



Another silicosis ruling hits miners

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MEMBERS of the Chamber of Mines, which are facing huge claims from silicosis victims after the Constitutional Court paved the way for such claims, this month unobtrusively lost yet another silicosis-related case.

The decision by the North Gauteng High Court entails the country's gold mines having to pay up hugely, even if not a single silicosis-related claim is lodged against them.

The Chamber is considering whether it should appeal the decision.

On May 5 Judge J Zondo decided that mines would have to assume responsibility for deficits in the compensation fund for miners with pulmonary disease. In December the Chamber approached the court for an interpretation in terms of which the state should take the lion's share of the burden.

The decision means that by 2019 mines will have to pay additional levies of at least R1bn a year to compensate silicosis victims.

The Compensation Commissioner for Occupational Diseases (CCOD), a division of the department of health, collects levies from mines for the compensation fund.

The fund makes one-off payments to miners who contract silicosis and other mining-related diseases.

The money collected from mines has been insufficient to cover compensation of affected workers – even though compensation for silicosis is extremely poor compared to statutory compensation in any other sector.

As a result an actuarial deficit of R610m had arisen by 2003, according to audit firm Deloitte.



On Deloitte's recommendation the CCOD has since raised the levies on mines every year in an effort to clear the deficit.

In 2005 the average levy per "risk shift" was only 33c. (A risk shift is one in which a mineworker is possibly exposed to hazardous dust – in other words, practically every shift in an underground mine.)

The levy is now R3 and will have to be exponentially increased to R30.91 by 2019 to keep the fund solvent.

This will potentially increase the overall levy on mines from about R130m a year in 2010 to R1.3bn. Gold mines will carry by far the heaviest burden. Between a quarter and a third of gold miners contract silicosis and hundreds of thousands of men have worked in the mines in past decades.

In its High Court application the Chamber of Mines argued that the CCOD should make up two-thirds of the deficit with government funding. Its argument was that most future claims would come from miners who had already stopped working.

Silicosis often takes years to develop.

The Chamber further argued that the envisaged levies would penalise current mine owners and that the CCOD should have increased the levies years ago.

This would mean today's mine bosses would suffer from the legacy of former mine owners or mines that had already shut down.

Zondo however found increasing levies to be entirely within the CCOD's powers.

The CCOD, as well as the three mine trade unions, the National Union of Mineworkers (NUM), Uasa and Solidarity, were the respondents in the matter.

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Unions, like the Chamber of Mines, have to contend with conflicts of interest.

Silicosis compensation largely benefits former mineworkers and therefore former union members, while the financial burden on the mines could jeopardise the positions of current mineworkers/union members.

CHANGING ENVIRONMENT

By 2019 the current form of the CCOD could become a relic of the past.

The gold industry is under threat from much more serious demands after the Constitutional Court's historic March judgment in Thembekile Mankayi vs AngloGold Ashanti.

The ruling permits mineworkers and former mineworkers with pulmonary disease to sue their employers for compensation. There are an estimated 280,000 ailing mineworkers and former mineworkers on whose behalf class actions for such common-law claims can be lodged.

Richard Spoor, the legal representative for Mankayi, who died shortly before the decision, wants to launch just such an action.



Richard Meeran of British legal firm Leigh Day is planning a case on behalf of another group of former Anglo workers.

There is also talk that non-governmental organisations, as well as the National Union of Mineworkers, with its considerable resources, will lend support.

Parties wishing to submit claims will however find it difficult to win cases like these on a grand scale.

Negligence in terms of dust control in mines will have to be proved.

Up to the late 1990s South Africa did not enforce even theoretical safety standards in mines. Claimants will have to prove negligence and in this context mines could argue that the authorities were negligent.

According to Willem le Roux, a legal expert at Brink Cohen Le Roux, mines could also contest the scope of claims with reference to another common disease among mineworkers – Aids.

This disease commonly accompanies silicosis and aggravates pulmonary disease. In legal terms this could imply that the severity of the disease is partly the fault of the worker, said Le Roux in an article presented at a LexisNexis seminar. He represented the Chamber in the High Court.

The possibility of claims amounting to billions – even hundreds of billions – has already stimulated discussion regarding possible settlements.

In the Mankayi case, according to Le Roux, the expectation was that the Constitutional Court could abolish the current totally inadequate system of compensation for mineworkers.

As a result mineworkers might, for instance, fall under the Compensation for Occupational Injuries and Diseases Act, in terms of which all other workers are statutorily compensated. This could also mean that the CCOD is scrapped in favour of private insurance schemes, a trend which is apparently becoming established globally.

Both solutions will increase the burden on mines and improve workers' compensation, but nowhere near as much as successful claims for compensation will. Spoor has already mooted the possibility of negotiated settlements which could lead to a private compensation fund such as that for former asbestos workers.

Such a fund for the estimated 280 000 silicosis patients could cost roughly R11bn should they receive the same as asbestos sufferers.

In the spirit of social partnership some or other compromise will probably be reached between justice and economic expediency, but possible scenarios might be poles apart.