

# Weighing up cost of silicosis

The mineworker class action lawsuit is an opportunity to challenge employer and state neglect of workers' health and safety, write **Rachel Efenbein** and **Richard Jordi**.

## ABOUT SILICOSIS

Silicosis, or miner's phthisis, is a type of occupational lung disease caused by inhaling crystalline silica dust (a common mineral also known as quartz). It is an irreversible, progressive and incurable disease and can cause inflammation and scarring in the form of nodular lesions in the upper lobes of the lungs. At later stages, silicosis is disabling and eventually fatal.

Crystalline silica dust damages lung tissue when inhaled and results in scarring or fibrosis, which reduces lung function. Multiple mining processes can generate crystalline silica dust such as blasting, drilling and the handling and transporting of rock containing quartz.

Patients can be diagnosed with one of three types of silicosis depending on the disease's severity, onset and progression:

1. Simple chronic silicosis is caused by long-term exposure (more than 20 years) to low amounts of silica dust, which can cause areas of swelling in the lungs and chest lymph nodes and cause difficulty breathing.
2. Accelerated silicosis is caused by exposure to larger amounts of silica dust over a shorter period of time (5 to 15 years). Swelling in the lungs and associated symptoms occur faster than in simple chronic silicosis.
3. Acute silicosis is caused by short-term exposure to high concentrations of silica dust. The lungs can become inflamed and can fill with fluid, which causes severe shortness of breath and low blood oxygen levels.

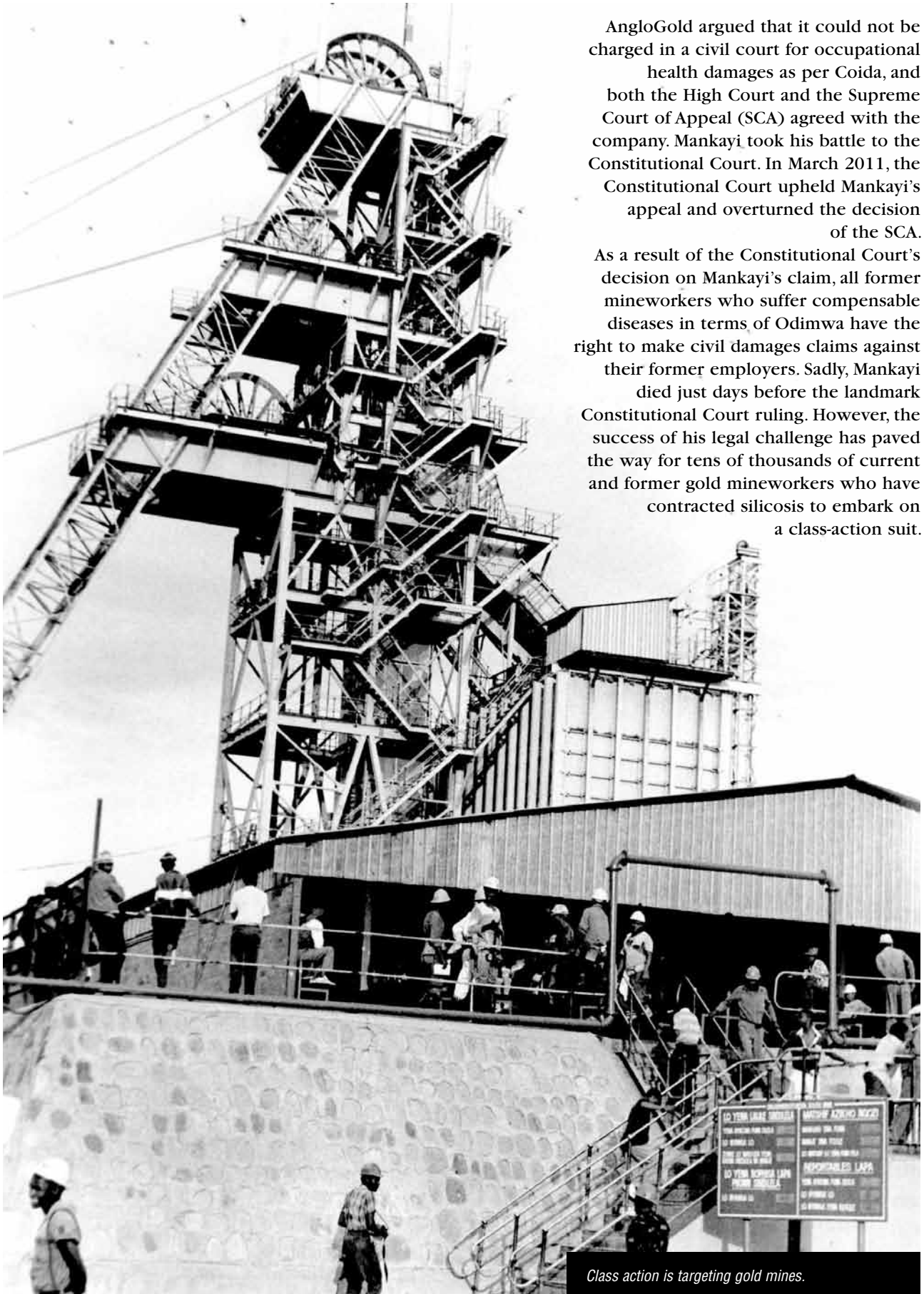
Silica dust exposure in high concentrations can lead to silicosis within a year, but 10 to 15 years typically pass before symptoms begin to appear in most victims. Medical monitoring and treatment may include: regular x-rays and lung function tests; tests for pulmonary tuberculosis and treatment; immunisation against influenza and pneumococcal pneumonia; and antibiotic treatment for lung infection.

*Reproduced from: <http://goldminersilicosis.co.za>*

## MANKAYI'S CONSTITUTIONAL COURT VICTORY

In 2006, Themekile Mankayi began a legal battle against AngloGold Ashanti Limited. Mankayi claimed that AngloGold had negligently exposed him to harmful levels of dust during the 16 years that he worked on the gold mines. This resulted in him developing occupational lung diseases which forced him to stop working. He argued that AngloGold did not fulfil its legal duties to provide a safe and healthy working environment.

Prior to launching this legal action, Mankayi received R16,320 in compensation under the Occupational Diseases in Mines and Works Act 78 of 1973 (Odimwa). He then sought to claim R2.6-million in damages from AngloGold. Mankayi made this claim on the basis that even though he had obtained compensation, Odimwa did not prohibit him from suing AngloGold for damages. Further, because Odimwa prohibited him from claiming compensation in terms of the Compensation for Occupational Injuries and Diseases Act of 1993 (Coida), Mankayi contended that section 35(1) of Coida (which bars claimants from making damages claims against their employers for negligence in civil court) did not apply to him.



AngloGold argued that it could not be charged in a civil court for occupational health damages as per Coida, and both the High Court and the Supreme Court of Appeal (SCA) agreed with the company. Mankayi took his battle to the Constitutional Court. In March 2011, the Constitutional Court upheld Mankayi's appeal and overturned the decision of the SCA.

As a result of the Constitutional Court's decision on Mankayi's claim, all former mineworkers who suffer compensable diseases in terms of Odimwa have the right to make civil damages claims against their former employers. Sadly, Mankayi died just days before the landmark Constitutional Court ruling. However, the success of his legal challenge has paved the way for tens of thousands of current and former gold mineworkers who have contracted silicosis to embark on a class-action suit.

*Class action is targeting gold mines.*

## SILICOSIS CLASS-ACTION LAWSUITS

Initially there were three legal teams preparing separate class-action lawsuits. In August 2013 these were consolidated into a combined class action involving a legal team that includes attorneys Richard Spoor and Charles Abrahams, the Legal Resources Centre (LRC) and advocates Geoff Budlender, Wim Trengrove, Alan Dodson and Gilbert Marcus, as well as experienced American class-action lawyers. All have a background in public interest litigation and the attorneys have been working towards the silicosis case for almost a decade.

While the Spoor class action targeted 30 gold mining companies (including Anglo American South Africa - AASA), the LRC was preparing its case only against AASA and the Abrahams case was targeting only Gold Fields, Anglo Gold Ashanti and Harmony. The consolidation of these cases allows the legal team to throw the net of liability as wide as possible and to cover all defendants in a single action. The majority of mineworkers have had exposure at several different mines and as such the defendants' liability is overlapping. To date the number of gold mineworkers in the consolidated action is close to 30,000.

Broadly, the charge is that gold mining companies operating in South Africa have negligently failed to protect gold mineworkers from exposure to harmful levels of silica dust and thus from acquiring silicosis. Silicosis is a debilitating respiratory disease that can lead to tuberculosis infection and even death. One out of every four current and former gold mineworkers in South Africa are believed to have silicosis.

## EMPLOYERS' LEGAL RESPONSIBILITIES ON HEALTH AND SAFETY

The Mine Health and Safety Act of 1996 and the Occupational Health

and Safety Act of 1993 require employers in South Africa to ensure that workplaces are healthy and safe. Employers have largely failed to fulfil this responsibility. The typical employer response to work-related injury, disease and death is reactive, and usually only to major workplace accidents. Employers tend to blame accidents on workers' behaviour and to rely on compensation as a remedy. In a profit-driven economy, workers' rights are not prioritised and there is little investment in developing a culture and practice of prevention that seeks to control and remove workplace hazards. Employers and management guard their control over health and safety fiercely, and impose their attitude of negligence onto workers. Workers are often encouraged not to report injuries on duty so as to keep the company's record clean.

As the 1997 Benjamin and Greef Committee of Inquiry into a National Occupational Health and Safety Council in South Africa found: 'the extremely low levels of compensation paid to black mine workers under the Occupational Diseases in Mines and Works Act prior to 1994, and the correspondingly low compensation assessment paid by mines, meant that the compensation system contained no financial incentive for employers to tackle dust problems in the mines.' Employers carry on with workplace practices that harm workers because it is cost effective and because they can get away with it.

## STATE FAILURE TO ENFORCE EMPLOYER COMPLIANCE

Mining employers have known about the risk of mineworkers contracting silicosis and have been legally required to take preventive steps for around 100 years. In spite of preventive legislation, studies indicate that between one-fifth and one-third of current and former gold mineworkers in South Africa have contracted silicosis. Clearly,

the gold mining employers in South Africa have not fulfilled their legal duty to protect gold mineworkers' health. The Chamber of Mines has admitted it has been negligent in preventing workers' exposure to harmful levels of silica dust.

Employer disregard for workers' health that is characteristic of the mining industry has been possible because of the South African state's failure to enforce employer compliance, or to meaningfully penalise employer contraventions.

Richard Spoor maintains that over the last 50 years there has not been a single prosecution of a mine owner for exposing gold mineworkers to harmful quantities of dust, nor a single statutory enquiry into a case of silicosis as is required in terms of the Mine Health and Safety Act, nor a single inquest into the death of a silicotic gold miner. Spoor argues: 'Up until now, mine owners have operated with complete impunity, with no accountability under either criminal or civil law, let alone any moral accountability to their workforce or the communities severely impoverished by returning mine workers. This places a huge burden of disease on civil society and the public health system.'

## SOCIAL AND ECONOMIC COST OF OCCUPATIONAL INJURY AND DISEASE

The mineworkers' class action lawsuits have generated considerable hostile press. They could result in an enormous compensation payment to workers and their family members. It is estimated that the number of current and former gold mineworkers with silicosis could be between 200,000 and 300,000. Several industry bosses and corporate analysts have argued that a successful outcome of a class action suit could signal the death of the already-suffering gold mining industry in South Africa. They say that to compensate workers will

cause unemployment and poverty to rise and stifle growth in the country. For example, Peter Major, a mining consultant, stated in an article published in the Agence France Press, 'There will be no golden goose anymore. There may be some feathers, some intestines and maybe a beak (but) there will be no goose, no golden bar ever again... Do you really want to put mining companies down forever in a country that has 30% unemployment?'

This lament from the mining bosses' interests is ironic. For over a century the mining companies have knowingly, and in defiance of mining law and regulations, exposed workers to dangerous levels of silica. It is this wilful negligence and the impact of lung disease on hundreds of thousands of able-bodied workers that has contributed significantly to poverty, unemployment, sickness and death in our country, not to mention the enormous public health cost burden imposed on taxpayers.

The Industrial Health Research Group (IHRG) has witnessed how the compensation system in South Africa fails workers. Many workers and their families do not know what their rights are and they are ignorant of the procedures and timeframes for making compensation claims. The process of making a claim is fragmented and frustrating. When workers claim compensation they typically experience indifference, obstruction, disrespect, lack of transparency and often injustice and abuse from employers, the state and medical practitioners. Even when workers or their families do receive compensation for occupational injury, disease or death, it often does not cover their needs.

When the compensation system fails workers and their families, the state absorbs the costs through the public health system and disability grants. Few occupational medicine

referral clinics exist in South Africa, so sick and injured workers often turn to the public health system for treatment. If workers cannot access compensation then they often turn to the state for disability grants in order to subsist. These costs are paid for by taxpayers and not by the employers who are responsible for incurring them. South African taxpayers have been subsidising business – and in this case, the gold mining industry – as business passes the costs for workers' injuries, diseases, and deaths off to taxpayers.

In addition, workers' families must absorb the costs of occupational injury and disease when the compensation system and the state fail to meet the needs of a sick or injured family member. This puts increased pressure on families that are already struggling because of a breadwinner's inability to work. Workers' families and communities also end up without support in helping workers recover psychologically and emotionally from their disabilities, loss of employability and their experience of being discarded by their employer and the state.

Because of this, class action compensation for gold mineworkers' silicosis is an issue that impacts all South Africans – not only the miners who have been directly affected, and not just the gold mine companies. The mining companies need to be penalised for the damage they have wittingly inflicted on hundreds of thousands of workers and their families. A successful class-action suit against the gold mining companies also challenges all employers to cease forcing the burden of occupational injury and disease onto workers and the public. To force the mining companies to be accountable in this way also needs to signal a change in the will and capacity of the state to enforce a culture and practice of prevention in relation to work-related deaths, injury and disease.

## HOW CAN WE USE SILICOSIS CLASS-ACTION SUITS TO TRANSFORM HEALTH AND SAFETY?

Class-action compensation is necessary for justice for silicosis-afflicted gold mine-workers and their families. But compensation is not enough. Only concerted and sustained pressure from workers, their organisations and the public in general will force employers and the state to change their practices. The publicity and potential impact of the silicosis class-action lawsuit presents us with an opportunity to interrogate and transform health and safety practices. IHRG believes that we must move towards a developmental approach that strengthens enforcement agencies and the rights and skills of workers and their organisations to better prevent occupational injury and disease. We must see this as a challenge to our democracy and to state institutions to monitor and enforce responsibilities and rights.

The Occupational Health and Safety Act provides rights for workers to elect health and safety representatives. Trade unions can initiate campaigns and training programmes to develop the skills of elected representatives to monitor health and safety practices in the workplace. This is the kind of initiative that is needed to challenge employer and state neglect, to promote workers' health and safety and thus to save workers' lives.

Although an entirely preventable disease, silicosis is an epidemic in South Africa. <sup>18</sup>

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