” then “*no further evidence*” is “*needed*”.<sup>34</sup>
  
20. As we shall show, TAC and Sonke’s approach in this application presumes a role for an *amicus* which contradicts Constitutional Court precedent as established in the *locus classicus* on the role of *amici curiae*. TAC itself was a party to this judgment.
  
21. The judgment in *Treatment Action Campaign* confirms that
  - it is not the role of an *amicus* to draw the attention of a Court to matters of law and fact to which attention would otherwise be drawn;
  - participating in the proceedings without having to qualify as a party is a privilege, not a right to be asserted;
  - in return for the privilege to participate as *amicus*, it has a special duty to the Court;
  - it is the duty of an *amicus* to provide cogent and helpful submissions that assist a Court;
  - an *amicus* must not repeat arguments already made by other parties;
  - an *amicus* must raise new contentions;

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<sup>33</sup> *Id* at para 5.

<sup>34</sup> *Id* at para 9.

- new contentions raised by an *amicus* must be raised on the data already before a Court; and
- ordinarily it is inappropriate for an *amicus* to seek to introduce new contentions based on fresh evidence.

22. In *Treatment Action Campaign* the Constitutional Court held that granting admission to a would-be *amicus* is always in the discretion of the Court.<sup>35</sup> It is implicit that this discretion must be exercised judicially.<sup>36</sup> As the Constitutional Court held, “[i]n the exercise of that discretion the Court will consider whether the submissions sought to be advanced by the *amicus* will give the Court assistance it would not otherwise enjoy.”<sup>37</sup> Thus, not only must any would-be *amici*’s participation be relevant, new and useful;<sup>38</sup> it must also assist where no incumbent party does. Furthermore, it does not suffice for an aspirant *amicus* merely to introduce *some* novelty; instead, its submissions must be “substantially new”.<sup>39</sup>
23. Accordingly, on the one hand, an attempt to assist a Court where the Court is already assisted does not provide a basis for a judicial exercise of a Court’s discretion to admit an *amicus*. On the other hand, an *amicus* is not permitted to raise novel issues which do not usefully assist in the determination of relevant issues. For the reasons identified in the answering papers, TAC and Sonke’s application falls foul of these requirements. We deal with some of the most important failings below.

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<sup>35</sup> *Id* at para 3.

<sup>36</sup> *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) at para 8.

<sup>37</sup> *Ibid*, emphasis added.

<sup>38</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 9.

<sup>39</sup> *Id* at para 10 (emphasis added), refusing leave to intervene to the Human Rights Commission for lack of usefulness of its submissions.

(2) Application of the legal requirements

24. In amplification of the bases of opposition set out in Gold Fields' answering affidavit,<sup>40</sup> we make brief submissions on the following three issues in turn: the application's failure to provide a succinct summary of the submissions intended to be advanced; the application's failure to advance substantially new submissions; and the application's failure to focus on relevant issues which would assist the Court seized with the certification application.

(a) *Succinct summary of submissions*

25. As TAC and Sonke recognise in their heads of argument,<sup>41</sup> the Constitutional Court confirmed that the rules of Court<sup>42</sup> require that an application for admission as an *amicus curiae* must set out the submissions to be advanced; explain the relevance of the submissions to the proceedings; and provide the reasons for believing that the submissions would be useful to the Court and different from those of the other parties to the proceedings.<sup>43</sup> The Court further held that these issues are "*not always easy to assess ... from mere allegations in the affidavit in support of an application for admission as amicus*" or "*from a letter requesting consent to be admitted as amicus curiae.*"<sup>44</sup>

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<sup>40</sup> Record pp 419-425 paras 15-32.

<sup>41</sup> Para 36 of the applicants' heads of argument.

<sup>42</sup> The judgment deals with Rule 10 of the Constitutional Court, but it applies equally to Rule 16A of the Uniform Rules of Court. Cf Woolman *et al* (eds) *Constitutional Law of South Africa* 2<sup>nd</sup> ed (Juta & Co Ltd, Cape Town 07-06) at 8-6.

<sup>43</sup> *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) at para 10. The judgment records that it "must be regarded as a general instruction on how to prepare an application for admission as an amicus" (*id* at para 11).

<sup>44</sup> *Ibid.*

26. Therefore, “[f]or a proper assessment of these matters to be made, the application for admission as an amicus must ordinarily be accompanied by a summary of the written submissions sought to be advanced.” A summary is required to enable both the Court and the respondents “to assess the application properly and evaluate the submissions sought to be advanced in the light of the principles governing the admission of an amicus.”<sup>45</sup> The Constitutional Court cautioned that “an applicant who fails to comply with this requirement runs the risk of the application being refused if the [requirements] are not readily ascertainable from the application.”<sup>46</sup>

27. Furthermore, the Constitutional Court had previously held that a constitutional issue must be described with sufficient specificity.<sup>47</sup> Similarly the Supreme Court of Appeal reiterated that “a terse, uninformed description” is insufficient.<sup>48</sup> It held that

“[t]he use of the word ‘succinct’ in Rule 16A(1)(b) is ... deliberate – it signifies the requirement of a ‘brief and clear expression’ (as defined in the Concise Oxford English Dictionary 12<sup>th</sup> ed (2011)) of the constitutional issue concerned. A description can only be ‘brief and clear’ when it has some particularity ...”<sup>49</sup>

28. TAC and Sonke did not summarise their legal argument in their Rule 16A letter.<sup>50</sup> Their founding affidavit fails likewise,<sup>51</sup> as do their heads of argument.<sup>52</sup> One of the

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) at para 24, in the context of the requirement to provide “a clear and succinct description of the constitutional issue” in Rule 16A(1), which applies to a notice by a party raising a constitutional issue. The same wording is used in Rule 16A(6) which applies to an *amicus* application.

<sup>48</sup> *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at paras 64-65. Also this judgment deals with the operative words “a clear and succinct description of the constitutional issue” as used in Rule 16A(1), but the same wording is used in rule 16A(6).

<sup>49</sup> *Id* at para 72.

<sup>50</sup> Under the heading “Our clients’ submissions” the applicants’ Rule 16A(1) letter simply stated that they intended advancing legal argument in support of the certification application (Record p 44 para 9.1), intended to introduce evidence (Record p 42 para 9.2), and “intend to consider whether there was a need for the applicants [in the certification application] to seek certification, or whether the class action could have been brought directly under section 38(c) of the Constitution” (Record p 42 para 10). It is in relation to the latter aspect that

recurring refrains is the terse recordal that the TAC and Sonke intend “*to focus*” on “[t]he framework of class action law in South Africa”.<sup>53</sup>

29. It is precisely this approach which falls foul of the requirement that an aspirant *amicus* articulate its proposed argument with sufficient cogency, clarity, and succinctness. Indeed, on this basis in one of the judgments which TAC itself invokes in support of its proposed participation, the Supreme Court of Appeal questioned the utility of TAC’s participation. In that case it was not TAC’s intended focus on a *framework*, but its focus through a *prism* which attracted the Court’s comment. It observed that “[w]hat we are to make of viewing the legislation through the prism of the Constitution was not developed by the TAC.”<sup>54</sup>
30. In this application TAC and Sonke similarly fail to demonstrate with the required specificity how its focus on a framework will assist the Court seized with the certification application.

**(b) Substantially new submissions**

31. As the Constitutional Court’s own approach shows, an *amicus* purporting to canvass a “*central issue*” already dealt with by an incumbent party cannot properly “*allege that*

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four sub-issues were merely identified, namely: a direct reliance on section 38(c) in support of a claim for damages; the application of section 173 to class actions brought directly under section 38(c); the gold mining industry’s role in South Africa’s political economy, and what this means for a direct reliance on section 38(c); and corporate accountability and the right to an effective remedy under international law. But, as mentioned, the founding affidavit did not invoke the section 38(c) issue.

<sup>51</sup> In para 39 of the applicants’ heads of argument they contend that the founding affidavit “*briefly describe*” the four legal issues invoked. Yet the argument reveals that this assertion rests on the understanding that identifying issues on which “*TAC and Sonke intend to focus*”, and “*breaking down*” one of them, somehow qualifies as a *description* which is brief and succinct, containing some particularity.

<sup>52</sup> Para 45.2 of the applicants’ heads of argument simply states that “*the legal submissions that the TAC and Sonke seek to advance will focus more squarely on the relationship of the certification sought in the main application and the broader framework of class action law in South Africa.*”

<sup>53</sup> Record p 20 para 26.1.

<sup>54</sup> *Cipla Medpro (Pty) Ltd v Aventis Pharma SA* 2013 (4) SA 579 (SCA) at para 45.

*it would raise new contentions that had not been raised by the parties.*<sup>55</sup> Similarly, the Constitutional Court referred to this Court’s judgment (by Satchwell J) in *S v Engelbrecht* – on which the applicants rely – to demonstrate that “*submissions*” under Rule 16A contemplate “*background information not supplied by the original parties*”.<sup>56</sup> In short, submissions by an *amicus* must be “*substantially new*”.<sup>57</sup>

32. The applicants cannot deny that the Wilson evidence overlaps materially with evidence already adduced by the applicants for certification.<sup>58</sup> They nonetheless contend that because the evidence already adduced had been summarised *inter alia* in an affidavit by the compiler of the report herself, therefore TAC and Sonke are now “*free to introduce the [full, unabridged] evidence*”.<sup>59</sup> The express basis for this contention is that whatever is not “*a mere repetition of what’s already in the record of proceedings*” “*would be of assistance to the Court*”.<sup>60</sup> This argument is contrary to law, logic and practice.
33. First, it misconstrues the legal test. The test is not whether there are interstices not covered by the record of proceedings. The test is whether that which the aspirant *amicus* seeks to introduce is substantially new.
34. Second, the argument also fails at the level of first principle. It does not follow that expanding upon evidence which had been summarised by its compiler herself would

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<sup>55</sup> *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) at para 14.

<sup>56</sup> *Children’s Institute v Presiding Officer, Children’s Court, Krugersdorp* 2013 (2) SA 620 (CC) at para 23 at para 22, quoting *S v Engelbrecht (Centre for Applied Legal Studies intervening as amicus curiae)* 2004 (2) SACR 391 (W) at para 37 (emphasis added).

<sup>57</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 10.

<sup>58</sup> See e.g. para 71 in their heads of argument, relating to “*the evidence in the affidavits of the expectant class representatives*”. Apart from the three substantial founding affidavits and extensive expert evidence, there are 56 affidavits by the prospective class representatives.

<sup>59</sup> Para 68 of the applicants’ heads of argument.

<sup>60</sup> Para 53 of the applicants’ heads of argument.

assist the Court. It is the converse which is true. A Court is generally assisted by attempts to adduce *concise* evidence, not by exercises in the *proliferation* of evidence.<sup>61</sup>

35. Third, TAC and Sonke’s argument fails as a matter of practice and procedure. This is because a would-be *amicus* does not have procedural entitlements which it can assert. It is, in particular, not “*free to introduce ... evidence*”. Evidence may only be introduced to the extent that leave is granted by the Court, in the judicial exercise of its discretion.
36. Departing from this flawed premise, the applicants further argue – without reference to the answering papers – that the respondents’ opposition to introducing Wilson’s affidavit “*cannot be correct*”, because it disavows the “*relevance*” of “*the broader context*”.<sup>62</sup> It is, with respect, the applicants who are incorrect – at every level.
37. The legal test for admission of evidence by an *amicus* is not mere relevance. While relevance is required, the standard is much higher: the criterion is whether additional evidence by a non-party is in the interests of justice. Thus the applicants’ argument fails already at the legal entry level.

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<sup>61</sup> Significantly the applicants are unable to bring themselves within an exception recognised in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para 5, where the Constitutional Court had “*to decide whether the applicant and the amicus curiae may supplement the truncated record filed in this Court. It is in the interest of a proper adjudication of this dispute that the record be supplemented. The record is minimal and contains neither new nor disputed matter. It is drawn from the full record that served before the preceding courts. No prejudice has been claimed or suffered by any party. Also, the added record is helpful because it provides insights into the submissions before us.*” This case does not concern an attempt by any incumbent party (supported by an *amicus*) to remedy an erroneous truncation (for purposes of an appeal) of a confined record.

<sup>62</sup> Para 55 of the applicants’ heads of argument.

38. On a factual level it is incorrect to construe the respondents' case in relation to Wilson as relying on irrelevance. As Gold Fields' answering affidavit shows, its opposition to introducing Wilson's evidence is that it is not substantially new.<sup>63</sup> Having misconceived Gold Fields' clear case, the applicants have failed to meet it.
39. This defect is perpetuated in continuing to replicate not only the contents of the replying affidavits under the heading "*The Roberts affidavit*", but also those under the heading "*The evidence in the affidavits of the expectant class representatives*".<sup>64</sup> Perpetuating their approach, the applicants concede "*overlaps*"<sup>65</sup> between the Wilson evidence and the numerous and voluminous affidavits filed in the certification application.<sup>66</sup> The applicants merely contend that there are "*clear differences*".<sup>67</sup> Again, the test is not whether differences can be demonstrated (with whatever degree of clarity). It is whether the so-called "*differences*" (which must, necessarily, not be opaque) are such as to qualify the "*substantially new*" criterion, and whether it would assist the Court in a way which the incumbent parties cannot or do not.
40. Having conceded – "*as they must*" – that the 56 individual affidavits (filed in addition to the main affidavits in support of the certification application) "*is of significant*

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<sup>63</sup> Record pp 440-443 paras 79-87. For instance, Record p 440 para 80 demonstrates that the allegations in paras 14-27 of Wilson's affidavit are "*not materially different*" from the submissions advanced in the affidavit of Ms Jaine Roberts (p 1186-1188 para 9-11 of the certification application) and by the Abrahams class (e.g. pp 986-987 paras 23.7-23.9; p 1002 paras 55-56; and p 1015 para 77 of the certification application), the Spoor class (p 316 para 117.5; p 350 para 171 of the certification application) and the LRA class (pp 1583-1590 and pp 1591-1601 of the certification application); and Record p 443 para 87 demonstrates that the submissions advanced in paras 82-88 of the Wilson affidavit not only revisits what he describes as "*common cause*", but also repeats what is covered in the Trapido study – referenced throughout the founding papers in the certification application (e.g. p 294 para 97.2; p 879 para 37; p 296 para 100.1; p 1498 para 25.2.2; p 1500 para 27; and pp 1591-1601 of the certification application – which not only annexed the unabridged Trapido study, but also introduces and summarises other studies collecting similar data.

<sup>64</sup> As is done in paras 69-73 of the applicants' heads of argument.

<sup>65</sup> Para 71 of the applicants' heads of argument.

<sup>66</sup> As mentioned, apart from the three substantial founding affidavits and affidavits introducing extensive expert evidence, there are 56 affidavits by the prospective class representatives.

<sup>67</sup> Para 71 of the applicants' heads of argument.

*assistance to the Court*”, the applicants have themselves demonstrated that any evidence intended to bear on socio-economic circumstances fail the test for the admission of evidence by an *amicus curiae*.

41. Compounding this problem for themselves, the applicants repeat<sup>68</sup> their argument that “*[i]t is not as though [sic] the amicus respondents admit that the evidence of the class representatives is both correct and representative of the entire would-be class.*”<sup>69</sup> This is wrong, both in fact and in law. In law, class certification proceedings do not require (for purposes of the certification application) that evidence be “*representative of the entire would-be class*”. Moreover, as a matter of fact, Gold Fields does not dispute – for purposes of certification – the correctness of the evidence.<sup>70</sup> It is, in fact, not Gold Fields but Wilson himself who states that “*205 participants from one municipality do not necessarily constitute a representative sample of all former gold mineworkers.*”<sup>71</sup> Nonetheless, on the basis of this sample he purports to put up the “*precise nature and manifestations*” of the conditions described by 65 class representatives themselves in their own individual affidavits.
42. The applicants cannot and do not explain how it could assist the court seized with the certification application to consider e.g. the statistical number of households without television sets when the socio-economic circumstances of class representatives are not

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<sup>68</sup> First pleaded at Record p 548 para 77.

<sup>69</sup> Para 69 of the applicants’ heads of argument.

<sup>70</sup> Record p 440 para 79.

<sup>71</sup> Record p 271-272 para 47. He adds that he “*can think of no good reason why the experiences of former gold mineworkers in this district should differ significantly from those of former gold mineworkers elsewhere in the former Transkei*” (*ibid.*, emphasis added), but does not purport to extrapolate commonality to the rest of South Africa or its neighbouring countries in question.

only explained by “*qualitative evidence*”,<sup>72</sup> but is in fact (for purposes of the certification application) common cause.

**(c) Relevancy of submissions**

43. Finally, those residual issues as the applicants desire to introduce are not relevant to the certification application.
44. The first of these issues is the international law debate regarding States’ responsibility to introduce legislative and other measures to ensure legal recourse in the form of class actions, and to protect against impunity of multinational corporations. After the Constitutional Court’s judgment in *Mukaddam v Pioneer Foods (Pty) Ltd*,<sup>73</sup> the Supreme Court of Appeal’s judgment in *Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd*,<sup>74</sup> and the High Court’s judgment in *Pretorius v Transnet Second Defined Benefit Fund*,<sup>75</sup> it is with respect not understood what purpose would be served by referring to United Nations soft-law in support of recognising class actions in South African law. Not only has the Constitutional Court itself expressly recognised class actions, it has also repeatedly cautioned against applying soft-law directly.<sup>76</sup>
45. Furthermore, the impunity of multinational corporations is simply not relevant to the certification proceedings. Nor is corporate liability. In fact, Gold Fields’ citation by

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<sup>72</sup> Para 69 of the applicants’ heads of argument.

<sup>73</sup> 2013 (5) SA 89 (CC).

<sup>74</sup> 2013 (2) SA 213 (SCA).

<sup>75</sup> 2014 (6) SA 77 (GP).

<sup>76</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at paras 52-54; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 32; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para 34.

the applicants in the certification application and the applicants for intervention as *amici* itself discloses that nine corporations have been cited to ensure that the relevant entity is before Court and bound by the judgment. The same applies to e.g. Harmony (cited in different guises as first, second fourth, fifth, sixth, seventh, eight and thirty-second respondent). Thus the situation for which international law is invoked demonstrably does not arise.

46. Instead, this issue raises extraneous and irrelevant questions of law which would unduly burden the Court in adjudicating upon (and the parties in participating in) the certification application.<sup>77</sup> It is not in the interests of justice to precipitate the hearing of extraneous academic issues by admitting an *amicus* to raise and debate them.
47. Accordingly, also in this respect, the *amicus* intervention application fails to comply with the legal requirements. If anything, the intended introduction of this issue is the slip that shows: participation by the applications will introduce side-issues that have not been identified by any of the incumbent parties either as triable or as relevant.

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<sup>77</sup> As the approach of the United State Supreme Court (which is the most *amicus*-friendly Court in one of the most pro-*amicus* jurisdictions of the world) demonstrates

*“[a]n amicus curiae brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favoured”* (US Supreme Court Rule 37.1).

Rule 10 of the Constitutional Court Rules is similar to those of the US Supreme Court (Erasmus *Superior Court Practice* (Juta & Co Ltd, Cape Town 2014 serv41) at C4–24), and therefore of particular significance. Rule 16A of the Uniform Rules of Court is, in turn, similar to Rule 10 of the Constitutional Court Rules. See also Murray *“Litigation in the public interest: Intervention and the Amicus Curiae”* 1994 SAJHR 240 at 256, observing that

*“if the broad locus standi provision in s 7(4) of Constitution is matched by a similarly broad right to intervene, the courts dealing with rights issues may well be overburdened with repetitious and irrelevant material. Moreover, in most cases, an intervener in the public interest does not require the same rights as an original party.”*

**D. Conclusion: Appropriate relief and costs**

48. The applicants make extensive submissions in support of a costs order in their favour, should they succeed; or no costs order, should they fail.<sup>78</sup> They invoke two judgments by the Constitutional Court in this respect.<sup>79</sup> Neither deals with an application for intervention by an *amicus*, or costs in favour of an *amicus*.<sup>80</sup> Constitutional Court judgments which do deal with costs in relation to *amici* make it clear that costs are not usually awarded in favour or against an *amicus*.<sup>81</sup>
49. We submit that, this being an interlocutory application, if successful costs should be reserved for determination by the Court seized with the certification application. It is that Court which will be best placed to determine the extent to which the applicants' putative participation assisted it, and whether exceptional circumstances warrant a costs order in favour of the applicants. TAC and Sonke's request for a contrary approach rest on the misapprehension that the mere opposition to an *amicus* application is somehow unreasonable and therefore warrants a costs order. This approach is not consistent with what Rule 16A(7), which itself explicitly contemplates an entitlement to any incumbent party to oppose an *amicus* intervention. TAC and Sonke's approach is, furthermore, contrary to Constitutional Court case-law.<sup>82</sup>

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<sup>78</sup> The final substantive section of their heads of argument is devoted to this topic.

<sup>79</sup> *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) and *Bothma v Els* 2010 (2) SA 622 (CC).

<sup>80</sup> Both cases deal with costs in favour of a party.

<sup>81</sup> *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd* 2006 (6) SA 103 (CC) at para 28; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 63; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) at para 67; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* 2014 (4) SA 437 (CC) at para 30.

<sup>82</sup> *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) at paras 10-11

"... This requirement [relating to a summary of the written submissions sought to be advanced] applies equally to a request addressed to the parties for their consent. The parties must be placed in a position

50. Should this application fail, Gold Fields does not seek costs against the applicants – despite its position that the application is defective and should (for the reasons set out above, and identified already in the answering papers) not have been pressed.
51. We accordingly ask that the application be dismissed with no order as regards costs.
52. Strictly in the alternative, to the extent that this Court may nonetheless be of the view that the Court seized with the certification application might be assisted by TAC and Sonke’s submissions and that the other requirements for certification are met, we ask that the Court impose<sup>83</sup> conditions, as was in fact contemplated in the concluding paragraph of the applicants’ founding affidavit<sup>84</sup> (which the notice of motion mentioned but did not specify).<sup>85</sup>
53. In this regard we submit that it is just and equitable that, if – despite Gold Fields’ position to the contrary – the applicants be admitted, the terms that are usually

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*where they can assess properly whether the request complies with the underlying principles governing applications for admission as amicus curiae.*

*... We are mindful that in the past there has been a tendency to grant consent for the mere asking. Consent should not be given as a matter of course. Parties who are requested to give consent must apply their minds to these principles ...”*

<sup>83</sup> As the Constitutional Court confirmed in *Children’s Institute v Presiding Officer, Children’s Court, Krugersdorp* 2013 (2) SA 620 (CC) at para 20, it is ultimately the function of a court granting a Rule 16A application to determine the terms and conditions on which an *amicus* is permitted to participate in proceedings.

<sup>84</sup> Record p 26 para 40.

<sup>85</sup> Record p 2 prayers 2-4 only deals with the admission of evidence, leave to file head of argument, and leave to present oral argument. As the Constitutional Court held in *Children’s Institute v Presiding Officer, Children’s Court, Krugersdorp* 2013 (2) SA 620 (CC) at para 23, “*the phrase ‘terms and conditions as it may determine’ in rule 16A(8) empowers a high court to admit any ‘submissions’ by an amicus and to determine whether those submissions will include: (a) written argument, and if so, to what extent; (b) oral argument, and if so, the duration thereof; and (c) the nature and extent of the evidence sought to be led, and if so, under what conditions. In making these determinations the court will obviously be guided by what is in the interests of justice.*” The Constitutional Court’s own practice demonstrates that *amici* are under tight restrictions as regards the length and duration of written and oral argument, and the extent of their intervention. The same applies in the Supreme Court of Appeal and in comparable jurisdictions.

permitted in the Supreme Court of Appeal (with changes required by the context) be imposed.<sup>86</sup>

- (a) TAC and Sonke's written submissions may not exceed 20 pages.<sup>87</sup>
- (b) TAC and Sonke's written submissions may not repeat any matter set forth in the argument of the other parties, and must raise new contentions that are useful to the Court.<sup>88</sup>
- (c) TAC and Sonke shall not present oral argument.<sup>89</sup>
- (d) TAC and Sonke's evidence may not include matter which is
  - (i) common cause for purposes of certification, or substantially similar to material already adduced as evidence by the applicants for certification;<sup>90</sup> or
  - (ii) extraneous to the issues raised in the certification application.<sup>91</sup>

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25 March 2015

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<sup>86</sup> Supreme Court of Appeal Rule 16.

<sup>87</sup> Supreme Court of Appeal Rule 16(7)(b).

<sup>88</sup> Supreme Court of Appeal Rule 16(7)(a).

<sup>89</sup> Supreme Court of Appeal Rule 16(8).

<sup>90</sup> The affidavit of Wilson and its annexures (Record pp 254-329) fall within this category.

<sup>91</sup> The affidavit of Grover and its annexures (Record pp 86-253) fall within this category.