

Compensating miners for the burden of lung disease

Alide Dasnois - Associate Editor GroundUp

Alide Dasnois, a South African journalist and former editor of the Cape Times, has written an article titled "The long battle to get the mines to cough up" which is about compensating miners for the burden of lung disease. The article with photos and videos can be found at GroundUp (www.groundup.org.za) (September 2015), but we wanted to reproduce the text here as we think it is of interest to the Quarterly readers. The importance of this issue has been highlighted before in a SACEMA Quarterly article by Tony Davies giving an historical overview on occupational lung disease in South Africa.

Their lawyers are preparing to fight in court, but for many of the miners who contracted lung disease from the silica dust on South Africa's gold mines, it's too late.

Miners with silicosis and tuberculosis are dying at an "alarming" rate, warn their lawyers in a 181-page document asking the Gauteng High Court for permission to proceed with a class action to sue 32 gold mining companies.

In August, in spite of opposition by the companies, the Treatment Action Campaign (TAC) and Sonke Gender Justice were granted leave by the court to join the litigation, which affects tens of thousands of miners and their families.

Three legal teams in South Africa and two in the United States are working together to represent 69 miners, and seven legal teams are representing the mining companies in a case which has already generated nearly 5,000 pages of documents. The mineworkers are applying to be allowed to bring a class action on behalf of all miners who have silicosis and tuberculosis as a result of their exposure to silica dust since 1965, and of the families of all miners who have died of silicosis and tuberculosis.

Anglo American, one of the companies involved, has described the case as "without precedent in South African law and indeed in any other jurisdiction in the world".

The matter, which will be heard in October, could affect some 196,000 gold miners in South Africa and 84,000 from neighbouring countries who are thought to have silicosis, an irreversible, incurable and painful disease in which scar tissue gradually

replaces healthy tissue in the lungs. The disease is often associated with TB. It is disabling and can be fatal.

The mineworkers say the mines are to blame because they failed over the years to take steps to protect mineworkers against excessive levels of dust and the risks of silicosis and tuberculosis.

In 1912, South Africa became the first state to introduce compensation for silicosis as an occupational disease. Compensation for pulmonary TB was introduced in 1916. Yet, say the lawyers, though methods of controlling silica dust were known early on and applied in other countries, South Africa's gold mines failed to act. "Despite the death and serious injury of thousands of mineworkers over decades, the mining industry has enjoyed almost complete immunity from liability for the harm done to mineworkers' health from exposure to silica dust."

The mines have been almost immune not only from civil claims but also from paying statutory compensation. Because of the nature of the disease, many mineworkers returned home to South Africa's rural areas and to neighbouring countries without knowing they were ill. When the symptoms of illness appeared, the former miners were unable to get screening or treatment, and could not claim compensation. In this way, say the mineworkers' lawyers, the costs of silicosis and tuberculosis have been transferred from the mines to the miners' communities in rural South Africa and neighbouring countries.

But a 2011 Constitutional Court judgment opened the door to mineworkers and their families to claim damages for the wrongs done to them by the mines in which they were employed.

"The question is not whether they should be allowed to sue. The only question is how they should be allowed to do so," write the lawyers.

They argue that a class action is the only solution open to the miners and their families. Many of them do not have the benefit of education; as individuals they are too poor to afford lawyers; they suffer from chest pains and coughs and are too weak and too sick to travel to see lawyers or attend court. Widows and other dependants battle to follow up their claims when the miners die.

“The interests of justice thus require that the mineworkers and their families be allowed to proceed by class action. It is their only hope. If the facility of a class action is denied to them, most of them will not be able to sue at all.”

“They will be denied any remedy for the violation of their constitutional, statutory and common law rights. The guilty mines will get off scot-free.”

The mines are aware of this, the lawyers say, which is why they are opposing the application. “They do not seek justice. They seek to escape liability for their history of neglect of mineworkers.”

The mining companies argue that there is no common ground for a class action. In their own court papers their lawyers argue that conditions on each mine were different and that there is no “class” of affected workers or of negligent mining companies. Some also argue that they did not themselves operate the mines.

Anglo American says it is not “and has never been” a mine owner.

In its court papers, for instance, Anglo American says it is not “and has never been” a mine owner and so is different from the other mining companies, though it “held different interests in many mining companies at different times”. Anglo American also argues that there were important differences between mines with respect, for example, to silica content of the rock, dust control and ventilation standards, knowledge of risk, and between mineworkers, such as how long each worked on a particular mine, whether or not a miner was involved in other activities which exposed him to silica dust, and whether he was more or less “susceptible to contract silicosis as a result of being HIV positive or whether he smoked”.

But the lawyers for the mineworkers argue that as a group the mines knew very well what had to be done to protect workers and failed to do it. They quote UCT professor Jonny Myers to show that the mining companies offered protection, screening and treatment to white mineworkers but not to black.

“This includes the occupational hygiene dust measurement strategies, the provision of health services, diagnosis and treatment, compensation for silica-related diseases, and post-mortem examinations and record-keeping, which pertained to white mineworkers.”

“The respondents and indeed the entire gold mining industry consistently and systemically failed for decades to take the required reasonable and practicable measures to protect mineworkers against excessive levels of silica dust and the concomitant risks of silicosis and tuberculosis.” Workers themselves had no control over their working conditions, the lawyers say.

In support of claims that the industry as a whole failed to take care of the workers, they cite the fact that prevalence rates of silicosis and TB did not fall; numerous investigations and reports (including one by the Chamber of Mines) which recognised “a persistent, industry-wide failure to take adequate dust control measures”; admissions by the mining industry that legal dust limits were not being met; and statements by the 69 applicants about their own experiences on different mines, which “attest to the widespread, generalised and systemic failure of the gold mines to provide mineworkers with adequate and effective protection from silica dust.”

“The prevalence of silicosis, silico-tuberculosis and tuberculosis is not, and never has been, a problem limited to a few of the respondents’ mines. It is a problem common to all of them.”

The mines have known for years about ways to reduce the risk of silicosis for their workers, yet tens of thousands of mineworkers have contracted one of these diseases, the lawyers say, citing incidence rates of up to 36%.

“Gold miners with silicosis, silico tuberculosis and tuberculosis are dying at an alarming rate. For many, the inevitable delay that would result from individual litigation of their claims would be too long.”

Marcus Low, head of policy at TAC, said: “Over the past five decades gold mining companies in South Africa sent hundreds of thousands of men into mines without taking the required steps to protect those men from inhaling dangerous levels of silicosis-causing dust. The record shows that these mining companies knew that they were putting the lungs and health of these men at risk.”

“They simply didn’t care enough and they knew they could get away with it.”

“This case is about whether or not we accept a society in which such cruelties are perpetrated. It is about whether we will continue to turn a blind eye to this ugly scar that runs through our history. It is about whether there will be justice for the hundreds of thousands of men who died of silicosis or who got sick with silicosis because of the indifference of mining companies.”

A miner's testimony

Bongani Nkala worked at Harmony Mine from 1985 to 1997. Here is his testimony from the court papers:

During my time working for Harmony, I was frequently and regularly exposed to silica dust released during day-to-day mining activities. This exposure occurred from working with and near activities such as drilling, blasting, and crushing of ore and rock.

The dust levels underground were generally controlled by spraying the walls with water. This was done once in the morning, and after each blast that occurred during a shift. Blasting underground created a lot of dust and much of it remained in the workspace, even after the walls were sprayed with water, as we could still see it, as well as taste and smell it.

There was no ventilation to control the dust levels in my workspace underground and, as a result, the

watering process was the only means of dust control. The dust would remain in the air until the walls were watered, and soon thereafter, when walls dried, the dust levels would increase again. The watering process was an ineffective means of controlling the dust levels underground.

On a daily basis, I and my co-workers breathed silica dust in the following areas of the mines: in the travelling tunnels and in the worksite.

I was never provided with any respiratory equipment. I inhaled all dust that I was exposed to. The dust levels were especially high when I would enter the mine at the beginning of my shift. I had to walk eight kilometres through the tunnels underground to get to my workspace. Lots of dust would settle on the equipment that we used and the equipment was not cleaned during or between shifts. The dust would also settle on our hair, face, and clothes while we worked.

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