

COURT OF APPEAL FOR ONTARIO

CITATION: Matiko John v. Barrick Gold Corporation, 2026 ONCA 248

DATE: 20240407

DOCKET: COA-25-CV-0229

Fairburn A.C.J.O., Simmons and Trotter JJ.A.

BETWEEN

Sophia Matiko John, In Her Personal Capacity and as Litigation Guardian for her minor child, Kelvin; Anacretus Maringo Gimanza; 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 Mhuri; 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)

AND BETWEEN

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 W Anka; Charles Ikaya Mgaya; Maheri Mwita Ntora; and Charles Mwita Mseti

Plaintiffs
(Appellants)

and

Barrick Gold Corporation

Defendant
(Respondent)

Joe Fiorante, W. Cory Wanless and Ronan Mallovy, for the appellants

Steven G. Frankel, Kent E. Thomson and Anisha Visvanatha, for the respondents

Paul Champ, for the intervenor Amnesty International Canada

Heard: November 27, 2025

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated November 26, 2024, with reasons reported at 2024 ONSC 6240.

Simmons J.A.:

[1] The main issue on appeal is whether the motion judge erred in permanently staying these two related actions because he found that Tanzania is a clearly more appropriate forum than Ontario in which to try them.

[2] For the reasons that follow, I conclude that there is no basis for appellate interference in the motion judge's discretionary determination of the *forum non conveniens* issue. I would dismiss the appeal and the appellant's fresh evidence motion.

Background

[3] In their actions, the appellants claimed damages for personal injuries or the wrongful death of family members, against the respondent, Barrick Gold Corporation (“Barrick”), arising from the actions of Tanzanian Police Force (“TPF”) personnel who provided armed security at a mine (the “Mine”) located in a remote northern region of the United Republic of Tanzania.

[4] The appellants alleged that it was a longstanding practice of TPF personnel to respond with unnecessary violence against local community members attempting to eke out a subsistence living by gathering rocks containing trace amounts of gold from the Mine’s waste rock area.

[5] The Mine is owned by a Tanzanian company, North Mara Gold Mine Limited (“NMGML”). Barrick is a Canadian multinational mining company and the indirect majority shareholder (84%) of NMGML. The remaining shares of NMGML are owned by the Tanzanian government.

[6] The appellants’ claims relate to 20 incidents of allegedly unjustified violence which they say occurred at or near the Mine between April 2021 and July 2023. During that period, armed TPF personnel provided additional security¹ at the Mine under Memorandums of Understanding (“MOUs”) made with NMGML in 2019 and 2022.

¹ The evidence indicated that unarmed security was provided by a private Tanzanian contractor hired by NMGML or its management company.

- [7] The appellants advanced claims against Barrick based on two legal theories:
- (i) Barrick's involvement in the establishment, monitoring, and failure to enforce, corporate human rights and security policies at the Mine site, a claim premised on direct parent company liability and negligence; and
 - (ii) aiding and abetting violations of customary international law prohibitions against extrajudicial killings and torture, a claim premised on *Nevsun Resources Limited v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166.

[8] On its motion to dismiss or stay the action, Barrick raised the issues of both jurisdiction *simpliciter* and *forum non conveniens*. It asserted that the only forum with any connection to the issues and where the majority of the witnesses are located is Tanzania.

[9] In response, the appellants filed expert evidence launching a full-scale attack on the judiciary and administration of justice in Tanzania. They also filed numerous corporate documents² relating to Barrick and cross-examined Barrick's affiants in support of their pleaded position that Barrick's global headquarters and corporate head office is in Toronto and that Barrick exercises control over its global subsidiaries through policies and directives, including those related to security and

² These consisted of corporate documents publicly available on Barrick's website, but included documents required to be filed by Canadian securities regulators.

human rights, which are issued, monitored and enforced by its senior management and Board of Directors.

The motion judge's reasons

[10] Before turning to the issues of jurisdiction and *forum non conveniens*, the motion judge made several findings that are relevant on appeal, including the following:

- Barrick began as an Ontario company but was continued as a British Columbia corporation³ with its head office in Vancouver;
- of Barrick's 23,000 employees⁴, “only 55 are at the company's Toronto office, and they are engaged in finance, communications, investor relations, legal and corporate secretary matters, and human resources”;⁵
- the Mine is regularly accessed by local residents not employed by NMGML and not authorized to enter the Mine site – such entries have led to clashes between the residents entering the site and the TPF

³ In their statements of claim, the appellants asserted Barrick was incorporated under the laws of British Columbia. In an affidavit filed on the motion, Grant Beringer, the Group Sustainability Executive of Barrick, deposes that Barrick was continued under the laws of British Columbia. Corporate documents filed on the motion indicated that the continuation occurred in 2018.

⁴ In his affidavit, Mr. Beringer indicated that it is the Barrick “group of companies” that employs 23,000 people.

⁵ In his affidavit, Mr. Beringer deposed that employees who work at the Toronto office are involved in the following departments and business functions: Finance (including Tax & Treasury, Risk, Assurance & Business Integrity, and Information Technology); Strategic Matters; Communications & Investor Relations; Legal and Corporate Secretary; and Human Resources. He also stated “[n]ot one of the members of the Sustainability team that I lead is based in Toronto or elsewhere in Ontario.”

and reportedly between the local residents entering the site themselves;

- while the appellants claim the people entering the site were local craftsmen eking out a living at no one else's expense, according to Barrick they were trespassers attempting to steal gold-bearing rock and other property⁶;
- no member of Barrick's Board of Directors is located in Ontario;
- Barrick's senior executives with any responsibility in relation to the Mine reside primarily in South Africa or Tanzania while its Chief Executive Officer has residences in a number of countries, but not Canada;
- the business and management of NMGML are overseen by a five-member Board of Directors, none of whom resides in or works out of Ontario;

⁶ Apolinary Lyambiko, a NMGML employee and General Manager of the Mine, deposed that the Mine is regularly targeted by trespassers who are frequently armed with machetes, spears, slingshots, rocks, metal cutters and/or hammers who often storm the Mine together in groups. He said that there have been a number of incidents at the Mine in which trespassers have, among other things, climbed into active mining areas and detonated live explosives in an effort to steal gold-bearing rock; risked or suffered significant falls; drowned; and placed themselves at risk of significant or fatal injury from falling rocks. As a result, since late 2019, the Mine has implemented various measures to protect the Mine, Mine staff and the trespassers, including: construction of a security perimeter around the Mine consisting of sections of concrete wall, electric and barbed wire fencing and lockable gates and sirens.

- NMGML's contract with the TPF to provide additional security at the Mine appears to be a standard arrangement in the resource industry;
- the MOUs under which the TPF operate at the Mine are local Tanzanian agreements – while they require the TPF to abide by national and international human rights law and Tanzanian and international policing standards, there is nothing about their content that implicates Barrick in Ontario;
- the TPF is a national police force that operates under its own independent chain of command in all of Tanzania and this independence is expressly recognized in the MOUs;
- to the extent that the trial will turn on determining factual causation, the relevant evidence will come from witnesses who were in Tanzania on the relevant dates and possible video evidence⁷;
- no one from Barrick's Ontario office will be called as a witness to the incidents in issue;
- any analysis of Barrick's policies and their impact will be based on the evidence of witnesses in Tanzania or Barrick's regional personnel in South Africa;

⁷ Evidence on the motion confirmed that an extensive network of closed-circuit television, thermal and infrared cameras had been installed around the Mine site and that specially trained personnel had been employed to monitor the video feeds.

- no one has identified a single, truly relevant witness from Ontario;
- the Tanzanian political and legal system was designed based on the English common law model and is structured around familiar principles: the rule of law, the separation of powers, and the independence of the judiciary;
- evidence filed by Barrick from Mohamed Othman, the former Chief Justice of Tanzania, and Leonard Shaidi, a senior Tanzanian law professor, establishes that Tanzania's courts are fair, independent and competent;
- neither the unavailability of contingency fee arrangements nor the limited pre-trial discovery rights available in Tanzania disqualify it or make it an inappropriate alternative for *forum non conveniens* purposes – concerning the latter issue, the evidence of Professor Shaidi and former Chief Justice Othman “demonstrate 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”;
- former Chief Justice Othman's evidence shows that the courts and substantive law in Tanzania are open to new categories of torts;

- the record establishes that the Tanzanian legal system and legal profession would be up to the task of addressing the appellants' claims; and
- former Chief Justice Othman's evidence indicates that there is no provision in Tanzania's civil procedure for enforcing letters of request issued by a foreign court.

[11] Concerning jurisdiction *simpliciter*, the motion judge applied the "real and substantial connection" test articulated in *Club Resorts Limited v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at paras. 101-102, and found that although Barrick has an office in Toronto and therefore carries on business in Ontario, the subject matter of the claim was disconnected from Ontario, and any presumption of jurisdiction was therefore rebutted. Among other things, he held:

- 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; and
- the evidence is conclusive that the Mine at the centre of the claim is not operated or overseen from Ontario and that the human rights violations alleged did not take place in Ontario.

[12] The motion judge therefore dismissed the actions for lack of jurisdiction.

[13] Given his conclusion that Ontario did not have jurisdiction *simpliciter*, it was unnecessary that the motion judge conduct a *forum non conveniens* analysis. However, he chose to do so, at least briefly, in the event he was wrong about the jurisdiction issue.

[14] Citing *Breeden v. Black*, 2012 SCC 19, [2012] 1 SCR 666, at para. 37, the motion judge recognized that the “party raising *forum non conveniens* has the burden of showing that his or her forum is clearly more appropriate.” He considered several factors often considered in a *forum non conveniens* analysis⁸, but focused his attention on “convenience and expense on one hand, and fairness and efficiency on the other.”

[15] The motion judge noted that virtually all the witnesses were located in Tanzania, and that the cost of bringing them to Canada, housing them once here, translating documents from Swahili to English and arranging for simultaneous interpretation would be significant. Although the appellants’ legal expenses would be greater if the trial proceeded in Tanzania because contingency fees are not permitted, he accepted Barrick’s expert evidence that the appellants would have “access to *pro bono* or subsidized representation by Tanzanian legal aid organizations.”

⁸ These included: the law to be applied to issues in the proceeding, the desirability of avoiding a multiplicity of legal proceedings, the desirability of avoiding conflicting decisions in different courts, and the enforcement of an eventual judgment: *Van Breda*, at para. 105.

[16] The motion judge also accepted Barrick's expert evidence that there is no mechanism in Tanzania for compelling a Tanzanian resident witness to testify in a foreign proceeding. He found that this would severely hamper Barrick's defence because it would be unable to compel the eyewitness evidence of police officers and others it would require to defend itself from the allegations against it.

[17] The motion judge concluded that "the Tanzanian bar and the Tanzanian judiciary are capable of conducting a fair, efficient, and just trial" and that "given the remoteness of Ontario from the matters at issue, and the fact that crucial witnesses would inevitably be absent from an Ontario trial [because of the inability of Tanzania to respond to letters of request], it [was] incumbent on [him] to decline jurisdiction". He said, "[a] trial in Tanzania is the only way for all the relevant evidence on both sides to be aired in court".

[18] The motion judge stated that, "[a]s between Ontario and Tanzania, it is Tanzania that is clearly the more appropriate forum in which to try the matters raised in this claim." In addition to dismissing the action for lack of jurisdiction, his order provides: "if this Court has jurisdiction, the Companion Actions are permanently stayed on the basis of *forum non conveniens*."

The issues on appeal and positions of the parties

[19] The appellants assert that the motion judge made multiple factual and legal errors in both his jurisdiction *simpliciter* and *forum non conveniens* analyses and

as a result failed to properly consider the issue of access to justice in the context of a transnational human rights case. The various errors alleged can be grouped as follows:

- finding that Barrick's corporate head office is in Vancouver, rather than Toronto, and misapprehending the legal and factual significance of Barrick's global human rights and security policies, which the appellants say emanated from Barrick's Toronto head office
- applying the legal test for assumed jurisdiction when presence-based jurisdiction was established;
- applying a summary judgment "best evidence" standard to a *forum non conveniens* motion;
- recharacterizing the actions as essentially negligence claims and minimizing or failing to take account of the human rights context and customary international law claim for aiding and abetting torture and extra-judicial killing; and
- improperly assessing the real risk of unfairness to the appellants of proceeding in Tanzania and disregarding their evidence about limited access to legal resources and sources of proof.

[20] It is undisputed that Barrick has an office in Toronto. For the purposes of the appeal, Barrick does not contest the presence-based jurisdiction of the Ontario

courts. Barrick therefore submits that the primary issue on appeal is whether the motion judge committed a reversible error in finding that Tanzania is a clearly more appropriate forum than Ontario for determining the appellants' claims. Although Barrick does not say so explicitly, it follows from its acknowledgement on appeal of presence-based jurisdiction, that the actions should not have been dismissed for lack of jurisdiction based on the real and substantial connection test, which applies where assumed jurisdiction is the basis of a plaintiff's assertion of jurisdiction. The appellants note that it was Barrick that advanced the real and substantial connection test in the court below.

[21] Further, the appellants submit that the motion judge's errors in failing to find that Barrick's head office is in Toronto and related misapprehension of the legal and factual significance of Barrick's global human rights and security policies emanating from that office are significant to the *forum non conveniens* analysis.

Discussion

1. Standard of review

[22] It is well-established that *forum non conveniens* determinations involve an exercise of discretion. The appropriate standard of review was described as follows in *Van Breda*, at para 112:

The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts, which ... takes place at an interlocutory or preliminary stage.

[23] Here, the motion judge properly articulated the *forum non conveniens* test and concluded that Barrick had discharged its burden with respect to the test. As I will explain, I am not satisfied that he made any error of law or any error in determining the relevant facts concerning that issue that would justify appellate interference

2. The head office and global human rights and security policies issue

[24] Relying on *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R.3, at para. 21, the appellants say that it is the pleadings that frame the action for the purpose of a *forum non conveniens* analysis. Here, they pleaded that Barrick's global headquarters and corporate head office is in Toronto. They also pleaded extensive facts relating to Barrick's organizational structure and policies and the implementation and enforcement of these policies at the Mine, which they say establishes Barrick's duty of care and makes it accountable for their damages. In addition, they point to evidence that the policies on which they rely emanated from Barrick's Toronto global headquarters. Based on these (and other) factors, the appellants say these actions are properly rooted in Ontario and should proceed here.

[25] Further, the appellants contend that there is nothing inherently unfair about suing a corporation in a place where it has established its global headquarters. It is well-established that the location of a company's head office grounds a finding

of presence-based jurisdiction and that the real and substantial connection test “does not oust the traditional private international law bases for court jurisdiction”: *Van Breda*, at paras. 79, 86. Significantly, even where a company merely establishes and continues to operate a place of business in Ontario, it can expect that it “might one day be called upon to answer to an Ontario court’s request that it defend against an action” and that presence-based jurisdiction is established: *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 89. Moreover, where a court has jurisdiction, “the normal state of affairs” is for the court to exercise that jurisdiction: *Van Breda*, at para. 109; *Haaretz*, at para. 47.

[26] Although Barrick did not concede for the purposes of the appeal that its Toronto office is its global headquarters or corporate head office, the appellants point to numerous corporate documents, which say that this is the case⁹. The appellants therefore submit that the motion judge’s finding that Barrick’s head office is in Vancouver is incorrect and, in all the circumstances, constitutes a palpable and overriding error in this case. They say that the fact that Barrick’s global headquarters is in Toronto and that its sustainability policies relating to security and human rights emanated from that office points to Ontario being at the centre of this case for the purpose of the *forum non conveniens* analysis.

⁹ For example, Barrick’s 2022 Annual Information Form states, at p. 15, that Barrick’s registered office is located in Vancouver while its head office is located in Toronto

[27] I would not accept this submission. Assuming, without deciding, that the motion judge erred in failing to find that Barrick's global headquarters and corporate head office is in Toronto¹⁰, the motion judge made other findings that support his conclusions in his *forum non conveniens* analysis about "the remoteness of Ontario from the matters at issue", and that analysis favoured Tanzania.

[28] As I have said, the motion judge found 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 elaborated, "[t]hese filings and communications do not assign a geographic location to matters at issue in the action". Although made in the context of his jurisdiction *simpliciter* analysis, this finding belies the appellants' submission that Ontario is at the centre of this case for the purposes of the *forum non conveniens* analysis.

[29] The motion judge's findings in this respect were supported by affidavit evidence from Grant Beringer of South Africa, Barrick's Group Sustainability Executive, that "sustainability-related"¹¹ ... policies, procedures, codes and

¹⁰ During oral submissions, Barrick's counsel asserted that the head office issue is "somewhat complex" because Barrick was "registered" in British Columbia in 2019. In light of my conclusions about the appellants' submissions on this issue, I consider it unnecessary to decide whether Barrick's head office is in Toronto.

¹¹ Mr. Beringer deposed that matters such as human rights, social and economic development, health and safety as well as the environment at and in the areas of producing mines fall within the rubric of "Sustainability" at Barrick.

guidelines were not and are not prepared by Barrick employees who reside in Ontario or elsewhere in Canada.” Mr. Beringer also deposed that “[n]ot one of the members of the Sustainability team that I lead is based in Toronto or elsewhere in Ontario.”

[30] Significantly, the motion judge also found that no member of Barrick’s Board of Directors resides in Ontario and further, “no one ha[d] identified a single, truly relevant witness from Ontario.”

[31] While the pleadings frame a *forum non conveniens* analysis, it is sometimes necessary that a motion judge address factual issues in dispute to properly assess the “considerations at the heart of” that analysis, albeit adopting a “prudential, not an aggressive, approach to fact finding”: *Young v. Tycoe*, 2008 ONCA 709, 92 O.R. (3d) 161, at paras. 31, 33. Here, I see no error in the motion judge’s findings noted at paras. 28 and 30 above.

[32] A *forum non conveniens* analysis presumes the existence of jurisdiction, whether presence-based, consent or assumed. The factors that drove the motion judge’s *forum non conveniens* analysis were “convenience and expense on one hand, and fairness and efficiency on the other.” In the absence of a demonstrated reversible error in relation to those issues or a failure to consider other factors relevant to the *forum non conveniens* analysis in this case, I am not persuaded that any error in identifying the location of Barrick’s global headquarters and

corporate head office would constitute a palpable and overriding error in all the circumstances of this case.

3. The evidentiary standard issue

[33] The appellants point to the following statements at paras. 34 and 35 of the motion judge's reasons as demonstrating that he improperly applied a summary judgment "best evidence" standard to the evidence adduced on the *forum non conveniens* motion:

[O]ne can surmise that this record contains the [appellants'] best evidence....

As 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".

[34] The appellants reiterate that the law is clear that the pleadings provide the context for the assumption and exercise of jurisdiction analysis. They assert that by relying on a mistaken summary judgment evidentiary standard the motion judge wrongly faulted them for failing to produce any first-hand evidence of the underlying events giving rise to their claims. Further, they say that the motion judge did not apply the same standard to Barrick as he took no issue with its failure to produce CCTV evidence or police reports concerning the underlying incidents when the record made clear that it had access to that type of evidence.

[35] I would not accept this submission for three reasons. First, by using the phrase “[or at least *some*] of the evidence that would be forthcoming at trial”, the motion judge made it clear that he was not applying the summary judgment evidentiary standard, which requires that parties put their best evidentiary foot forward: see e.g., *Pedaya v. 261109 Ontario Inc.*, 2025 ONCA 657, at para. 6.

[36] Second, when read in their full context, paras. 34 and 35 include the commonsense observation that, when faced with a motion to stay or dismiss an action because another jurisdiction is “clearly more appropriate”, parties will presumably adduce “the most cogent evidence available in order to demonstrate the type of forum that their case demands.” I see no error in that commonsense observation.

[37] Third, I am not persuaded that any unfairness accrued to the appellants as a result of the impugned statements or that they amount in any way to a reversible error that would justify appellate interference.

[38] The impugned statements were made in the context of the motion judge’s discussion of “[t]he incidents”. A fundamental issue that emerged in his discussion under that heading was that factual causation was going to be a central issue in the case and that significant eyewitness testimony would be necessary to resolve it. Based on the record before him, the motion judge concluded that Barrick was

going to have to call multiple witnesses¹² to defend itself on that issue and would have no ability to do so at a trial in Ontario because Tanzania would not enforce letters of request. The fact that the motion judge commented on the appellants' failure to adduce any eyewitness testimony on the motion¹³ did not impact his conclusion on that or any other issue central to his *forum non conveniens* analysis.

4. Recharacterizing the actions and failing to take into account the human rights context

[39] The appellants assert that the motion judge mischaracterized their actions as simple negligence claims, which led him to minimize or ignore the human rights context of their claims, and ultimately to prejudge the merits of their customary international law claims for aiding and abetting torture and extrajudicial killings.

[40] At para. 37 of his reasons, the motion judge said: "Although articulated in the language of human rights law, the claim against Barrick is essentially a negligence claim." Later at para. 169, the appellants say he rejected the human rights context of their claims by saying, "a trial in Ontario ... would focus its efforts on platitudes about human rights and corporate responsibility without delving into the actual facts at issue in the claim."

¹² The motion judge found that such witnesses would potentially include other individuals who may have been with the persons who were injured or killed, members of the unarmed security team at the Mine, NMGML staff who may have been present, perhaps medical personnel from hospitals where the injured were treated, TPF members on site at the time of the incident along with the TPF officers in command of those members.

¹³ I acknowledge that the motion judge observed at para. 168 of his reasons that the record before him suggested that "the [appellants] cannot produce even one relevant witness to the incidents in question." However, at para. 51, he also recognized the likelihood that "any number of the [appellants] ... may testify".

[41] Similarly, the appellants say the motion judge minimized the legal significance of their *Nevsun*-based claims by describing them, at para. 99 of his reasons, as a “nuanced development in Canadian tort law” that had little significance to the *forum non conveniens* analysis.

[42] Finally, the appellants say the motion judge prejudged the merits of their human rights claim when he said, at para. 170 that “no corporation, including a global giant like Barrick, is responsible for violence and/or deaths caused by others or contributorily caused by the claimants themselves.”

[43] The appellants note that in *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, 407 D.L.R. (4th) 651, at paras. 107 and 130, leave to appeal refused, [2017] S.C.C.A. No. 94, the British Columbia Court of Appeal found that the motion judge in that case erred in her *forum non conveniens* analysis by ignoring the context of the dispute which involved a transnational company involved in human rights violations and placing insufficient weight on the real risk that the appellants would not receive a fair trial in Guatemala.

[44] In this case, the appellants say that, by mischaracterizing their actions as simple personal injury claims and minimizing and pre-judging the human rights context of their claims, the motion judge arrived at the erroneous conclusion that they were not disadvantaged by being deprived of their counsel and their forum of choice.

[45] I would not accept these submissions. The appellants have in my view taken the motion judge's statements out of context and attributed to them a significance they did not have in his analysis.

[46] The motion judge's statement that the appellants' actions were essentially negligence claims was made in the context of emphasizing that factual causation was going to be an important issue at trial that would require the testimony of multiple witnesses who may have been present when the alleged incidents occurred, or in their aftermath.

[47] The full context of the motion judge's statement at para. 169 of his reasons was the following:

There is really no comparison between Ontario and Tanzania as jurisdictions that can properly try this case. 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. [Emphasis added.]

[48] Clearly, the motion judge's central point was that important evidence would be missing if the trial were to proceed in Ontario. This was as true in relation to their human rights claims as it was of their claims founded on direct parent liability and negligence. Whether characterized as a breach of international human rights law or as a personal injury claim, causation remains one of the key issues to be

resolved at trial. Establishing causation with respect to either claim will require multiple witnesses relating to multiple incidents.

[49] Although the motion judge characterized the appellant's *Nevsun*-based claims as a recent and nuanced development in Canadian law, he also noted former Chief Justice Othman's evidence that "Tanzanian law accepts the common law principle that the categories of torts are not closed". Based on the former Chief Justice's evidence, the motion judge accepted that "the Tanzanian judiciary is open to new and innovative causes of action." He was entitled to do so on the record before him.

[50] Finally, when considered in context, I do not read the motion judge's statement at para. 170 of his reasons as prejudging the appellants' human rights claims. Rather, he was making the point that Barrick's position concerning how the alleged incidents may have unfolded was starkly different than that of the appellants, that issues of justification and causation could be involved, and that it should not be deprived of the ability to call witnesses that could advance its defence.

[51] I observe as well that the context of this case is quite different than the context in *Garcia* where the seven appellants alleged that they were injured by security personnel at a mine during a protest they all attended. In *Garcia*, there were allegations of corruption in the justice system. In that context, and based on

the evidence adduced in that case, the court perceived a real risk that the appellants would not receive a fair trial in Guatemala against a powerful international company whose mining interests in Guatemala aligned with the political interests of the Guatemalan state: *Garcia*, at para. 130.

[52] In this case, the motion judge accepted Barrick's expert evidence concerning the independence and impartiality of the judiciary. Further, this case involves allegations that 20 people were abused by the TPF in separate incidents. These factors and the difficulty of compelling third-party witness testimony if the action were to proceed in Ontario makes the context of this case very different from the context that existed in *Garcia*. Once again, I conclude that it was open to the motion judge to make the findings he did based on the record before him.

5. Improperly assessing the real risk of unfairness to the appellants of proceeding in Tanzania

[53] Relying on *Garcia*, the appellants submit that, as part of his *forum non conveniens* analysis, the motion judge was required to assess whether they faced a "real risk" of unfairness if their actions proceeded in Tanzania. Pointing to para. 172 of his reasons, the appellants say the motion judge elevated the "real risk" test to an impossibly high standard by holding that the risk of unfairness arises only where the alternative forum is a "non-democratic, non-rule of law country" like Eritrea.

[54] The appellants also rely on *Vedanta Resources PLC v. Lungowe*, [2019] UKSC 20, [2019] 2 W.L.R. 1051, where the UK Supreme Court upheld the lower court's decision holding that an English case should not be dismissed in favour of Zambia where "the practical impossibility of funding such group claims where the claimants were all in extreme poverty" and the absence of experienced legal teams "to enable litigation of this size and complexity" created a real risk that substantial justice would be unavailable in Zambia: *Vedanta*, at para. 89.

[55] The appellants say that, in contrast, here the motion judge found it fair that they be required to seek representation through legal aid to prosecute their complex transnational human rights claim against an international mining giant. In doing so, they say that he made multiple errors, including:

- ignoring their expert evidence that legal aid representation through to trial would not be available;
- focusing his unfairness analysis almost exclusively on Barrick's claim that it would potentially be unable to compel Tanzanian witnesses, including police, to testify in Ontario and holding erroneously that "Tanzania sits in the same position with respect to letters of request as Israel did in the *Haaretz* case",
- failing to weigh against any perceived unfairness to Barrick if the actions proceeded in Ontario the appellants' inability to compel key

Barrick witnesses from outside Tanzania to testify in Tanzania and the limited discovery rights available in Tanzania if the case proceeded there.

[56] I would not accept these submissions.

[57] As a starting point, the motion judge's reference to the appellants' relying on "an inapt comparison to [Eritrea] a non-democratic, non-rule of law country" must be placed in the context in which it was made. In the preceding paragraph, the motion judge emphasized that he knew he was required to consider any potential unfairness to both parties as part of his *forum non conveniens* analysis. He then said that he was satisfied based on the record before him, "that the laws, the judiciary, the bar, and the justice system of Tanzania overall, present[ed] no insurmountable hurdle to a fair trial".

[58] Further, immediately after referring to the Eritrea comparator, the motion judge noted that the appellants had also made "unfounded allegations of prejudice, political intimidation, and a lack of independence" on the part of the Tanzanian judiciary. He said those allegations were not based on the kind of cogent evidence needed to establish "real risk" as identified in *Garcia*. In contrast, he found that:

[C]ogent evidence of the common law foundation and proper functioning of the Tanzanian court and legal system has been provided by the former Chief Justice of the country and one of its most prominent law professors.

[59] Placed in its proper context, I am not persuaded that the motion judge's comment about the appellants using Eritrea as a comparator demonstrates that he improperly elevated the "real risk" standard. Rather, he specifically referenced *Garcia* and explicitly rejected the appellants' allegations concerning the Tanzanian judiciary.

[60] Nor am I persuaded that the appellants' reliance on UK caselaw is helpful. As I understand it, they point to that caselaw to suggest that the access to justice considerations they rely on should be prioritized over other factors in the *forum non conveniens* analysis. However, that is not the law as articulated in *Van Breda*, which requires a weighing of all relevant "facts, considerations and concerns": *Van Breda*, at para. 105. Here, the motion judge made findings of fact that addressed the appellants' various concerns as part of his overall analysis.

[61] Further, I would not accept the appellants' argument that the motion judge ignored the evidence of their expert, Joseph Oleshangay, concerning the unlikelihood of the appellants' obtaining adequate legal representation to prosecute their actions. I acknowledge that the motion judge did not explicitly refer to Mr. Oleshangay's evidence in his reasons. However, in the circumstances of this case, he was not required to do so. At para. 61 of his reasons, the motion judge referred to the fact that the appellants produced a number of expert reports "in an attempt to demonstrate that the Tanzanian legal system does not provide an appropriate forum to host their claim". He was clearly aware of the appellants'

evidence. But he considered it highly significant that there was no evidence that any of the appellants had approached any Tanzanian lawyers or legal aid clinics to see what legal services might be available. He said this appeared to be a “critical omission from the record” that made it difficult to assess “the veracity of the [appellants’] claim that local legal representation is unavailable to them.” That finding was open to him on the record before him.

[62] It is also apparent from the motion judge’s reasons that he preferred the evidence of Barrick’s experts, former Chief Justice Othman and Ulimboka Lugano Mwasomola. Although he did not reference it specifically, Professor Shaidi also gave evidence on this issue. The motion judge was entitled to prefer the evidence of these witnesses to the evidence of the appellants’ experts. Indeed, former Chief Justice Othman served as a judge for almost 13 years and as Chief Justice of Tanzania for a little over six years until his retirement in January 2017. While Chief Justice, he was Head of the Judiciary of Tanzania and the Presiding Justice of the Court of Appeal. He also served as Chairperson of the Judicial Service Commission, Chairperson of the Council of Legal Education, and from 2014 to 2016 as a member of the Executive Committee of the Southern Africa Chief Justices Forum. Given the Chief Justice’s qualifications and experience, it is not surprising that the motion judge chose to rely on his evidence.

[63] The appellants also assert that, unlike the situation in *Haaretz*, it was unclear in this case what Tanzanian witnesses Barrick would be required to call and

whether such witnesses may refuse to attend voluntarily. Moreover, they assert that the motion judge wrongly concluded that former Chief Justice Othman's evidence was conclusive that letters of request would not be honoured in Tanzania. Accordingly, they say that the motion judge afforded undue weight to concerns about fairness to Barrick if the action proceeded in Ontario.

[64] I disagree. The appellants' allegations involve claims that seven people were shot to death by the TPF and 13 were injured through shootings or beatings in separate incidents. While some of the incidents are described in the statements of claim as having occurred inside the Mine perimeter others are not¹⁴. Even assuming CCTV footage was available for all, or many of, the incidents, the motion judge noted the likelihood that "multiple viewpoints will have to be explored" and that "most of the relevant evidence will have to come from eyewitnesses". I see nothing unreasonable about this finding or the motion judge's conclusions that Barrick would be severely hampered in its defence if the trial were to proceed in Ontario. He said Barrick cannot compel, and will likely not persuade, some of the most important witnesses for its defence, who were not employees of Barrick or NMGML¹⁵, to testify or produce documents in Ontario. This could leave the court without crucial evidence about the manner in which each incident involving the

¹⁴ For example, two incidents are described as having occurred in the village centre, two while the two appellants were riding a motorcycle near a Mine road, one at a barbershop, another at a private event.

¹⁵The various witnesses the motion judge found Barrick could require for its defence included other individuals who may have been with the persons who were injured or killed, members of the unarmed security team at the Mine, medical personnel from hospitals where the injured were treated, TPF members on site at the time of the incident along with TPF officers in command of those members

TPF occurred, including whether they happened, whether the TPF actions were justified in the specific circumstances of each incident, how specific injuries were incurred, the extent of injury and whether specific injuries caused death. Particularly in light of the number of incidents and witnesses that could be involved, I am satisfied that the motion judge's findings were open to him on the record.

[65] Further, while former Chief Justice Othman opined that it was "highly uncertain, and in [his] view unlikely" that Tanzanian Courts would compel its residents to produce documents or submit to examinations in connection with foreign civil litigation, I am not persuaded that the motion judge committed a reversible error in "tak[ing] it as a fact" from the former Chief Justice's opinion "that there will be no means of compelling police officers and other necessary witnesses to testify" if the actions were to proceed in Ontario.

[66] The former Chief Justice explained that in Tanzania, a civil litigant must identify a relevant enabling provision, rather than a merely prescriptive provision, in order to obtain relief. He said that to his knowledge "there is no enabling provision of Tanzanian law that authorizes Tanzanian Courts to enforce requests for assistance issued by foreign courts in connection with foreign civil proceedings." In the face of this explanation, I see no error in the motion judge's conclusion.

[67] The appellants point to the fact that former Chief Justice Othman gave a similar opinion concerning the inability of Tanzanian Courts to issue letters of request to foreign jurisdictions to obtain the evidence of foreign residents. In their factum, the appellants listed multiple Barrick executives whose evidence they say they would be unable to compel if the actions were to proceed in Tanzania. They also point to the fact that discovery is more limited in Tanzania than it is in Ontario. However, the motion judge relied on the fact that as part of the motion, Barrick represented to the court that it would attorn to Tanzanian Courts. Further, he accepted the evidence of a Barrick expert that documentary discoveries and written interrogatories are available as of right in Tanzania and oral examinations are available if a court, on application, determines that they are appropriate in the circumstances. I would observe as well that the appellants failed to explain why the testimony of the many Barrick executives they identified would be necessary, or how, accepting that they would be able to obtain at least some pretrial-disclosure, they would be prejudiced by an inability to compel the attendance of Barrick executives, when it would be Barrick's onus to prove its defence.

[68] In the end, I am not satisfied that the appellants have demonstrated an error in law or reversible error in fact in the motion judge's discretionary *forum non conveniens* decision.

6. The fresh evidence motion

[69] The appellants seek to file a law clerk's affidavit appending various exhibits as fresh evidence on appeal. The exhibits include an October 20, 2025 report by Amnesty International concerning events in Tanzania preceding its October 2025 national election; an October 31, 2025 Joint Statement by the Foreign Ministers of Canada, the United Kingdom and Norway concerning the post-election state of affairs in Tanzania; two newspaper articles relating to recent events at the Mine or the situation in Tanzania and a document obtained from Barrick's website responding to one of the newspaper articles; a hearsay statement by the law clerk concerning information she obtained from a lawyer about a court registry search he conducted in Tanzania; and a press release obtained from Barrick's website concerning a change in its senior leadership.

[70] The purpose of such evidence is said to be to provide evidence of: a developing human rights crisis in Tanzania surrounding the national election, ongoing TPF violence at the Mine as cited in newspaper articles and evidence that no lawsuits have been filed in response, and the appointment of a replacement CEO with deep connections to Ontario.

[71] In response, Barrick filed an affidavit from former Chief Justice Othman opining that recent events in Tanzania have not compromised the proper administration of civil justice in that country.

[72] To succeed on their motion for fresh evidence, the appellants must meet the well-known high threshold established in *R. v. Palmer*, [1980] S.C.R. 759, at p. 775¹⁶:

- (i) the evidence should generally not be admitted if, by due diligence, it could have been adduced at the proceeding below;
- (ii) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the proceeding below;
- (iii) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (iv) the evidence must be such that, if believed, it could reasonably be expected to have affected the result when taken together with the other evidence adduced in the court below.

[73] At best, the various exhibits attached to the law clerk's affidavit are hearsay. Even assuming that they are capable of being admitted into evidence, in my view, they lack the relevance, credibility and cogency necessary to approach the threshold of being capable of having affected the outcome of the proceeding below. I would decline to admit the proposed fresh evidence.

¹⁶ See: *Barendregt v. Grebliunas*, 2022 SCC 22, [2022] 1 S.C.R. 517, at para. 3.

Disposition

[74] Based on the foregoing reasons, I would dismiss the appeal and the fresh evidence motion. As Barrick does not seek costs, I would make no order as to costs.

Released: April 7, 2026 *JMF*

[Signature]

I agree Fair ACJO

I agree. J. Justice J.A.