

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA, AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA

Plaintiffs (Appellants)

and

BARRICK GOLD CORPORATION

Defendant (Respondent)

A N D B E T W E E N:

ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA WANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI

Plaintiffs (Appellants)

and

BARRICK GOLD CORPORATION

Defendant (Respondent)

**FACTUM OF THE RESPONDENT,
BARRICK GOLD CORPORATION**

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Steven G. Frankel (LSO# 58892E)
Tel: 416.367.7441
Email: sfrankel@dwpv.com

Anisha Visvanatha (LSO# 74421O)
Tel: 416.367.7480
Email: avisvanatha@dwpv.com

Alexander Barnes (LSO# 89981N)
Tel: 416.863.4131
Email: abarnes@dwpv.com

Lawyers for the Defendant (Respondent)

TO: **CFM LAWYERS LLP**
400-856 Homer Street
Vancouver, BC V6B 2W5

Joe Fiorante, K.C. (LSBC# 9197 / LSO# 86342O)
Email: jfiorante@cfmlawyers.ca

Jen Winstanley (LSBC# 508967)
Email: jwinstanley@cfmlawyers.ca

Tel: 604.689.7555

Lawyers for the Plaintiffs (Appellants)

AND TO: **PHILLIPS BARRISTERS PROFESSIONAL CORPORATION**
36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5

John Kingman Phillips (LSO# 46206E)
Email: john@phillipsbarristers.ca

W. Cory Wanless (LSO# 57288M)
Email: cory@phillipsbarristers.ca

Patti Shedden (LSO# 46210W)
Email: patti@phillipsbarristers.ca

Tel: 647.261.4486

Lawyers for the Plaintiffs (Appellants)

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PART I – OVERVIEW

1. This case is a quintessential example of impermissible forum-shopping. The Appellants are residents of Tanzania who claim that they were injured, or that they are the dependants of other residents of Tanzania who were killed, by members of the Tanzania Police Force at or in the vicinity of the North Mara Gold Mine (the “**Mine**”). The Mine is located in Tanzania. It is owned and operated by a Tanzanian corporation called North Mara Gold Mine Limited (“**NMGML**”), which has agreements with the Tanzania Police Force that are governed by Tanzanian law. Yet the Appellants sued Barrick Gold Corporation (“**Barrick**”),¹ the indirect parent company of NMGML, in Ontario. They did so even though they have no connection to Barrick and none of the events in question occurred in Ontario.

2. Justice Morgan saw this case for what it is in the Court below. He therefore stayed these proceedings on the basis that Tanzania is a clearly more appropriate forum than Ontario in which to adjudicate the matters at issue. In doing so, he applied correctly well-established principles concerning the doctrine of *forum non conveniens*. He also made a number of factual findings that are amply supported by the record. Those findings are fatal to the arguments the Appellants now advance in this Court.

3. Justice Morgan’s ruling gave effect to the principle of comity and recognized that it would be unfair for these proceedings to be tried in Ontario because important evidence that goes to the heart of the claims at issue is highly unlikely to be available here. His Decision is entitled to significant deference.

¹ Now known as Barrick Mining Corporation.

4. The Appellants effectively ask this Court to conduct a *de novo* hearing. They do little more than recycle contentions that were considered carefully and dismissed by Justice Morgan. They also ignore important factual findings while faulting Justice Morgan for findings he never made. Moreover, the Appellants invite this Court to sit in judgment of the Tanzanian judiciary and the administration of civil justice in that country. They proceed as if the principle of comity does not exist.

5. The true quarrel of the Appellants is with the manner in which Justice Morgan weighed the evidence and exercised his discretion in arriving at the outcome that he did. They have identified no error of law or palpable and overriding error of fact.

6. This appeal is devoid of merit. It should be dismissed.

PART II – SUMMARY OF FACTS

A. Background

(i) The Appellants and their Claims

7. The Appellants claim to be residents of local villages in Tanzania situated in the vicinity of the Mine. Sixteen of the Appellants assert that they are relatives of persons who were allegedly killed by members of the Tanzania Police Force. The remaining 13 claim they were personally injured by members of the Police Force. Their claims pertain to incidents that allegedly occurred during the period from April 2021 to July 2023. There is no suggestion that any such acts were engaged in by employees of either NMGML or Barrick.

8. The Mine is frequently the target of violent gangs of trespassers who invade the Mine site illegally to steal gold-bearing rock, fuel, equipment and other property. They are regularly armed with weapons. Many of these trespassers are part of local criminal syndicates. Their armed

incursions are well-planned and orchestrated, and often involve climbing 14-foot walls that surround the perimeter of the Mine and are topped with barbed wire. These armed intruders threaten and endanger the lives and safety of employees of NMGML, private security personnel and employees of other third-party contractors. Moreover, intruders place themselves at risk by invading an active mining operation that can be hazardous for anyone who is not intimately familiar with the site and/or does not have appropriate safety training.² Contrary to the suggestion of the Appellants, violent trespassers are hardly “artisanal miners” who somehow wandered onto the Mine site while prospecting for gold.³

9. Every witness with firsthand knowledge of the events in question resides in Tanzania. The primary witnesses are current and former: (i) members of the Tanzania Police Force; (ii) residents of local villages that surround the Mine; (iii) medical personnel who allegedly treated the Appellants or members of their families in Tanzania; (iv) employees of NMGML; and (v) employees of a Tanzanian company called Nguvu Moja that NMGML hired to provide unarmed security at the Mine. Rather than sue the Tanzania Police Force, NMGML or Nguvu Moja in Tanzania, however, the Appellants chose to sue Barrick in Ontario in negligence and for alleged complicity in supposed breaches of customary international law.⁴

² Affidavit of Apolinary Lyambiko, October 1, 2023 (“**Lyambiko Affidavit**”) ¶¶28-31 [Respondents’ Compendium (“**RCOM**”) Tab 4, pp. 91-93].

³ Appellants’ Factum (“**FOA**”) ¶¶1-2.

⁴ Statement of Claim, November 23, 2022 ¶¶13, 44-84, 148-153; Statement of Claim, February 5, 2024 ¶¶13, 36-76, 111-116; Reasons of Justice Morgan, November 26, 2024 (“**Reasons**”) ¶¶10-11; Transcript of Cross-Examination of Sebastiaan Bock, May 28, 2024 (“**Bock Transcript**”), q. 455 [RCOM Tabs 1, 2 & 23, pp. 3-32, 35-63 & 261-262].

(ii) **Barrick**

10. Barrick is an international mining company that has a small corporate office in Toronto where fewer than 55 people work. These employees are involved in various corporate functions. None of them is responsible for managing or overseeing operations at the Mine, or played any role in the matters at issue.⁵

11. Barrick has a decentralized structure. All mines in the Company's portfolio are owned and operated by separate affiliates domiciled in the jurisdictions in which the mines are located. Regional teams are responsible for key functions in those countries. No member of Barrick's regional team for Africa and the Middle East—which has oversight over activities of the Company's affiliates in Tanzania—resides in Ontario. Most of them reside in Africa, including in Tanzania.⁶

12. In attempting to establish a connection between the claims at issue and Ontario, the Appellants rely upon corporate policies of Barrick that require everyone associated with it to respect human rights at mines in the Company's portfolio. The Appellants took the same approach in the Court below.⁷ They ignore that Barrick has a bottom-up approach to sustainability that requires employees of local affiliates to implement Company-wide policies at each operating

⁵ Affidavit of Grant Beringer, October 1, 2023 (“**Beringer Affidavit**”) ¶19 [RCOM Tab 6, pp. 121-122].

⁶ Reasons ¶16-18; Beringer Affidavit ¶18; Affidavit of Sebastiaan Bock, October 1, 2023 (“**Bock Affidavit**”) ¶10-12; Bock Transcript, q. 7; Barrick Information Circular, May 2, 2023 (“**2023 Information Circular**”), p. 123; Barrick Annual Report 2021, p. 14 [RCOM Tabs 6, 5, 23, 33 & 34, pp. 121, 107, 252-253, 513 & 515].

⁷ Plaintiffs' Factum, September 27, 2024 ¶5-9, 23, 27-52; FOA ¶ 3-5, 11, 19, 22, 26-27, 32-42; Reasons ¶14-15, 31 [RCOM Tab 3, pp. 65-75].

mine.⁸ Indeed, Barrick's Human Rights Policy recognizes explicitly that responsibility for implementing the Policy rests with General Managers and Executive Directors in countries where the mines are located.⁹ Even the diagram from Barrick's 2023 Information Circular the Appellants rely upon in their Factum evidences this bottom-up approach, and includes arrows that illustrate the upward flow of information from each individual mine.¹⁰

13. No member of Barrick's Sustainability team resides in Ontario. Barrick's most senior Sustainability Executive and regional sustainability lead for Africa both reside in South Africa. None of the Barrick personnel who developed the corporate policies the Appellants rely upon resides in Ontario.¹¹

14. More generally, only one of Barrick's executive officers is based in Ontario. That executive has no involvement in the operation of the Mine. Not a single member of the Company's Board of Directors resides here.¹²

(iii) NMGML

15. The Mine is located in a remote area of Tanzania near the country's border with Kenya. It is owned, operated and managed by NMGML. Barrick has an indirect 84% ownership interest in

⁸ Transcript of Cross-Examination of Grant Beringer, May 29, 2024, q. 178; 2023 Information Circular, p. 117; Barrick Annual Report 2022, p. 67; Barrick Human Rights Policy; Barrick Sustainability Report 2020, p. 12; Barrick 2020 Annual Report to the Voluntary Principles on Security and Human Rights ("VPSHR"), p. 3 [RCOM Tabs 24, 33, 35, 36, 37 & 38, pp. 267-268, 512, 517, 519, 521, 523].

⁹ Barrick Human Rights Policy. See also Barrick's Annual Report 2022, p. 67 [RCOM Tabs 36 & 35, pp. 519 & 517].

¹⁰ FOA ¶35; 2023 Information Circular, p. 117 [RCOM Tab 33, p. 512].

¹¹ Reasons ¶17; Beringer Affidavit ¶24-26, 29; Affidavit of Ashleigh Lawson, April 5, 2024 ¶6 [RCOM Tabs 6 & 7, pp. 123-125 & 140].

¹² Bock Affidavit ¶12; Beringer Affidavit ¶20 [RCOM Tabs 5 & 6, pp. 107 & 122].

NMGML, with the Government of Tanzania owning the remaining 16%. Barrick and the Government also co-own a Tanzanian company called Twiga Minerals Corporation Limited (“**Twiga**”), which provides management services to the Mine.¹³

16. The Mine is a local operation. The General Manager of the Mine, Apolinary Lyambiko, is a citizen of Tanzania and resides there. He is responsible for day-to-day management of the Mine and has final say on operational matters.¹⁴ He reports to the Board of Directors of NMGML, which meets in person in Tanzania.¹⁵

17. NMGML has a workforce of more than 1,350 people, approximately 96% of whom are Tanzanian nationals. No employees of NMGML reside in Ontario. Most of NMGML’s Department Heads are Tanzanian nationals. The remainder are nationals of other African countries. All of NMGML’s employees involved in matters pertaining to security and community relations are Tanzanians. Importantly, all sustainability initiatives involving the Mine are implemented on the ground in North Mara. They are not delivered from a corporate office in Ontario.¹⁶

¹³ Reasons ¶4; Bock Affidavit ¶16, 21 [RCOM Tab 5, pp. 108, 113].

¹⁴ Reasons ¶19; Lyambiko Affidavit ¶1, 13, 15; Bock Affidavit ¶23 [RCOM Tabs 4 & 5, pp. 81, 85 & 113].

¹⁵ Reasons ¶18, 20; Lyambiko Affidavit ¶14-15; Bock Affidavit ¶23, 26-27; Transcript of Cross-Examination of Apolinary Lyambiko, May 18, 2024 (“**Lyambiko Transcript**”), p. 6, q. 407 [RCOM Tabs 4, 5 & 22, pp. 85, 113-115 & 242-243].

¹⁶ Reasons ¶19, 21; Lyambiko Affidavit ¶13, 15, 18-21; Bock Affidavit ¶23; Lyambiko Transcript, q. 417-420 [RCOM Tabs 4, 5 & 22, pp. 85-87, 113 & 246-247].

(iv) Security at the Mine

18. In response to the extraordinarily difficult security environment described above, NMGML has implemented reasonable and appropriate security measures. These include arrangements with a private contractor as well as with the Tanzania Police Force.

19. In August 2020, NMGML and Twiga (rather than Barrick) entered into an agreement with Nguva Moja for the provision of unarmed security services at the Mine. The agreement was negotiated in Tanzania among Tanzanian companies and was governed by Tanzanian law. Security services were performed by Tanzanian personnel. Fees for these services were paid into Nguvu Moja's Tanzanian bank account. In July 2023, NMGML and Twiga terminated their arrangements with Nguvu Moja and contracted with a different Tanzanian company to provide unarmed security services at the Mine.¹⁷

20. NMGML has also entered into Memoranda of Understanding (“**MOUs**”) with the Tanzania Police Force concerning the provision of supplemental policing services in the area of the Mine. Barrick is not party to these MOUs. Contrary to the assertions of the Appellants, there is no evidence that the MOUs were entered into “[a]t Barrick’s direction” or that Barrick negotiated them. Executives who have signed these MOUs have done so on behalf of NMGML in their capacity as its Directors.¹⁸

¹⁷ Reasons ¶¶23; Lyambiko Affidavit ¶¶34-40; Lyambiko Transcript, qq. 410-414; Security Services Agreement, August 25, 2020 [RCOM Tabs 4, 22 & 39, pp. 94-96, 244-245 & 524].

¹⁸ FOA ¶¶44-47; Lyambiko Affidavit ¶¶44; Beringer Affidavit ¶¶44; Bock Transcript, qq. 329-331; Memorandum of Understanding, May 24, 2022 (“**2022 MOU**”), ss. 7(b), 11(a) [RCOM Tabs 4, 6, 23 & 41, pp. 97, 130, 259-260 & 664-665].

21. The MOUs that were in place during the relevant period: (i) were governed by Tanzanian law; (ii) provided for the payment of allowances¹⁹ in Tanzanian shillings to Tanzanian bank accounts of the Tanzania Police Force; and (iii) required members of the Police Force to comply with relevant human rights standards.²⁰

22. Neither NMGML nor Barrick controls, directs or supervises the Tanzania Police Force. Instead, the Tanzania Police Force is a sovereign, independent police force that operates under its own chain of command. The uncontested evidence is that even in the absence of the MOUs, the Police Force would operate in the area of the Mine.²¹

23. There is nothing improper about these MOUs. Arrangements of this nature are commonplace both in Tanzania and internationally. Indeed, the provision of support to local police forces is expressly contemplated by the Voluntary Principles on Security and Human Rights. The Voluntary Principles are “best practice” standards that have been adopted by prominent companies in the extractives sector, leading NGOs and national governments (including the Government of Canada). The Voluntary Principles recognize that “[i]n cases where there is a need to supplement security provided by host governments, Companies may be required or expected to contribute to,

¹⁹ Not wages, as the Appellants contend in their Factum at paragraph 5.

²⁰ Reasons ¶27; Lyambiko Affidavit ¶47, 51-52, 57-58, 61; Memorandum of Understanding, April 30, 2019 (“**2019 MOU**”); 2022 MOU [RCOM Tabs 4, 40 & 41, pp. 97-102, 620 & 652].

²¹ Reasons ¶33; Lyambiko Affidavit ¶42, 45-46; Beringer Affidavit ¶44; Expert Report of Leonard Shaidi, October 2, 2023 (“**First Shaidi Report**”) ¶53-54 [RCOM Tabs 4, 6 & 13, pp. 96, 130 & 173].

or otherwise reimburse, the costs of protecting Company facilities and personnel borne by public security”.²²

24. The Voluntary Principles thus reflect the reality that police forces are frequently under-resourced in remote areas where mines are often located, and would be unable to protect properly the lives and safety of people working at or near those mines in the absence of financial and other assistance. That is certainly true of the Tanzania Police Force in the area of the Mine. In the absence of supplemental policing services provided by the Tanzania Police Force, the safety and security of Mine personnel and employees of third-party contractors would be placed at risk.²³

25. The Appellants assert incorrectly in paragraph 4 of their Factum that “the [Tanzania Police Force] provides a heavily armed security force at North Mara with 142 officers and 3 liaison officers working in the mine’s security office”.²⁴ In reality, members of the Tanzania Police Force operate primarily outside the Mine site. They only enter the Mine site in limited circumstances.²⁵

B. The Evidentiary Record

26. The claims at issue in these proceedings thus have no connection to Ontario. They instead involve allegations made by residents of Tanzania concerning the supposed actions of current or former members of the Tanzania Police Force at or near a mine in Tanzania that is owned and operated by a Tanzanian company. In these circumstances, Barrick moved to dismiss the

²² Beringer Affidavit ¶28, 45-48; First Shaidi Report ¶55; VPSHR, p. 4 [RCOM Tabs 6, 13 & 42, pp. 124-131, 173 & 679].

²³ Lyambiko Affidavit ¶48; Beringer Affidavit ¶48 [RCOM Tabs 4 & 6, pp. 98 & 131].

²⁴ FOA ¶4.

²⁵ Reasons ¶29; Lyambiko Affidavit ¶38-39, 49; Bock Transcript, q. 353 [RCOM Tabs 4 & 23, pp. 95 & 260].

proceedings for lack of jurisdiction or to stay them on the basis of *forum non conveniens*. The motion was heard on October 15, 16 and 17, 2024.

27. The parties filed an enormous volume of evidence in connection with the motion. That evidence included: (i) expert reports from seven Tanzanian lawyers concerning the legal system of Tanzania; (ii) an expert report filed by the Appellants from a Kenyan lawyer who purported to opine on the independence of the Tanzanian judiciary; (iii) expert reports from three comparative legal scholars; and (iv) affidavits from 12 lay witnesses. Most of these witnesses were cross-examined.

28. Much of this evidence was necessary because the Appellants launched a full-frontal attack on the judiciary and administration of civil justice in Tanzania.

C. The Decision of the Motion Judge

29. The Motion Judge issued his Decision on November 26, 2024. His Honour dismissed the proceedings on the basis that the Court lacked jurisdiction *simpliciter*. In the alternative, he stayed them on the basis that Tanzania is a clearly more appropriate forum than Ontario for the adjudication of the matters at issue. As explained below, to dispose of this appeal the Court need only address the issue of *forum non conveniens*.

30. The Motion Judge considered the evidence carefully and applied properly well-established legal principles governing the doctrine of *forum non conveniens*. His Honour made numerous well-supported factual findings in rejecting all of the Appellants' criticisms concerning the Tanzanian judiciary and the administration of civil justice in that country. He held instead that "Tanzania's courts are fair, independent, and competent", and that "[t]hey administer a system, and approach adjudication, in a way that is, warts and all, quite similar to Canadian and Ontario legal process".

The Motion Judge concluded that “the Tanzanian bar and the Tanzanian judiciary are capable of conducting a fair, efficient, and just trial”.²⁶

31. In arriving at his conclusion that Tanzania is a clearly more appropriate forum than Ontario, the Motion Judge preferred the evidence of Barrick’s witnesses over the evidence of witnesses tendered by the Appellants:

- (a) He accepted the evidence of Mohamed Othman, the former Chief Justice of Tanzania, and Leonard Shaidi, a senior professor of law in Tanzania, that the judiciary of Tanzania is independent and functions properly, and that the legal system of Tanzania is organized around the principle of the rule of law;²⁷
- (b) Although there is no dispute that contingent fee arrangements are prohibited in Tanzania, the Motion Judge noted that such prohibitions are commonplace in many countries with respected legal systems and held that “Tanzania’s policy choice is neither aberrant nor unjust in any objective sense”;²⁸
- (c) His Honour accepted the evidence of Professor Scott Dodson that limitations on discovery rights in Tanzania are hardly unusual, and that if anything the more expansive approach to discovery in Ontario is the global outlier. Based on the evidence of Chief Justice Othman and Professor Shaidi, the Motion Judge

²⁶ Reasons ¶¶78, 175.

²⁷ Reasons ¶¶68-75, 78-82, 173; First Shaidi Report ¶¶28-30; Expert Report of Mohamed Othman, October 2, 2023 (“**First Othman Report**”) ¶¶38-71 [RCOM Tabs 13 & 15, pp. 171 & 189].

²⁸ Reasons ¶¶90-93. On this issue, see the Expert Report of Stefaan Voet, April 5, 2024 ¶¶38-49 [RCOM Tab 16, p. 204].

concluded that “the Tanzanian system has achieved a level of efficiency and fairness in its operation with more limited discovery rules than in Ontario, and that it remains an effective choice for civil litigation purposes”;²⁹

- (d) His Honour rejected the complaint that the laws of Tanzania do not recognize claims based on breaches of customary international law, noting that the Supreme Court of Canada only decided *Nevsun* in 2020 and that “[t]he *forum non conveniens* analysis does not size up the substantive law in the competing jurisdictions in order to measure whether the foreign law is keeping up with every new nuance announced by the Canadian courts”. In any event, he accepted the evidence of Chief Justice Othman that under Tanzanian law “the categories of torts are not closed, and that in appropriate cases novel torts can be established”;³⁰
- (e) His Honour rejected the assertion of the Appellants that they cannot obtain legal aid in Tanzania. He accepted instead the evidence of Chief Justice Othman concerning the availability of legal aid in Tanzania, as well as the evidence of Ulimboka Mwasomola, an expert in the legal aid system of Tanzania, that the Appellants likely can obtain legal aid in Tanzania all the way through to trial. In accepting this evidence, the Motion Judge noted that the Appellants failed to adduce

²⁹ Reasons, ¶¶94-96; Expert Report of Scott Dodson, April 4, 2024 ¶¶18, 27-39. See also Expert Report of Audax Vedasto, April 5, 2024 ¶¶16 [RCOM Tabs 17 & 11, pp. 210 & 163].

³⁰ Reasons ¶¶98-104, 157; First Othman Report ¶¶122-123 [RCOM Tab 15, p. 199].

evidence that they had been turned down by—or even approached—lawyers or legal aid clinics in Tanzania;³¹ and

- (f) The Motion Judge rejected the Appellants’ contentions that a handful of Tanzanian lawyers have been subjected to professional discipline in retaliation for acting against the Government of Tanzania. Leaving aside the important fact that the Appellants have sued Barrick rather than the Government of Tanzania, the Motion Judge found as a fact that the lawyers in question were subjected to disciplinary proceedings in Tanzania because of their alleged misconduct—not because of the nature of mandates they were pursuing at the time. The Motion Judge accepted the uncontested evidence of Professor Adam Dodek that the approach taken in Tanzania to regulating the conduct of lawyers is consistent with the approach taken in other jurisdictions.³²

32. The Motion Judge also found that it would be more efficient and less costly for the claims at issue to be tried in Tanzania rather than Ontario. As His Honour observed, “it defies logic to say that flying dozens of witnesses some 12,000 km across an ocean is more convenient and efficient than bringing them from the North Mara region to the nearest courthouse in Tanzania”. That is particularly so in view of the expense associated with conducting a lengthy trial in Ontario in which

³¹ Reasons ¶¶105-107, 160; Expert Report of Ulimboka Mwasomola, March 9, 2024 (“**Mwasomola Report**”) ¶40. See also, First Othman Report ¶93-100 [RCOM Tabs 12 & 15, pp. 168 & 197].

³² Reasons ¶¶111-119; Expert Report of Adam Dodek, April 5, 2024 ¶118 [RCOM Tab 18, p. 215].

many of the witnesses would speak Swahili rather than English. By contrast, trials in Tanzania are conducted both in English and Swahili as a matter of course.³³

33. Critically, the Motion Judge found as a fact that “there will be no means of compelling police officers and other necessary witnesses [from Tanzania] to testify if this action were to remain in Ontario for trial”. He made that finding based on the uncontested evidence of Chief Justice Othman that: (i) there is no mechanism under Tanzanian law to enforce Letters of Request issued by a foreign court; (ii) no Court in Tanzania has ever enforced such Letters of Request; and (iii) it is unlikely that the Courts of Tanzania would do so in this case. The inability to enforce Letters of Request in Tanzania is highly problematic in this case given that every witness to the facts and circumstances at issue resides there. Put simply, if these actions were to proceed in Ontario, the Superior Court would almost certainly be deprived of vitally important evidence it would require to make safe and reliable findings. For these reasons, the Motion Judge found that concerns with respect to trial fairness militate heavily in favour of staying these proceedings.³⁴

34. In these circumstances, the Decision of the Motion Judge to stay these proceedings was not a close call. The Motion Judge found that “[a] trial in Ontario would either be bereft of relevant evidence, or it would focus its efforts on platitudes about human rights and corporate responsibility without delving into the actual facts at issue in the claim”. By contrast, he was satisfied that “the laws, the judiciary, the bar, and the justice system of Tanzania overall, present no insurmountable hurdle to a fair trial of this action”. The Appellants’ argument to the contrary rested on: (i)

³³ Reasons ¶¶161-162; First Shaidi Report ¶74(c); First Othman Report ¶¶28, 31, 36, 89 [RCOM Tabs 13 & 15, pp. 176 & 200].

³⁴ Reasons ¶¶54, 121-122, 164-168, 174; First Othman Report ¶¶124-140. See also First Shaidi Report ¶73 [RCOM Tabs 15 & 13, pp. 200 & 175].

“unfounded allegations of prejudice, political intimidation, and a lack of independence by the judiciary” based on evidence the Motion Judge either rejected or ascribed little weight to; and (ii) an inapt comparison of this matter to the Decision of the Supreme Court of Canada in *Nevsun*, even though Tanzania bears no resemblance to Eritrea—a failed state that the Motion Judge described as a “non-democratic, non-rule of law country”.³⁵

35. The Motion Judge therefore determined that “[t]here is really no comparison between Ontario and Tanzania as jurisdictions that can properly try this case”. He held correctly that Tanzania “is clearly the more appropriate forum in which to try the matters raised in this claim”.³⁶

PART III – POSITION ON ISSUES

36. This appeal raises one question: whether the Motion Judge committed reversible error in exercising his discretion to stay these actions on the basis that Tanzania is a clearly more appropriate forum than Ontario for the adjudication of the claims at issue. That question must be answered in the negative. As a result, there is no need for this Court to determine whether the Motion Judge erred in deciding that the actions must also be dismissed for lack of jurisdiction *simpliciter*.³⁷

PART IV – LAW AND ARGUMENT

A. Standard of Review

37. The standard of review in a case of this nature is onerous. The Appellants face the “significant hurdle” of overcoming the “considerable deference” that must be accorded to a

³⁵ Reasons ¶169, 171-173.

³⁶ Reasons ¶169, 175.

³⁷ This is precisely the approach this Court adopted in *Samina N.A. v. HE Enviro LLC*, [2005 CanLII 39667](#) (ONCA) ¶1-3, Barrick Book of Authorities (“**BBOA**”), Tab 50.

decision to stay proceedings on the basis of the doctrine of *forum non conveniens*.³⁸ As the Supreme Court of Canada has explained: “the decision not to exercise jurisdiction and to stay an action based on *forum non conveniens* is a discretionary one” that is “entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts”.³⁹ It is not the function of this Court to “engage in a factor-by-factor reassessment of the motion judge’s weighing of the *forum non conveniens* factors”.⁴⁰

38. The Appellants have identified no basis upon which this Court could interfere with the manner in which the Motion Judge exercised his discretion. Their efforts to recast the factual determinations of the Motion Judge as errors of law are unavailing.⁴¹

39. The Motion Judge made no reversible error of fact. A factual misstatement is only relevant on appeal if it constitutes a palpable and overriding error that affected the lower court’s reasoning

³⁸ *Coldmatic Refrigeration Ltd. v. Leveltek Processing LLC*, [2005 CanLII 1042](#) (ONCA) ¶2, BBOA, Tab 10; *Commonwealth Ins. Co. v. CIBC*, [2005 CanLII 30839](#) (ONCA) ¶2, BBOA, Tab 11.

³⁹ *Breeden v. Black*, [2012 SCC 19](#) ¶37 (“*Breeden*”), BBOA, Tab 7; *Club Resorts v. Van Breda*, [2012 SCC 17](#) ¶112 (“*Van Breda*”), BBOA, Tab 9.

⁴⁰ *SVB Underwriting Ltd. v. Fairfax Financial Holdings*, [2008 ONCA 7](#) ¶3 (quotation) (“*SVB*”), BBOA, Tab 54; *RJM56 Holdings v. Bazinet*, [2018 ONCA 791](#) ¶6-7, BBOA, Tab 49; *BNP Paribas v. BCE*, [2007 ONCA 559](#) ¶33, BBOA, Tab 5; *Vahle v. Global Work & Travel*, [2020 ONCA 224](#) ¶14, BBOA, Tab 56. See also *Fresco v. CIBC*, [2024 ONCA 628](#) ¶32 (“*Fresco*”), BBOA, Tab 19.

⁴¹ See *Parc Downsview Inc. v. Penguin Properties*, [2018 ONCA 666](#) ¶56, BBOA, Tab 44; *ID Inc. v. Toronto Wholesale Produce Assoc.*, [2024 ONCA 948](#) ¶25, 41, BBOA, Tab 26.

and altered its final conclusion.⁴² Not one of the alleged factual errors the Appellants complain of comes close to being palpable and overriding.⁴³

B. The Motion Judge Considered Properly the Issue of Fairness

40. The Appellants argue that the Motion Judge did not consider properly the real risk that they will allegedly face unfairness if required to litigate their claims against Barrick in Tanzania. They contend that this alleged unfairness arises from: (i) their impecuniosity; (ii) their desire to be represented by their Canadian counsel; (iii) constraints on legal aid and a prohibition on contingency fees in Tanzania; (iv) limits on the scope of discovery rights in Tanzania; (v) an alleged inability to compel witnesses who reside outside of Tanzania to provide testimony at trial in Tanzania; and (vi) purported inadequacies with respect to the Tanzanian judiciary, the independence of the bar and the legal system generally.⁴⁴

41. These are the very same complaints the Appellants raised in the Court below. They were rejected by the Motion Judge based on his factual findings (summarized above in paragraph 31), which were well grounded in the overwhelming lay and expert evidence filed by Barrick.

⁴² *Fresco, supra*, ¶100, BBOA, Tab 19; *Pedwell v. Pelham*, [2003 CanLII 7488](#) (ONCA) ¶62-63 (“*Pedwell*”), BBOA, Tab 46; *Woods v. Ontario*, [\[2003\] O.J. No. 1165](#) (ONCA) ¶28-29, 42, BBOA, Tab 61; *Huisman v. MacDonald*, [2007 ONCA 391](#) ¶56 (“*Huisman*”), BBOA, Tab 25; *Fairfield Sentry v. PWC*, [2018 ONCA 696](#) ¶14, BBOA, Tab 17.

⁴³ FOA ¶56. For instance, the Appellants assert that the Motion Judge erred by finding that Barrick’s headquarters are located in Vancouver rather than in Toronto. In reality, His Honour understood that the Company has a corporate office in Ontario: see Reasons ¶16, 21, 33, 54 and 137. This is hardly palpable and overriding error.

⁴⁴ FOA ¶1-2, 8, 12-17, 53-79, 82, 105-117. In paragraph 90 of their Factum, the Appellants assert that a key factor in this case is the “enforcement of an eventual judgment” issued by the Courts of Tanzania. Their Factum does not otherwise address this factor, which the Motion Judge dispensed with correctly in paragraph 159 of his Reasons.

42. Unfortunately, the arguments advanced by the Appellants rest on attributing to the Motion Judge erroneous reasoning he did not engage in.

43. In this regard, the Appellants assert in paragraph 106 of their Factum that “[t]he motion judge was of the view that the risk of unfairness only arises where the alternative forum is a ‘non-democratic, non-rule of law country’ like Eritrea”. The Motion Judge made no such finding. As stated above, he held that the efforts of the Appellants to compare this case to *Nevsun* were without merit and that their allegations of unfairness in Tanzania were unfounded and unsupported by cogent evidence.⁴⁵

44. In addition, the Appellants assert that “[t]he motion judge focussed the fairness analysis almost exclusively on unfairness to Barrick in potentially being unable to compel Tanzanian witnesses – particularly police – to testify in Ontario”.⁴⁶ Once again, the Motion Judge did no such thing. Instead, he recognized explicitly that he was required to consider fairness to both sides.⁴⁷ He reviewed exhaustively the very fairness-related concerns the Appellants now raise on appeal and rejected them because the evidence simply did not bear them out.⁴⁸ He was fully entitled to make the findings that he did, all of which were supported by ample lay and expert evidence. He was likewise entitled, and indeed required, to consider the unfairness Barrick would sustain if forced to litigate the claims of the Appellants in Ontario.⁴⁹

⁴⁵ Reasons ¶172.

⁴⁶ FOA ¶112.

⁴⁷ Reasons ¶163, 171.

⁴⁸ Reasons ¶62-120, 160, 171-175.

⁴⁹ *Breeden, supra*, ¶36, BBOA, Tab 7; *Haaretz.com v. Goldhar*, [2018 SCC 28](#) ¶79 (“*Haaretz.com*”), BBOA, Tab 23; *Van Breda, supra*, ¶105, BBOA, Tab 9.

45. In effect, the position of the Appellants reduces to two propositions: (i) the Motion Judge was obligated to prioritize their professed concerns about trial fairness in Tanzania over every other factor in conducting his *forum non conveniens* analysis; and (ii) he was also obligated to accept the Appellants' contentions concerning their alleged inability to obtain justice in Tanzania. Both of these propositions are obviously incorrect.

46. In emphasizing their fairness-related concerns, the Appellants place significant weight on two English authorities.⁵⁰ Neither of those authorities assists them, including because they do not consider—let alone determine—the law of this Province. Indeed, the analytical approach Canadian courts are required to apply in conducting a *forum non conveniens* analysis is markedly different than the approach adopted in the United Kingdom.

47. In the United Kingdom, the analysis proceeds in two stages: (i) the Court considers whether the foreign court is *prima facie* the more appropriate forum; and (ii) if it is, the Court decides whether there is nevertheless “a real risk that [the plaintiff] will not be able to obtain substantial justice” in the foreign jurisdiction.⁵¹ The existence of such a risk is dispositive in favour of the Courts of the United Kingdom exercising jurisdiction.

48. That is clearly *not* the law in Ontario. Here, in conducting a *forum non conveniens* analysis, “[n]o factor is determinative [and] all factors should be considered and weighed together”.⁵² This

⁵⁰ FOA ¶105-117; *Vedanta Resources v. Lungowe*, [2019 UKSC 20](#) (“*Vedanta*”), BBOA, Tab 58; *Limbu v. Dyson Technology*, [\[2024\] EWCA Civ 1564](#) (“*Limbu*”), BBOA, Tab 32.

⁵¹ The two-stage approach followed in the United Kingdom is described in *Vedanta*, *supra*, ¶85-89, BBOA, Tab 58; *Limbu*, *supra*, ¶22-23, BBOA, Tab 32.

⁵² *Muscutt v. Courcelles*, [2002 CanLII 44957](#) (ONCA) ¶76 (quotation), BBOA, Tab 37; and see *SVB*, *supra*, ¶3, BBOA, Tab 54; *Amtim Capital v. ARCA*, [2012 ONCA 664](#) ¶14-16, BBOA, Tab 2; *Forbes Energy Group v. Parsian Energy*, [2019 ONCA 372](#) ¶8-9, BBOA, Tab 18; *Mynerich v. Hampton Inns*, [2009 ONCA 281](#) ¶3, 5-8, BBOA, Tab 38.

is the very approach the Motion Judge followed. Notably, the British Columbia Court of Appeal has rejected the English approach.⁵³

49. Respectfully, the Appellants have fallen into the same trap they fell into in the Court below. They treat differences between the legal systems of Canada and Tanzania as proof of the inadequacy of the latter. They are not.⁵⁴ Such an approach is plainly impermissible and essentially disregards the foundational role the principle of international comity plays in the *forum non conveniens* analysis. Both the Supreme Court of Canada and this Court have emphasized the importance of this principle.⁵⁵ Moreover, as this Court recently confirmed, comity can outweigh notional concerns about access to justice in a foreign jurisdiction.⁵⁶

50. In reality, many of the concerns the Appellants have raised with respect to the fairness of litigating their claims against Barrick in Tanzania are little more than complaints that they will be deprived of “juridical advantages” they would otherwise have access to in Ontario. The existence of such advantages has been characterized repeatedly as the least important and compelling of the *forum non conveniens* factors.⁵⁷

⁵³ *Garcia v. Tahoe*, [2017 BCCA 39](#) ¶118-126, BBOA, Tab 21; see FOA ¶103-105.

⁵⁴ Reasons ¶88-89, 97; *Breeden, supra*, ¶26, BBOA, Tab 7; *Currie v. Farr’s Coach Lines Ltd.*, [2015 ONSC 2352](#) ¶55 (“*Currie*”), BBOA, Tab 12.

⁵⁵ *Van Breda, supra*, ¶112, BBOA, Tab 9; *Breeden, supra*, ¶26, BBOA, Tab 7; *Prince v. ACE Aviation Holdings Inc.*, [2014 ONCA 285](#), ¶60-63 (“*Prince*”), BBOA, Tab 47; *Vale Canada v. Royal & Sun Alliance*, [2022 ONCA 862](#) ¶7, 22, 147 (“*Vale*”), BBOA, Tab 57; *Bouzari v. Bahremani*, [2015 ONCA 275](#) ¶46, BBOA, Tab 6.

⁵⁶ *Shirodkar v. Coinbase Global*, [2025 ONCA 298](#) ¶3-4, 71, 75 (“*Shirodkar ONCA*”), BBOA, Tab 52.

⁵⁷ *Breeden, supra*, ¶26-27, 35, BBOA, Tab 7; *Van Breda, supra*, ¶112, BBOA, Tab 9; *Haaretz.com, supra*, ¶71-76, 96(3), BBOA, Tab 23; *Vale, supra*, ¶155, BBOA, Tab 57; *Prince, supra*, ¶64, BBOA, Tab 47.

51. The Motion Judge conducted his *forum non conveniens* analysis in the manner required by Ontario law. He weighed the question of fairness to both parties alongside other considerations, including the location of parties, documentary evidence and witnesses, the languages spoken by witnesses and the law that governs the causes of action at issue. In all of the circumstances, he determined that Tanzania is the clearly more appropriate forum. He committed no error in doing so.

52. The specific issues raised by the Appellants with respect to access to justice in Tanzania are addressed immediately below.

(i) Availability of Counsel and Legal Aid

53. The Appellants assert that their desire to be represented by their Canadian counsel is a key *forum non conveniens* factor. It is not. A party's choice of counsel is only one of many relevant factors rather than a dispositive one.⁵⁸ Even where a party argues that they cannot afford to retain equally specialized—or any—counsel in a foreign country, Courts have stayed the domestic action.⁵⁹ Canadian courts have likewise refused to assume jurisdiction despite a plaintiff's concerns about the small size of the foreign bar, the limited number of specialized practitioners and the risk of bias within the foreign bar.⁶⁰

⁵⁸ See *e.g.* *Kahlon v. Cheecham*, [2010 ONSC 1957](#) (“*Kahlon*”), ¶45, BBOA, Tab 28.

⁵⁹ *Kahlon*, *supra*, ¶40-46, BBOA, Tab 28; *McAlpine v. McAlpine*, [2012 ONSC 297](#) ¶9, 18-19, 25-28, 35-39 (discussed in jurisdiction *simpliciter* context), BBOA, Tab 35; *Smiley v. P.E.T. Foundation*, [2023 NLSC 107](#) ¶99-109, 113-117, 122, BBOA, Tab 53; *Burt v. ClarksonGordon*, [1989 CanLII 5180](#) (MBCA) ¶1, 15-19, BBOA, Tab 8.

⁶⁰ *Lan Assoc. XVIII LP v. BNS*, [\[2000\] O.J. No. 168](#) (SCJ) ¶1, 31, 44-46 (“*Lan ONSC*”), *aff'd*, [2000 CanLII 16943](#) (ONCA), BBOA, Tab 30.

54. The fact that the Appellants are impecunious and claim to be unable to retain counsel in Tanzania is not a basis for the Courts of Ontario to assume jurisdiction. The Courts of Ontario are not a haven for impecunious litigants around the world. Proceedings in Ontario have been stayed despite a party's limited means, notwithstanding the risk that that party will be unable to pursue a claim or retain counsel elsewhere.⁶¹

55. In contending that they cannot retain counsel in Tanzania, the Appellants have recycled at least three misplaced complaints they advanced in the Court below.

56. *First*, the Appellants complain that contingent fee arrangements are prohibited in Tanzania. They rely upon English authorities for the proposition that a “lack of case financing”, “access to experienced, well-resourced counsel” and “equality of arms in the conduct of litigation” are relevant factors. These English authorities are irrelevant for the reasons discussed above.⁶²

57. The Appellants have simply ignored that here, at least, contingent fee arrangements are at most a minor factor in the *forum non conveniens* analysis.⁶³ The Motion Judge was rightly alive to the Ontario authorities. He noted correctly that contingent fee arrangements are prohibited in many

⁶¹ *Kahlon, supra*, ¶¶40-46, BBOA, Tab 28; *Tamminga v. Tamminga*, [2013] O.J. No. 4515 (SCJ) ¶¶8-10, *aff'd*, 2014 ONCA 478 (“*Tamminga ONCA*”), BBOA, Tab 55; *Arsenault v. Nunavut*, 2015 ONSC 4302, ¶¶67, 78, 80-81, 83, *aff'd*, 2016 ONCA 207, BBOA, Tab 3; *Currie, supra*, ¶¶41(iii), 58, 61, BBOA, Tab 12; *Fritz v. Fritz*, 2007 CanLII 54274 (ONSC) ¶¶1, 5(4), 13, BBOA, Tab 20; *Pavacic v. Nicely Estate*, 2008 CanLII 24228 (ONSC) ¶¶1, 52-55, 61, 87 (discussed in jurisdiction *simpliciter* context), BBOA, Tab 45; 6463908 *Canada v. BellSouth Affiliate Services*, 2006 CanLII 40990 (Master) ¶¶27(g), 28, BBOA, Tab 1.

⁶² Furthermore, *Vedanta, supra*, ¶¶93-95, BBOA, Tab 58, has limited relevance because the necessity of external litigation funding was linked to a need for extensive expert scientific evidence. The Appellants have not suggested that such evidence is required here.

⁶³ See the discussion of the unavailability of class actions in foreign jurisdictions in *Shirodkar v. Coinbase Global*, 2024 ONSC 1399 ¶¶131, 134, 138-142, *aff'd*, *Shirodkar ONCA, supra*, ¶¶64, 71, 75, BBOA, Tab 52; *Leon v. Volkswagen*, 2018 ONSC 426 ¶¶39-47 (“*Leon*”), BBOA, Tab 31.

jurisdictions, “[a]nd yet Canadian courts have routinely deferred to the policy choices of those jurisdictions in finding those forums to be appropriate alternatives for civil claims”.⁶⁴

58. *Second*, the Appellants assert that Tanzanian lawyers are prohibited from charging fees below a minimum amount.⁶⁵ This assertion is based on a mischaracterization by one of the Appellants’ experts of Tanzanian legislation and ethical rules. The evidence of that witness was debunked by the evidence of Professor Shaidi as well as in cross-examination. In fact, the Appellants’ expert had it backward: lawyers in Tanzania *are prohibited from charging excessive fees*. The same expert advanced the implausible claim that lawyers in Tanzania are forbidden from providing *pro bono* services. In reality, the ethical rules in Tanzania state expressly that “[a]n advocate may, in keeping with the best traditions of the legal profession, reduce or waive a fee ... in cases of hardship or impecuniosity or where a client or prospective client would otherwise effectively be deprived of legal advice or representation”.⁶⁶

59. *Third*, the Appellants complain about the availability of legal aid in Tanzania. Their complaint is unavailing, particularly given that there is no evidence they even tried to obtain legal aid. In any event, limits on the availability of legal aid in a foreign jurisdiction are at most “one factor of many to be considered in the *forum non conveniens* weighing exercise”.⁶⁷ Canadian

⁶⁴ Reasons ¶92.

⁶⁵ FOA ¶54.

⁶⁶ Expert Report of Jebra Kambole, February 1, 2024 (“**Kambole Report**”) ¶29; Transcript of Cross-Examination of Jebra Kambole, May 8, 2024 (“**Kambole Transcript**”), qq. 781-845; Reply Expert Report of Leonard Shaidi, April 5, 2024 (“**Shaidi Reply Report**”) ¶23-28; Advocates (Professional Conduct and Etiquette) Regulations, 2018, Rules 6, 72, 74; *Sugar Board of Tanzania v. Mhango*, Reference No. 5 and 16 of 2019; Advocates Remuneration Order, Order 13, Schedule IX [RCOM Tabs 20, 29, 14, 43, 44 & 45, pp. 234, 390, 182, 685, 689 & 705].

⁶⁷ *MacDonald v. Lasnier*, [1994] O.J. No. 2923 (GenDiv) ¶20, BBOA, Tab 33.

courts have declined repeatedly to exercise jurisdiction even though legal aid was unavailable in the foreign jurisdiction.⁶⁸ As the Motion Judge noted, this Court has held that access to litigation funding “cannot serve to ‘bootstrap’ the domestic forum over a more connected foreign one”.⁶⁹

60. The Motion Judge considered carefully the evidence of multiple expert witnesses concerning the availability of legal aid in Tanzania. As stated above, he accepted the evidence of Barrick’s expert that “there is a significant possibility that the [Appellants] can obtain legal aid funded representation in Tanzania all the way through trial”.⁷⁰ He was fully entitled to prefer the evidence of one witness over another in making this finding.

61. The Appellants assert that the Motion Judge ignored evidence provided by their expert, Joseph Oleshangay, concerning alleged shortcomings of the legal aid system in Tanzania.⁷¹ That criticism is unwarranted. It is evident on the face of his Reasons that the Motion Judge was cognizant of the very evidence the Appellants now accuse him of ignoring.⁷²

62. It appears that the basis of the Appellants’ complaint is that Mr. Oleshangay is not referred to by name in the Reasons. Judges are not required to address explicitly in their Reasons every issue raised and every piece of evidence relied upon by parties.⁷³ Judges are also entitled to prefer

⁶⁸ *Wilson v. Wilson*, [2013 NSSC 427](#), ¶1, 20, 34, BBOA, Tab 60; *O’Keefe v. Lyngholm*, [\[2014\] N.J. No. 238](#) (T.D.) ¶11-12, 27, 31-32 (assessing codified principles), BBOA, Tab 41; *Hadissi v. Hassibi*, [1994 CanLII 7566](#) (ONSC) ¶43-47 (assessing codified principles), BBOA, Tab 24.

⁶⁹ Reasons ¶108, citing *Tamminga ONCA, supra*, ¶27, BBOA, Tab 55.

⁷⁰ Reasons ¶106-107, 160; Mwasomola Report ¶40; First Othman Report ¶93-100. See also Shaidi Reply Report ¶11-16 [RCOM Tabs 12, 15 & 14, pp. 168, 197 & 179].

⁷¹ FOA ¶13-15, 60-64, 82.

⁷² Reasons ¶61, 105.

⁷³ *McLean v. Seisel*, [2004 CanLII 9418](#) (ONCA) ¶94-98 (“*McLean*”), BBOA, Tab 36; *Marmora v. Ontario*, [2025 ONCA 10](#) ¶25, BBOA, Tab 34; *Welton v. U.L. Corp.*, [2020](#)

the evidence of one witness over that of another without making explicit adverse credibility findings or providing detailed justifications.⁷⁴

63. The Motion Judge can hardly be blamed for preferring the evidence of Chief Justice Othman and Mr. Mwasomola over that of Mr. Oleshangay, who was not a fair or credible witness. Mr. Oleshangay's report was riddled with misstatements and mischaracterized multiple decisions of the Courts of Tanzania. In his report and in cross-examination, he behaved as a partisan advocate rather than a neutral and independent expert.⁷⁵

64. In their Factum, the Appellants seek to discredit Mr. Mwasomola as a "junior lawyer".⁷⁶ This attack is unfounded. Mr. Mwasomola is the Co-Chair of the Legal Aid Committee of the University of Dar es Salaam and was eminently qualified to provide expert evidence concerning legal aid in Tanzania. He and Mr. Oleshangay are of essentially the same vintage, having graduated from law school one year apart.⁷⁷

[ONCA 322 ¶60](#), BBOA, Tab 59; *Oshawa Group v. Mason Homes*, [2005 CanLII 36443](#) (ONCA) ¶[17-20](#), BBOA, Tab 42.

⁷⁴ *McLean, supra*, ¶[98](#), BBOA, Tab 36; *Huisman, supra*, ¶[37-41](#), [66-67](#), BBOA, Tab 25; *O.C.D.S.B. v. Scharf*, [2008 ONCA 154](#) ¶[6-7](#), BBOA, Tab 43; *Pedwell, supra*, ¶[35-36](#), BBOA, Tab 46; *Donovan v. Barclay*, [\[2001\] O.J. No. 3858](#) (CA) ¶[5](#), BBOA, Tab 15.

⁷⁵ Oleshangay Transcript, qq. 512-527, 778-787, 812-855, 1094-1110 (refusal to make concessions and acting evasively); qq. 414-611 (availability of legal aid and costs orders against legal aid recipients); qq. 802-855, 1061-1087, 1094-1112 (mischaracterizing and misquoting authorities); qq. 295-296, 638-669, 893-925 (making bald assertions and providing hearsay evidence) [RCOM Tab 27, pp. 276].

⁷⁶ FOA ¶64.

⁷⁷ Mwasomola Report ¶6-8; Expert Report of Joseph Oleshangay, February 2, 2024 ("**Oleshangay Report**") ¶2-3 [RCOM Tabs 12 & 21, pp. 166 & 235].

(ii) Allegations of Retaliation Against Tanzanian Lawyers

65. In their Factum, the Appellants assert that “international organizations have raised concerns about attacks on prominent members of the Tanzanian bar”. The unproven concerns of such organizations have no relevance, particularly given that: (i) no representatives of those organizations gave evidence in the Court below; (ii) concerns expressed by those organizations were based on inaccurate understandings of the very proceedings in Tanzania they purported to criticize; and (iii) the matters in question involved fewer than five of the more than 10,000 lawyers currently practicing in Tanzania.⁷⁸

66. As stated above, the Motion Judge concluded that there was “no cogent evidence to show the Tanzanian government or the Tanzanian bar intimidates lawyers or that there are any negative consequences in Tanzania for lawyers using their legal skills to litigate against the government, its officials, the police or large resource corporations – including Barrick”.⁷⁹ That finding is amply supported by the evidence of multiple lay and expert witnesses, including uncontested evidence of Tanzanian lawyers who act regularly against the Government of Tanzania.⁸⁰

67. The Appellants accuse the Motion Judge of ignoring evidence concerning the alleged plight of a handful of lawyers, while simultaneously faulting him for having supposedly “engaged in the

⁷⁸ Transcript of Cross-Examination of Mohamed Othman, May 14, 2024, q. 109 [RCOM Tab 25, pp. 271]. See also *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, [2021 FCA 72 ¶150](#), BBOA Tab 65.

⁷⁹ Reasons ¶111-120; Transcript of Cross-Examination of Omondi Deya, May 15, 2024, qq. 176-197, 205-218, 222-245; Kambole Transcript, qq. 1001-1002, 1020-1027, 1029-1053; Transcript of Cross-Examination of Fatma Karume, June 25, 2024 (“**Karume Transcript**”), qq. 395-401, 405-423, 426-433, 436-439, 443, 446-455, 474-477, 609-611, 646-647 [RCOM Tabs 28, 29 & 30, pp. 374, 408 & 424].

⁸⁰ Affidavit of Mpayya Adalbert Kamara, April 5, 2024 ¶3-6; Affidavit of Richard Rweyongeza, April 5, 2024 ¶2-3; Mwasomola Report ¶5, 72-75; Vedasto Transcript, qq. 269-271 [RCOM Tabs 8, 9, 12 & 26, pp. 145, 148, 165 & 274].

re-litigation of professional disciplinary proceedings” against two of those lawyers.⁸¹ Both criticisms are unfair. The Appellants ignore multiple paragraphs of the Reasons of the Motion Judge in which he addressed this very issue.⁸² It is apparent from those paragraphs that His Honour scrutinized carefully the affidavits of these lawyers as well as numerous contemporaneous documents and transcripts of their cross-examinations. He then made findings about what did and did not happen in respect of their disciplinary cases. That is precisely what he was required to do.⁸³

68. In total, the Appellants refer to five Tanzanian lawyers in their Factum. Professor Shaidi rightly opined that it is difficult to draw any “general conclusion concerning the Tanzanian bar ... from the existence of individual, isolated and idiosyncratic complaints”.⁸⁴ That said, the actual facts concerning the lawyers in question are as follows:

- (a) **Tito Magoti and Jebra Kambole.** The Motion Judge found that neither Mr. Kambole nor Mr. Magoti was subjected to disciplinary proceedings for accepting mandates against the Government of Tanzania. The Appellants ignore that finding and instead complain about an inconsequential slip made by the Motion Judge in referring to Mr. Magoti as a deponent.⁸⁵

⁸¹ FOA ¶79.

⁸² Reasons ¶111-118, 172.

⁸³ Reasons ¶113-116.

⁸⁴ Shaidi Reply Report ¶7 [RCOM Tab 14, p. 178].

⁸⁵ Reasons ¶117; *Tito Magoti v. Attorney General* (Miscellaneous Civil Cause No. 3 of 2022); *Tito Magoti v. Attorney General* (Miscellaneous Civil Cause No. 18 of 2023); *Attorney General v. Jebra Kambole and Edson Kilatu* (Application No. 26 of 2020); Kambole Transcript, qq. 1001-1002, 1020-1027, 1029-1044, 1055-1062, 1066-1074 [RCOM Tabs 46, 47, 50 & 29, pp. 707, 729, 858 & 408].

- (b) **Joseph Oleshangay.** The evidence of Mr. Oleshangay concerning threats supposedly made against him consisted largely of hearsay. As noted above, he was not a credible or reliable witness. There is no evidence that disciplinary proceedings have ever been commenced against him.⁸⁶
- (c) **Boniface Mwabukusi.** The Motion Judge found that Mr. Mwabukusi conducted a media briefing concerning a case pending before the Courts of Tanzania while wearing courtroom attire. During that briefing, Mr. Mwabukusi made inflammatory and irresponsible statements. The sole disciplinary penalty he received was a reprimand. The Motion Judge was entitled to find that “the punitive effect of the Tanzanian approach is a mild and reasonable one” and consistent with “the same principles of respect for the court and profession as those that prevail in Ontario.”⁸⁷ The Motion Judge did not accept Mr. Mwabukusi’s inaccurate account of his disciplinary proceedings, which was contradicted by contemporaneous documents and undermined by the highly questionable evidence he gave in cross-examination.⁸⁸

⁸⁶ Oleshangay Report, see *e.g.*, ¶¶80, 116, 160-162; Oleshangay Supplementary Affidavit, see *e.g.*, ¶¶13, 15, 19, 21, 23; Oleshangay Transcript, qq. 638-678 [RCOM Tabs 21, 10 & 27, pp. 236, 156 & 326].

⁸⁷ Reasons ¶¶114-116; See also the Expert Report of Makarios Tairo, April 16, 2024 (“**Tairo Report**”) ¶7(d), 169-178 [RCOM Tab 19, p. 218, 228-232].

⁸⁸ Transcript of Cross-Examination of Boniface Mwabukusi, June 20, 2024, qq. 146-152, 179-182, 187-203, 221-256, 279-289, 353-365, 387-393, 412-420, 492-494, 507-511, 540-550; Mwabukusi Undertakings Chart, pp. 3-4 *The Attorney General vs Boniface Mwabukusi*, Final Ruling, pp. 14-15 [RCOM Tabs 31, 32 & 48, pp. 451, 509 & 779].

(d) **Fatma Karume.** The Motion Judge found that Ms. Karume was not subjected to professional discipline for having acted against the Government of Tanzania. Instead, she was disciplined for being rude and insulting in her submissions, and for abusing court staff during her disciplinary proceedings. She also acted irresponsibly throughout those proceedings, including by engaging in inflammatory social media postings. She elected to call no evidence in her own defence.⁸⁹

69. The Motion Judge committed no error in making factual findings concerning this issue.

(iii) Discovery Rights

70. The Appellants complain in their Factum that discovery rights in Tanzania are more limited than they are in Ontario.⁹⁰ The relatively narrower scope of discovery in Tanzania is not, however, a source of unfairness or a reason for the Courts of Ontario to assume jurisdiction. He held correctly that: (i) our Courts frequently refuse to exercise jurisdiction despite the unavailability of robust (or any) discovery rights in the foreign venue;⁹¹ and (ii) it is contrary to the principle of comity to find that an enhanced procedural right in one jurisdiction renders it clearly more appropriate than another.⁹²

⁸⁹ Karume Transcript, qq. 296-299, 305-306, 395-401, 405-423, 426-433, 436-439, 443, 446-455, 474-477, 494-504, 609-611, 646-647; Ruling of Kilekamajenga J., September 23, 2020; Tairo Report ¶¶133-168 [RCOM Tabs 30, 49 & 19, pp. 420, 802 & 219].

⁹⁰ FOA ¶¶67-69.

⁹¹ *E.g.*, *Lan ONSC*, *supra*, ¶¶41, 46-47, BBOA, Tab 30; *Nelson Barbados Group v. Cox*, [2009 CanLII 22563](#) (ONSC) ¶¶97-100, BBOA, Tab 39; *Eastern Power v. Azienda*, [\[1998\] O.J. No. 4908](#) (GenDiv) ¶¶24, 28-29, *aff'd*, [1999 CanLII 3785](#) (ONCA), BBOA, Tab 16.

⁹² See, *e.g.*, *Leon*, *supra*, ¶49, BBOA, Tab 31. Notably, efforts are currently underway to narrow the scope of discovery in Ontario. See : <https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf>. (April 2025).

(iv) Letters of Request

71. Relying on the recent decision of the Supreme Court of Canada in *Haaretz.com*,⁹³ the Motion Judge determined that the inability of the Courts of Tanzania to enforce Letters of Request issued in Ontario was critical to the *forum non conveniens* analysis. The Motion Judge found that in the circumstances, permitting the Appellants to pursue their claims in Ontario would severely hamper Barrick’s ability to defend itself and thereby give rise to serious fairness concerns.⁹⁴

72. The Appellants argue that Chief Justice Othman’s evidence established merely that “it is ‘highly uncertain’ and ‘unlikely’ that Tanzanian courts would assist a foreign court”.⁹⁵ It is unclear what point the Appellants are seeking to make. Matters of this nature are determined on a balance of probabilities, which asks whether it is more likely than not that the Courts of Tanzania would decline to enforce Letters of Request issued by the Courts of Ontario.⁹⁶ The uncontested evidence of Chief Justice Othman is that “any effort to enforce or give effect to such a Letter of Request ... before the Courts of Tanzania would likely fail”.⁹⁷

73. The Appellants allege that Barrick has not identified residents of Tanzania who will provide evidence relevant to its defence in Ontario, and has not proven that such witnesses will

⁹³ *Haaretz.com, supra*, ¶47, 59, 61, 63-65, 70, 79, BBOA, Tab 23; see also *Jacobovich v. Israel*, [2021 ONSC 3558](#) ¶108-111, BBOA, Tab 27; *Shanghai Z.J.H.C.Y. Investments v. Bai*, [2022 BCSC 935](#) ¶34, BBOA, Tab 51; *Bang v. Kim*, [2022 BCSC 1893](#) ¶148-149, *varied*, [2024 BCCA 88](#), BBOA, Tab 4.

⁹⁴ Reasons ¶126, 166-167.

⁹⁵ FOA ¶113.

⁹⁶ The balance of probabilities is the only standard of proof in civil proceedings: *F.H. v. McDougall*, [2008 SCC 53](#) ¶40, BBOA, Tab 63.

⁹⁷ First Othman Report ¶124 [RCOM Tab 15, p. 200].

decline to assist Barrick voluntarily.⁹⁸ This argument attempts to impose a burden on Barrick that is inappropriate in a case of this nature where the claims at issue pertain to unparticularized incidents of alleged violence that supposedly occurred at multiple places and at different times, and involved dozens or hundreds of unidentified participants and witnesses in Tanzania.⁹⁹

74. Next, the Appellants seek to flip this issue on its head by arguing that a trial in Tanzania would be unfair because Letters of Request could not be used to compel representatives of Barrick who reside outside Tanzania to testify.¹⁰⁰ This argument is entirely without merit. To the extent that the Appellants have any viable claim to assert, it is not against Barrick but rather against the Tanzania Police Force or possibly NMGML, whose employees reside in Tanzania. In any event, representatives of Barrick are presumptively under the Company's control. Barrick has never suggested it will not make such individuals available. Although the Appellants purport to identify numerous people who reside outside Tanzania, they have provided no explanation as to why they supposedly have relevant evidence to give. None of the individuals on the Appellants' list resides in Ontario save for "employees in Strategic Matters involved in negotiations with the Government of Tanzania"—a topic that is wholly irrelevant to the claims at issue.¹⁰¹

⁹⁸ FOA ¶¶112-115.

⁹⁹ Reasons ¶53; Beringer Affidavit ¶57 [RCOM Tab 6, p. 134]. The Appellants' reliance on *Kyko Global Inc. v. M/S Crawford Bayley*, [2021 ONCA 736](#) ¶40, BBOA, Tab 29 is inapposite, including because that case involved much simpler facts than this one.

¹⁰⁰ FOA ¶¶70-71, 116.

¹⁰¹ FOA ¶71; Lyambiko Affidavit ¶15-17; Bock Affidavit ¶9-12; Beringer Affidavit ¶18-19, 35-39; Lyambiko Transcript, qq. 415-424, 433; Bock Transcript, qq. 160-162; Beringer Transcript, qq. 34-35, 177-178 [RCOM Tabs 4, 5, 6, 22 & 24, pp. 85, 106, 121, 245 & 264].

C. The Motion Judge Did Not Recharacterize Improperly the Claims at Issue

75. The Appellants contend that by supposedly ignoring their pleadings and “stripp[ing] the case of its vital human rights context”, the Motion Judge “reframed” their actions as a “simple negligence claim” and that this tainted his *forum non conveniens* analysis.¹⁰²

76. This ground of appeal must also fail. The Motion Judge was well aware that the Appellants pleaded two causes of action—negligence and alleged breaches of customary international law—and that both claims centred on allegations of human rights violations in Tanzania.¹⁰³ He found this “human rights context” was insufficiently compelling to justify assuming jurisdiction in view of overwhelming evidence pointing to Tanzania as the most appropriate forum. He was entitled to reach that result.

77. Although the Appellants claim their human rights were violated, this does not alter the fundamental character of their negligence claims¹⁰⁴ or imbue those claims with a special status.

78. The Appellants likewise criticize the Motion Judge for analogizing Barrick’s human rights policies and public statements to the “marketing materials of an international hotel chain” and for describing them as mere “platitudes”.¹⁰⁵ These criticisms are also unwarranted. In advancing them, the Appellants have taken isolated phrases from the Reasons out of context.

¹⁰² FOA ¶¶5, 8-12, 17, 21-27, 32-34, 40-43, 97-104.

¹⁰³ Reasons ¶4, 7-12, 14-15, 23-27, 30-57, 64-65, 98-99.

¹⁰⁴ *Rieder v. Plista GmbH*, [2022 ONCA 281](#) ¶13 (“*Rieder*”) ¶7-10, BBOA, Tab 48: “The form of the claim cannot trump the substance of the claim when addressing a jurisdictional argument”. This statement applies equally to a *forum non conveniens* analysis.

¹⁰⁵ FOA ¶11, 26, 98.

79. The Motion Judge held correctly that “regulatory filings and other communications about Barrick’s global policies of sustainability do not bring the actual management, supervision, and security measures at the Mine into Ontario”. He observed that “[t]hese filings and communications do not assign a geographic location to matters at issue in the action”. It was against this backdrop that the Motion Judge analogized “filings and communications by a global mining company like Barrick, or postings and links on its website” to “the marketing efforts of an international hotel chain like the Westin hotels”. Notably, he did so in the context of his jurisdiction analysis rather than his *forum non conveniens* analysis.¹⁰⁶

80. The Motion Judge did not “find that Barrick’s global human rights and security policies were mere ‘platitudes’”. As noted above, he found that “[a] trial in Ontario would either be bereft of relevant evidence, or it would focus its efforts on platitudes about human rights and corporate responsibility without delving into the actual facts at issue in the claim”.¹⁰⁷ A fair reading of the Reasons makes clear that the Motion Judge considered carefully Barrick’s policies and their relevance to the causes of action and material facts pleaded by the Appellants.¹⁰⁸ He held, however, that: (i) a proper adjudication of the claims at issue ultimately will turn on evidence concerning the facts on the ground in Tanzania; (ii) all of the witnesses to the events in question reside in Tanzania; and (iii) the evidence of many of those witnesses would be missing if a trial were to proceed in Ontario. Thus, a trial in this Province would focus on matters such as the design and implications of Barrick’s corporate policies, which would not permit an adjudication of crucial

¹⁰⁶ Reasons ¶¶143-145.

¹⁰⁷ Reasons ¶¶15, 169.

¹⁰⁸ Reasons ¶¶27, 31, 37-38.

issues such as who committed the allegedly wrongful acts; how, why and whether they occurred; and causation.¹⁰⁹

81. The Appellants assert incorrectly that the Motion Judge prejudged the merits of their *Nevsun* claims by holding that “no corporation...is responsible for violence and/or deaths caused by others or contributorily caused by the claimants themselves”.¹¹⁰ Nowhere did the Motion Judge hold that the Appellants caused or contributed to the harms complained of, let alone that their *Nevsun* claims would necessarily be dismissed.

82. Nor is there any merit to the Appellants’ contention that the Motion Judge “minimized the legal significance of the *Nevsun*-based claims, describing them as a nuanced development in Canadian tort law of limited import in the [*forum non conveniens*] analysis”.¹¹¹ This assertion mischaracterizes the Motion Judge’s findings and reasoning. His Honour simply observed that claims based on alleged breaches of customary international law are a relatively new phenomenon in Canada, and that the *forum non conveniens* analysis does not demand that the law of foreign jurisdictions “[keep] up with every new nuance announced by the Canadian courts”. Those comments were unobjectionable and indeed correct.¹¹²

D. The Motion Judge Did Not Apply an Inappropriate Evidentiary Standard

83. Finally, the Appellants argue that the Motion Judge erred by applying an inappropriate

¹⁰⁹ Reasons ¶¶39, 47, 51, 54-57.

¹¹⁰ FOA ¶101 (quoting Reasons ¶170).

¹¹¹ FOA ¶100.

¹¹² In *Nevsun v. Araya*, [2020 SCC 5](#) ¶¶63-69, 127, 131-132, BBOA, Tab 40, the Court refused to strike out claims for breaches of customary international law but did not definitively recognize this cause of action.

evidentiary standard that is suitable for summary judgment motions but not for *forum non conveniens* motions.¹¹³ This ground of appeal is also meritless.

84. There is no doubt that different evidentiary standards apply to summary judgment motions and *forum non conveniens* motions. In the summary judgment context, both parties must “put their best foot forward” by marshalling the most compelling available evidence concerning the merits of their claims or defences.¹¹⁴ By contrast, *forum non conveniens* motions do not involve or require merits-based determinations.¹¹⁵

85. This Court confirmed in *Young v. Tyco*, however, that each party to a *forum non conveniens* motion must adduce proper evidence to support its position: “the party relying on a fact supporting the application of a *forum non conveniens* factor in its favour will bear the evidential burden of establishing that fact”. The Court hearing the motion must “asses[s] all of the evidence in the record” and “fin[d] facts regarding the *forum non conveniens* factors themselves”.¹¹⁶

86. This is precisely the approach the Motion Judge followed in the case at bar. Contrary to the assertions of the Appellants, His Honour did not delve inappropriately into the *merits* of their claims. Nowhere did he make definitive findings concerning: (i) whether Barrick’s corporate policies could somehow ground a duty of care; (ii) what happened on the ground in Tanzania; or (iii) whether anyone could or should be held liable for the harms the Appellants complain of. Instead, the Motion Judge assessed the *nature* of the claims in the manner required by *Young*.

¹¹³ FOA ¶¶91-96.

¹¹⁴ *Dia v. Calypso*, [2021 ONCA 273](#) ¶25, BBOA, Tab 14.

¹¹⁵ *Young v. Tyco International*, [2008 ONCA 709](#) ¶31 (“*Young*”), BBOA, Tab 62; FOA ¶91.

¹¹⁶ *Young, supra*, ¶33, BBOA, Tab 62.

87. The same evidence may be relevant both to a *forum non conveniens* analysis and to the merits.¹¹⁷ It is hardly reversible error to consider such evidence at this stage.

88. The Appellants argue that “it is the pleadings which frame the case and provide context for the analysis of the assumption and exercise of jurisdiction”.¹¹⁸ To the extent they are suggesting that the Motion Judge was required to assess Barrick’s *forum non conveniens* challenge based solely on the manner in which the Statements of Claim are framed, that suggestion is wrong in law. A similarly misplaced argument was rejected in *Rieder*.¹¹⁹ Moreover, the passage from the decision of the Supreme Court in *Haaretz.com* the Appellants are relying upon does not assist them. The Supreme Court merely observed that when assessing the nature and intended geographical scope of a plaintiff’s defamation claim in light of subsequent changes of position, it is illuminating to look at the plaintiff’s original pleading.¹²⁰

89. In support of their argument that the Motion Judge applied an inappropriate evidentiary standard, the Appellants rely principally on his comments in paragraphs 34 and 35 of his Reasons. His Honour commented in those passages that “one can surmise that this record contains the Plaintiffs’ best evidence”, and that “[a]s in a summary judgment proceeding, the Court is ‘entitled to proceed on the basis that the parties have put into the record all [or at least *some*] of the evidence that would be forthcoming at trial’”.

¹¹⁷ *Epoxy Solutions v. Polymer Science*, [2009 CanLII 46657](#) (ONSC) ¶8, BBOA, Tab 64; and *GIAO Consultants v. 7779534 Canada*, [2020 ONCA 778](#) ¶12-13 (statement made in jurisdiction *simpliciter* context) (“*GIAO*”), BBOA, Tab 22.

¹¹⁸ FOA ¶94.

¹¹⁹ *Rieder, supra*, ¶4, [7-10](#), BBOA, Tab 48.

¹²⁰ *Haaretz.com, supra*, ¶[20-22](#), BBOA, Tab 23.

90. These comments are entirely innocuous. They simply confirm that the only evidence the Motion Judge could rely upon to determine the *forum non conveniens* motion was the evidence the parties placed before him. It is hardly inappropriate to expect that when a potentially dispositive *forum non conveniens* challenge is brought, the parties will present their strongest evidence in support of each relevant factor.

91. Put simply, the Appellants are attempting to manufacture reversible error where none exists. In doing so they have dissected the Reasons of the Motion Judge using a hyper-critical lens. This is precisely the sort of forensic approach this Court has rejected.¹²¹

92. The Reasons of the Motion Judge must be read fairly and as a whole before accepting that several isolated and out-of-context passages reflect reversible error.¹²² Here, a fair review of the Reasons confirms that the Motion Judge did exactly what was required of him. He articulated the correct legal test on a *forum non conveniens* motion, assessed the evidence placed before him by the parties in order to evaluate and ascribe appropriate weight to each potentially relevant factor, and identified Tanzania as the clearly more appropriate forum for the adjudication of the claims at issue. He was fully entitled to determine that the evidence of Barrick was compelling and cogent, and that the evidence of the Appellants was inadequate and unpersuasive.

PART V – ORDER REQUESTED

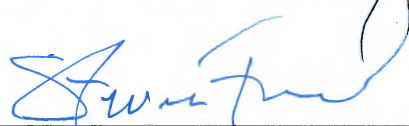
93. For all of the foregoing reasons, this appeal should be dismissed.

¹²¹ *GIAO, supra*, ¶[10-11](#), [17-19](#), BBOA, Tab 22.

¹²² *Huisman, supra*, ¶[54-57](#), BBOA, Tab 25; *McLean, supra*, ¶[98](#), BBOA, Tab 36; *Pedwell, supra*, ¶[72-73](#), BBOA, Tab 46; *DeJesus v. Linamar Holdings*, [2017 ONCA 384](#) ¶[7-10](#), BBOA, Tab 13.

94. Barrick understands that the Appellants are of limited means and that they do not have litigation funding or other arrangements that protect them against costs awards in these proceedings. In the circumstances, Barrick did not seek costs in the Court below and does not seek costs in respect of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2025.



DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Steven G. Frankel (LSO# 58892E)
Tel: 416.367.7441
Email: sfrankel@dwpv.com

Anisha Visvanatha (LSO# 74421O)
Tel: 416.367.7480
Email: avisvanatha@dwpv.com

Alexander Barnes (LSO# 89981N)
Tel: 416.863.4131
Email: abarnes@dwpv.com

Lawyers for the Defendant (Respondent)

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA, AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA

Plaintiffs (Appellants)

and

BARRICK GOLD CORPORATION

Defendant (Respondent)

A N D B E T W E E N:

ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA WANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI

Plaintiffs (Appellants)

and

BARRICK GOLD CORPORATION

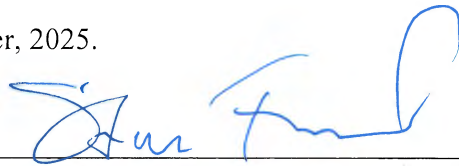
Defendant (Respondent)

CERTIFICATE

I estimate that 90 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required. There are 10,948 words in Parts I to V.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT Toronto, Ontario this 19th day of September, 2025.



Steven G. Frankel

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Steven G. Frankel (LSO# 58892E)
Tel: 416.367.7441
Email: sfrankel@dwpv.com

Anisha Visvanatha (LSO# 74421O)
Tel: 416.367.7480
Email: avisvanatha@dwpv.com

Alexander Barnes (LSO# 89981N)
Tel: 416.863.4131
Email: abarnes@dwpv.com

Lawyers for the Defendant (Respondent)

SCHEDULE “A” - LIST OF AUTHORITIES

1. *6463908 Can. Ltd. v. BellSouth Affil. Svces. Corp.*, [2006 CanLII 40990](#) (ON Master)
2. *Amtim Capital Inc. v. Appliance Recycling Centers*, [2012 ONCA 664](#)
3. *Arsenault v. Nunavut*, [2015 ONSC 4302](#), *aff'd*, [2016 ONCA 207](#)
4. *Bang v. Kim*, [2022 BCSC 189](#), *varied on other grounds*, [2024 BCCA 88](#)
5. *BNP Paribas (Canada) v. BCE Inc.*, [2007 ONCA 559](#)
6. *Bouzari v. Bahremani*, [2015 ONCA 275](#)
7. *Breeden v. Black*, [2012 SCC 19](#)
8. *Burt v. Clarkson Gordon*, [1989 CanLII 5180](#) (MBCA)
9. *Club Resorts Ltd. v. Van Breda*, [2012 SCC 17](#)
10. *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC*, [2005 CanLII 1042](#) (ONCA)
11. *Commonwealth Insurance Co. v. CIBC*, [2005 CanLII 30839](#) (ONCA)
12. *Currie v. Farr's Coach Lines Ltd.*, [2015 ONSC 2352](#)
13. *De Jesus v. Linamar Holdings Inc.*, [2017 ONCA 384](#)
14. *Dia v. Calypso Theme Waterpark*, [2021 ONCA 273](#)
15. *Donovan v. Barclay*, [\[2001\] O.J. No. 3858](#) (ONCA)
16. *Eastern Power Ltd. v. Azienda C.E.& A.*, [\[1998\] O.J. No. 4908](#) (Gen. Div.), *aff'd*, [1999 CanLII 3785](#) (ONCA)
17. *Fairfield Sentry Limited v. PricewaterhouseCoopers LLP*, [2018 ONCA 696](#)
18. *Forbes Energy Group v. Parsian Energy Rad Gas*, [2019 ONCA 372](#)
19. *Fresco v. CIBC*, [2024 ONCA 628](#)
20. *Fritz v. Fritz*, [2007 CanLII 54274](#) (ONSC)
21. *Garcia v. Tahoe Resources*, [2017 BCCA 39](#)
22. *GIAO Consultants Ltd. v. 7779534 Canada Inc.*, [2020 ONCA 778](#)
23. *Haaretz.com v. Goldhar*, [2018 SCC 28](#)

24. *Hadissi v. Hassibi*, [1994 CanLII 7566](#) (ONSC)
25. *Huisman v. MacDonald*, [2007 ONCA 391](#), *leave ref'd*, [2007 CanLII 66771](#) (SCC)
26. *ID Inc. v. Toronto Wholesale Produce Association*, [2024 ONCA 948](#)
27. *Jacobovich v. Israel*, [2021 ONSC 3558](#)
28. *Kahlon v. Cheecham*, [2010 ONSC 1957](#)
29. *Kyko Global Inc. v. M/S Crawford Bayley*, [2021 ONCA 736](#)
30. *Lan Assoc. XVIII LP v. BNS*, [\[2000\] O.J. No. 168](#) (S.C.J.), *aff'd*, [2000 CanLII 16943](#) (ONCA)
31. *Leon v. Volkswagen AG*, [2018 ONSC 426](#)
32. *Limbu v. Dyson Technology Limited*, [\[2024\] EWCA Civ 1564](#)
33. *MacDonald v. Lasnier*, [\[1994\] O.J. No. 2923](#) (Gen. Div.)
34. *Marmora and Lake v. Ontario*, [2025 ONCA 10](#)
35. *McAlpine v. McAlpine*, [2012 ONSC 297](#)
36. *McLean v. Seisel*, [2004 CanLII 9418](#) (ONCA)
37. *Muscutt v. Courcelles*, [2002 CanLII 44957](#) (ONCA)
38. *Mynerich v. Hampton Inns Inc.*, [2009 ONCA 281](#)
39. *Nelson Barbados Group Ltd. v. Cox*, [2009 CanLII 22563](#) (ONSC)
40. *Nevsun Resources Ltd. v. Araya*, [2020 SCC 5](#)
41. *O'Keefe v. Lyngholm*, [\[2014\] N.J. No. 238](#) (T.D.)
42. *Oshawa Group Ltd. v. Mason Homes*, [2005 CanLII 36443](#) (ONCA)
43. *Ottawa-Carleton D.S.B. v. Scharf*, [2008 ONCA 154](#), *leave refused*, [2008 CanLII 63478](#) (SCC)
44. *Parc Downsview Park Inc. v. Penguin Properties Inc.*, [2018 ONCA 666](#), *leave ref'd*, [2019 CanLII 29764](#) (SCC)
45. *Pavacic v. Nicely Estate*, [2008 CanLII 24228](#) (ONSC)
46. *Pedwell v. Pelham*, [2003 CanLII 7488](#) (ONCA), *leave ref'd*, [\[2003\] S.C.C.A. No. 335](#)

47. *Prince v. ACE Aviation Holdings Inc.*, [2014 ONCA 285](#), leave ref'd, [2014 CanLII 62244](#) (SCC)
48. *Rieder zu Wallburg v. Plista GmbH*, [2022 ONCA 281](#), leave refused, [2022 CanLII 115626](#) (SCC)
49. *RJM56 Holdings Inc. v. Bazinet*, [2018 ONCA 791](#)
50. *Samina N.A. Inc. v. HE Enviro LLC.*, [2005 CanLII 39667](#) (ONCA)
51. *Shanghai Zhong Jia Hua Chuang Ye Investment LLP v. Bai*, [2022 BCSC 935](#)
52. *Shirodkar v. Coinbase Global*, [2024 ONSC 1399](#), aff'd, [2025 ONCA 298](#)
53. *Smiley v. Pierre Elliott Trudeau Foundation*, [2023 NLSC 107](#)
54. *SVB Underwriting Ltd. v. Fairfax Financial Holdings Ltd.*, [2008 ONCA 7](#)
55. *Tamminga v. Tamminga*, [\[2013\] O.J. No. 4515](#) (S.C.J.), aff'd, [2014 ONCA 478](#)
56. *Vahle v. Global Work & Travel Co.*, [2020 ONCA 224](#)
57. *Vale Canada Inc. v. Royal & Sun Alliance*, [2022 ONCA 862](#), leave ref'd, [2023 CanLII 85843](#) (SCC)
58. *Vedanta Resources PLC v. Lungowe*, [2019 UKSC 20](#)
59. *Welton v. United Lands Corp.*, [2020 ONCA 322](#)
60. *Wilson v. Wilson*, [2013 NSSC 427](#)
61. *Woods v. Ontario*, [\[2003\] O.J. No. 1165](#) (ONCA)
62. *Young v. Tyco International*, [2008 ONCA 709](#)
63. *Epoxy Solutions v. Polymer Science*, [2009 CanLII 46657](#) (ONSC)
64. *F.H. v. McDougall*, [2008 SCC 53](#)
65. *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, [2021 FCA 72](#)

SCHEDULE "B" - TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. None.

SOPHIA MATIKO JOHN
et al. Plaintiffs / Appellants

- and - BARRICK GOLD CORPORATION
Defendant / Respondent

Court of Appeal File No. COA-25- CV-0229
Court File Nos. CV-22-00-690649-0000
CV-24-00-714148-0000

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE RESPONDENT,
BARRICK GOLD CORPORATION**

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Steven G. Frankel (LSO# 58892E)
Tel: 416.367.7441
Email: sfrankel@dwpv.com

Anisha Visvanatha (LSO# 74421O)
Tel: 416.367.7480
Email: avisvanatha@dwpv.com

Alexander Barnes (LSO# 89981N)
Tel: 416.863.4131
Email: abarnes@dwpv.com

Lawyers for the Defendant (Respondent)