



Your reference: Ms Ayanda Boss
Our reference: Richard Spoor

Briefing to the Portfolio Committee on Mineral Resources 22 November 2017

Background

- 1 On 13 May 2016 the South Gauteng High Court in Johannesburg certified a class action allowing gold miners suffering from silicosis and tuberculosis to proceed with their claims against 30 gold producers.
- 2 The Court appointed the law offices of Richard Spoor Incorporated (RSI), Abrahams Kiewitz Incorporated (AK) and the Legal Resources Centre (LRC) as class counsel.
- 3 The class action covers gold mine who worked on one or more of the 82 mines owned by one (or more) of the 30 named respondents who contracted silicosis or tuberculosis as a result of their employment on those mines and the dependents of deceased miners who died of these diseases.
- 4 The order certifying the class action has been taken on appeal to the Supreme Court of Appeal by the respondent mining companies. That appeal is still pending.
- 5 Over the last two years the claimants counsel and representatives of the six largest respondents ARM, Anglo American, AngloGoldAshanti, Gold Fields, Harmony and Sibanye Stillwater, who have organised themselves as the so-called "Working Group", have been engaged in discussions with a view to settling the claims.
- 6 Significant progress has been made in those discussions towards a settlement and the parties are reasonably confident that a settlement will be achieved in the course of this year.

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- 7 Any settlement will need to be confirmed by the High Court. Interested and affected parties will be given an opportunity to make submissions to the Court regarding the terms of the proposed settlement before it is confirmed.
- 8 Persons who do not wish to participate in the settlement will be given the opportunity to opt out of the settlement.
- 9 In parallel with the class action settlement negotiations the parties have been engaged in multilateral discussions with government and organised labour on the issue of legislative reform of the statutory compensation system.

Background to the Class Action Litigation

- 10 South Africa has two statutory workman's compensation system this has been the case for over 100 years.
- 11 Broadly speaking the *Occupational Diseases in Mines and Works Act* (ODMWA) compensates workers, and the dependents of workers, who contract occupational lung diseases caused by exposure to dust in mines only, the *Compensation for Occupational Injuries and Diseases Act* (COIDA) compensates all workers for occupational injuries and diseases other than occupational lung diseases caused by exposure to dust in miners.
- 12 For convenience sake we refer to the diseases covered by ODMWA as "compensable disease" these include, asbestosis, silicosis, coal workers pneumoconiosis, chronic obstructive airways disease and pulmonary tuberculosis that is linked to exposure to dust in mines. These diseases characterised by their long latency period that is it takes many years of exposure before they manifest.
- 13 ODMWA (and its antecedents) predates COIDA (and its antecedents) by several decades.
- 14 ODMWA was originally enacted as welfare of public health legislation which is why it falls under the Department of Health. At the time compensable diseases were considered an unfortunate but invariable consequence of mining. The laws enacted to

address the social problems arising from the large number of Mineworkers who are disabled by these diseases and the large number of widows and orphans who died of these diseases.

- 15 The basic principle was that mine owners (not employers) paid a so called risk levy for every person who was exposed to dust on its mines. The amount of the levy was proportional to the assessed risk to which the workers were exposed.
- 16 The COIDA scheme was established for different reasons. Historically the only recourse that workers had against their employers in respect of injuries at work caused by the negligence of their employer was to make a civil claim for damages. That was expensive and difficult and prejudiced workers. Also employers face the risk of being bankrupted by successful civil claims.
- 17 The state intervened to require employers to insure against the claims of the employees. Instead of litigating, the worker could file a claim against the insurer. Subsequently a statutory insurer was created known as the "Workman's Compensation Fund" (the Fund).
- 18 The Fund and two mutual associations, namely the Federated Employers Mutual (FEM) and the Rand Mutual Association (RMA) are the only insurers authorised to sell statutory employers liability insurance.
- 19 As part of what became known as a "*historical compromise*" workers gave up their right to sue their employers for but, as a quid pro quo, their compensation was limited to the benefits provided for under the COIDA, they were also relieved of the obligation to prove their employers negligence. Further the claim system was designed to be cheap, quick and simple.
- 20 Over time and especially since 1993 when ODMWA was deracialised, the value of the statutory benefits declined by over 80%.
- 21 The net result was that mineworkers with compensable diseases, were receiving benefits that compensate for only a fraction of their actual losses. However thanks to

the prohibition contained in COIDA against suing your employer, they could not recover their losses through the civil justice system.

- 22 In the 1980s there was a proliferation of litigation around occupational lung diseases in Europe Australia and the United States. In the mid-1990's a British law firm (Leigh Day) filed claims for damages on behalf of South African asbestos mineworkers against their erstwhile employer, Cape Asbestos, in England. The basis on which the litigation was allowed to proceed in England is that the workers had no civil remedy in South Africa.
- 23 We formed the view that notwithstanding the express provisions of COIDA, mineworkers with compensatable diseases were entitled to institute civil claims for damages against their employers. On the strength of this conviction we initiated legal action against two South African asbestos mining companies, Gencor and GEFCO, which actions were settled in 2002. That settlement led to the establishment of the Asbestos Relief Trust and the Kgalagadi Relief Trust, which between them have paid several hundred millions of rands in compensation to mineworkers with asbestos related diseases.
- 24 In 2006 AK and RSI issued summons against AngloGoldAshanti on behalf of Thembikile Mankayi, a former gold mine worker from the Eastern Cape. The issue was his right to sue his employer for damages. In 2011, the Constitutional Court ruled that mine workers with compensable diseases were entitled to sue their employers for damages. This decision cleared the way for the silicosis class action.
- 25 The application for the certification of a class action was filed the same year.

Why a class action?

- 26 The alternative to a class action are a series of individual actions. This would mean thousands upon thousands of individual claims. Claimants with the best claims and access to lawyers, would be first in the queue. Claimants without money and without access to legal services, particularly those in the rural areas and in neighbouring countries, would be last in the queue.

- 27 A series of individual actions would be enormously costly, it would impose a heavy burden on the courts, the litigation would be never ending and would very likely end in the bankruptcy of many defendant companies. Despite this the vast majority of potential claimants are unlikely ever to see any benefit.
- 28 A class action has the benefit that it includes all members of the class and that they will be treated equally. The settlement of a class action will result in the establishment of a scheme to compensate class members that will be cheap and effective and accessible to all.
- 29 A class action brings legal certainty, this permits the respondent gold mining companies to clear their liability and to continue in business without the threat of thousands of individual civil claims.
- 30 The downside to a class action is that it is complex, the law and procedure is not certain and if contested can take many years to resolve.
- 31 The class action mechanism however lends itself to the settlement of large and complex disputes such as this dispute which may involve as many as 100 000 former mineworkers across the subcontinent.
- 32 The class action, while cheaper than a multitude of individual actions is still enormously expensive. It would not have been possible to conduct this litigation without the financial support of two large US based class action law firms, who are partnered with AK and RSI, and the Legal Aid which funds the LRC.

The nature of the proposed settlement

- 33 The negotiations have for obvious reasons taken place on a confidential basis.
- 34 The detail of the settlement under consideration can therefore not be disclosed.
- 35 It is however reasonable to assume that it will have the following features:

- 35.1 The parties will be the claimants, represented by the class representatives and their legal counsel, and the defendant companies who have chosen to participate in the settlement and who are members of the working group.
 - 35.2 The settlement will involve the establishment of a settlement scheme, which will be centred around a trust to be funded by the defendants.
 - 35.3 The trust will be independent of the parties.
 - 35.4 The trust will pay compensation to former goldmine workers with the silicosis and or tuberculosis who contracted these diseases as a result of the employment underground on the defendants' gold mines and their dependants. All of these criteria will be precisely defined.
 - 35.5 Compensation amounts will depend on the degree of severity of disease.
 - 35.6 The trust will be under a positive duty to actively track and screen and compensate potential claimants.
 - 35.7 The intention is to integrate the scheme with the ODMWA scheme in order to achieve maximum efficiency and synergy between it and the statutory scheme and to ensure that claimants also receive the statutory benefits, to which they are entitled.
 - 35.8 The settlement trust will have adequate resources to carry out its functions over its anticipated life of 10 to 15 years.
- 36 It should be apparent that the scheme will not compensate all former goldminers with silicosis and/or tuberculosis but only those who were employed on the defendant's mines and who meet the other criteria stipulated in the settlement.
 - 37 There are many gold mining companies that have been wound up and deregistered and against who we have no remedy.
 - 38 The Court will be the final arbiter of the fairness of the settlement.

- 39 Persons who wish not to participate in the settlement scheme will have the option to opt out.
- 40 The intention is that the settlement scheme will be a more attractive option than litigation.

Factors that weigh on the settlement

- 41 By definition a settlement reflects a compromise between the parties.
- 42 The factors that weighs heaviest are cost and delay.
- 43 On the part of the claimants, delay is extremely prejudicial. Our records show that approximately 4% of our 30 000 individual clients die each year. This litigation comes from 2006. It took us five years to establish the principle that the claimants were entitled to file a civil claim and it has taken a further five years to get us to where we are today.
- 44 The class action certification is under appeal and if the matter is not is settled the litigation could conceivably continue for many more years.
- 45 The defendants' ability/willingness to settle is obviously qualified by issues of affordability.
- 46 The other factor that weighs heavily in any settlement is the parties' assessment of the merits of the claim. No one will settle a bad claim.
- 47 We are satisfied that the settlement that we hope to achieve will be the best that can be achieved in the circumstances and that it will help achieve a substantial measure of justice.
- 48 The court will be the final arbiter of this.

The challenge of occupational lung diseases in mines

- 49 The number of persons employed in mines has declined steadily over the last decades the average working life of Mineworkers has increased. These two factors confound efforts to establish whether or not conditions underground have improved.
- 50 South Africa has a sophisticated legislation regulating environmental conditions in mines. The capacity of the Inspectorate to monitor compliance is limited.
- 51 Prosecutions for non-compliance are extremely rare. I'm not aware of a single prosecution or MHSA enquiry.
- 52 Absent any civil or criminal sanctions for non-compliance, employers have few incentives to take the measures necessary to improve health and safety in the workplace.
- 53 The compensation provided for under the statutory scheme is completely inadequate. The benefits of paltry, facilities for medical examinations are few and once certified claimants often wait many years before they receive their compensation.
- 54 Because it takes so many years for the these compensable diseases to manifest, the cost of compensation, that will be borne by a fund 10 or 20 years hence, does not provide much of an incentive to employers and contractors many of whom don't expect to be in business in 10 or 20 year's time.
- 55 This class action litigation provides a very powerful incentive to employers to take effective measures to protect their employees against occupational lung diseases. It is however not enough.
- 56 In an ideal system workers would be fairly compensated for any harm and loss they suffer as a result of occupational injuries or diseases. There is no justification whatsoever for the enormous discount of statutory benefits towards the actual loss and harm that workers and their families suffer.
- 57 There is no justification either for the application of the fault principle when it comes to compensation for occupational injuries or diseases. The starting point should be that

employers should be held strictly liable for the harm that workers suffer as a result of unhealthy and unsafe working conditions.

58 The best way to bring these principles to bear is through a properly designed statutory compensation scheme. Both the current schemes resulted in under compensation and because they are so inefficient and ineffective, large numbers of workers who should receive benefits are not receiving benefits. In effect workers are subsidising industry with their health and with their lives

59 The existing COIDA scheme is not designed to deal with compensable diseases. Not least of all:

59.1 the funding model is completely different, COIDA levies determined on the basis of the employers claims history, ODMWA levies should be determined on the basis of the risk projected forward. COIDA is a short-term insurance scheme, ODMWA is a long-term insurance scheme.

59.2 Compensable diseases are progressive, they get worse over time, affected workers need to be reassessed on a periodic basis and their compensation must be adjusted. COIDA does not provide for this.

60 ODMWA is not integrated with the MHSA. So for example historically entry periodic and exit medical exams were conducted under the auspices of the Medical Bureau for Occupational Diseases (MBOD) which therefore had a record of all Mineworkers. Today this is done in-house including by contractors and there is no centralisation of records. This create huge problems when workers move from one mine and one employer to another.

61 It is our submission that legislative reform should not be undertaken on an ad hoc basis and that what is required is a complete review of the existing compensation schemes with a view to draft new legislation that will:

61.1 ensure that workers are fairly compensated;

- 61.2 provide an incentive to employers to ensure a safe and healthy working environment;
- 61.3 ensure that compensation is paid quickly.
- 61.4 address the challenges faced by the state-run compensation schemes;
- 61.5 guard against the effective privatisation of the state compensation schemes.
- 61.6 ensure better supervision by the courts over the functioning and operation of the compensation schemes.

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