

Health & safety rules!

Mineworkers' extraordinary victory

In March the Constitutional Court ruled that mineworkers suffering from work-related lung diseases can sue their employers opening the way for thousands of miners to be properly compensated for their illness and poor work conditions. **Richard Spoor** gives background to this case and explains what it means for workers and the industry.

On 3 March 2011 the Constitutional Court ruled that ex-mineworkers, who have contracted occupational lung diseases as a result of exposure to harmful quantities of dust and gas, may sue their employers for damages in common law.

Tens of thousands of ex-mineworkers who are suffering from these diseases are now free to sue their erstwhile employers for the harm that they have suffered. The potential value of their claims runs to billions of rand.

IN FAVOUR OF MINERWORKER

The ruling follows the institution of a claim in the Gauteng High Court by Thembekile Mankayi, a 49-year-old ex-mineworker from the Eastern Cape, against his former employer, AngloGold Ashanti Limited, for damages in the amount of R2.7-million in October 2006.

Mr Mankayi was employed by AngloGold Ashanti at their Vaal Reefs Gold Mine for 16 years until he was dismissed, after falling ill in 1995. He was dismissed on grounds of medical incapacity.

He had contracted silicosis and silico-tuberculosis as a result of his exposure to harmful dust

and gasses in the mine. Over the last hundred years hundreds of thousands of gold miners have contracted these diseases. All of them have become disabled and countless numbers have died.

Mr Mankayi had previously lodged a claim for compensation under the Occupational Diseases in Mines and Works Act (ODIMWA) and received R16 316 in compensation. This amount covers only a tiny fraction of the actual loss that he suffered. These losses include 20 years loss of earnings, very substantial medical costs and damages for pain and suffering. In his claim against AngloGold Ashanti, he sought to recover the difference between his actual loss and the compensation he received under the ODIMWA.

In its defence, AngloGold Ashanti denied that Mr Mankayi had the right to sue the company. It relied on the provisions of section 35(1) of the Compensation for Occupational Injuries and Diseases Act (COIDA) which provides that *'No action shall lie by an employee or any dependent of any employee, for the recovery of damages in respect of any occupational injury or disease resulting in the*

employees death or disablement against such employees employer and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement and death.'

On his part Mr Mankayi contended that section 35(1) of COIDA did not apply to him because he had no claim for benefits under that Act. As a mineworker suffering from a 'compensatable disease' which includes tuberculosis and silicosis he had a claim under ODIMWA. His right to claim benefits under COIDA was furthermore expressly excluded by the provisions of section 100(1) of ODIMWA which reads: *'Notwithstanding anything in any other law contained, no person who has a claim to benefits under this act in respect of the compensatable disease as defined in this Act, on the ground that such person is or was an employee at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen's Compensation Act, 1941... or any other law.'*

Unlike COIDA, ODIMWA does not contain any provision that

bars a mineworker, with a claim under that Act, from claiming damages under common law from his/her employer.

The Constitutional Court ruled in favour of Mr Mankayi. It concluded that despite the wide ambit of the word 'employee' in COIDA, section 35(1) of COIDA plainly did not cover employees who are not entitled to claim under COIDA. The Court further held that the exclusion of liability in section 35(1) of COIDA is limited to 'employees' who are entitled to compensation under COIDA, and that Mr Mankayi was therefore free to pursue his civil claim against the company.

Tragically Mr Mankayi did not live to see what he had achieved. He died of heart failure, associated with his lung disease, days before the hearing. His damages claim will become a dependents' claim and will be proceeding in the Johannesburg High Court.

IMPORTANCE OF DECISION

The decision of the Constitutional Court is important for a number of reasons which are outlined below.

A class or group action, to be brought on behalf of tens of thousands of ex-mineworkers suffering from mining-related lung diseases, holds the promise of delivering substantial benefits to them and to their families, the majority of whom live in poverty and hardship in the labour supplying areas.

It will spur employers in the mining industry to effect improvements in mine ventilation. All of the diseases concerned are preventable. Indeed in many mining countries silicosis and silico-tuberculosis have been virtually eliminated through improvements in mine ventilation.

In South Africa however mine

owners have had no reason to make the investment required to provide adequate quantities of clean air to workers underground, as it has always been cheaper for them to lose dozens of workers each year to lung disease than it has been to provide adequate ventilation. This decision puts a price on the health of workers and changes the cost benefit equation in favour of improved ventilation.

The ruling may help to bring an end to the current paralysis around the reform of the South African workmens' compensation legislation. At present the legislation leaves hundreds of thousands of sick and disabled workers in poverty and without adequate medical care.

The COIDA and ODIMWA regimes date back to the early part of the 20th century and are largely untransformed. They provide inadequate compensation and inferior health care to the men and women who have given their lives and their health in the service of industry. They are incompatible with modern conceptions of corporate social responsibility that include an acceptance of the overriding duty that rests on employers to provide a safe and healthy workplace.

It may help to bring an end to the discriminatory treatment of mineworkers, who receive inferior benefits as compared to their industrial counterparts both in terms of compensation and medical care.

Cabinet passed a resolution in 1998 calling for the merger of COIDA and ODIMWA compensation regimes to ensure that mine-workers receive the same compensation as their industrial counterparts. Progress towards that goal is however

stymied by disagreement between the Chamber of Mines and government as to who should bear the cost of increased compensation to mineworkers.

Mineworkers have been subsidising the profits of the gold mining industry with their health and their lives for the last 100 years. Mine owners have enjoyed the right to kill and maim on an industrial scale with impunity. This is a first step towards accountability and justice.

Class or group litigation is the only practicable way to deal with the thousands of claims that will likely flow from this important decision.

The most hopeful outcome is a settlement with the mining companies that will bring about the creation of a scheme that will compensate ex-mineworkers with lung diseases in much the same way as the Asbestos Relief Trust (ART) does in respect of miners suffering from asbestos-related diseases. The ART was established following the landmark 2004 settlement with the mining company Gencor.

The least hopeful outcome is years of protracted and costly litigation while thousands of sick miners continue to suffer and die. ¹⁸

Mineworkers who are suffering from occupational lung diseases and who wish to join a class or group action against employers in the gold mining industry can contact Spoor at richardspoor@iafrica.com or fax 013 750 1047 or by calling 013 7511662.

Richard Spoor is an attorney based in White River in Mpumalanga.