End in sight for silicosis case?

The money set aside by Anglo American and Gold Fields to pay out former miners sick with silicosis and TB ma be a bargain for shareholders.

By Pete Lewis/GroundUp 15 Aug 2017

Makatleho Selibo is the widow of Mahola Selibo who worked as a team leader at President Steyn mine in Welkom. He worked underground for 33 years. He passed away in 2013 and suffered from tuberculosis and silicosis. He did not receive any compensation from the mines. Photo: Thom Pierce

Editor's summary

- Gold miners sick with silicosis or TB (or their surviving families) are suing the big mining companies in a class action.
- The first part of the case was won by the miners, but the mining companies have appealed.
- Now Anglo American and Gold Fields have set aside R1.76 billion in a trust that will be used to reach an out-of-court settlement with the miners. There is optimism on both sides that an agreement will be reached.
- But there are complications: The number of sick miners, or miners who died of silicosis or TB, is a rough estimate. Many may still become sick. The mines have to find miners affected by silicosis and TB, or their surviving families, across southern Africa.
- Lewis explains that the "settlement amount may turn out to be a real bargain for the gold mining industry".

As reported by Miningne.ws and AFP in the past fortnight, Anglo American and Gold Fields have formally notified shareholders in their latest half-year financial statements that they have set aside $101 million and $30 million respectively towards a trust to pay compensation to former gold miners suffering from occupationally-caused silicosis and TB. At curre exchange rates, that is a total of R1.76 billion. These sums are to settle the class action that sick former mineworkers mounted in the South African courts in 2012 for compensation for damages due to their lung disease.

Anglo's financial report showed a profit of profit of $1.415 billion for the first six months of 2017, which turned around a lo of $0.8 billion for the same period last year. This rapid and steep rise in profits, which Anglo attributes to cost cutting and higher commodity prices on markets around the world dwarfs the amount lost due to the proposed settlement of the silicosis/TB matter. Anglo has announced a dividend payout to shareholders on the strength of it, and its share price in London rose by 3.2% on the news.

The other large mining houses operating in South Africa such as African Rainbow Minerals, Harmony Gold, and Sibanye also cited in the class action – might presumably follow suit and set aside funds to settle it.

Lawyers for the former mineworkers and their dependents have been in settlement discussions with the gold industry sinc the South Gauteng High Court ruled in May 2016 that the scores of miners named in the litigation could bring a class actic suit on behalf of all current and former uncompensated miners affected by these diseases. The gold industry leaders have appealed against this ruling and the Supreme Court of Appeal is due to hear the appeal in March 2018 or thereabouts.

Both sides in the litigation seem optimistic about the possibility of reaching a financial settlement in the not-too-distant futu If this happens before the end of the first quarter of 2018, the industry's appeal will essentially fall away. But then requirements in the South Gauteng High Court for it to oversee and approve any out-of-court settlement will apply. This is important because the court made clear findings on a number of crucial issues, including the right of dependents to inheri successful damages claims if sick miners die any time between 2012 — when they lodged court papers in the case — an the date of settlement. Many have died already, and they continue to die at a high rate.

The Court also ordered the mines to advertise in newspapers and radio stations all over the southern Africa to help bring sick, impoverished and rurally-isolated mineworkers forward for certification and payment. How much money, to be spent the mining houses on what types of "search and rescue" operation for these former mineworkers will therefore be promine in the mind of the Court when approving any out-of-court settlement.

The big six gold mining houses want new legislation that will bring future claims for silicosis and TB in mining under the Compensation for Occupational Injury and Diseases Act (COIDA) instead of the Occupational Diseases in Mines and Wo Act (ODIMWA). The former is under the Department of Labour while the latter is under the Department of Health.

The discussions on this matter between government, trade unions, and the mining houses have been slow to produce results. They have been beset bydifficulties owing to a lack of clarity on eventual solvency, or maladministration, of the benefit funds provided for in both these statutes. So, progress on this question now seems not to be an industry pre-condition for settlement of the class action litigation.

The announcement of money allocated by the mines for settlement coincides with the publication by Professor Rodney Ehrlich of UCT Medical School and three of his colleagues of a scientific paper titled *Public Health Implications of chang patterns of recruitment into the South African mining industry, 1973-2012*. The authors studied about 10.3 million mining contracts issued or registered by The Employment Bureau of Africa in the 40 years up to 2012, mostly in the gold sector, where silicosis and TB are by far most prevalent. TEBA was owned by the Chamber of Mines, and therefore the major mining houses, until it became a non-profit company in 2005.

The 10 million contracts (short term and open-ended) were taken up by 1.64 million workers and the study gives a detailec picture of the changing geographical origin of migrant mine workers over the period, down to district level, for the entire subcontinent. It is therefore much easier to state with confidence where the workers who will be eligible for the settlement trust payouts are to be found. This should guide the "search and rescue" efforts already under way, and make it easier to step them up when the settlement is reached.

Ehrlich and his colleagues also discuss in detail the question of how many ex-gold mineworkers with compensable silicosis and TB are actually likely to be still alive, and how long they will live, given what is scientifically known about their exposure times to silica dust and the relationship between silicosis in its various stages of progression, and TB morbidity and mortal Mandatory lung X-rays for mineworkers begin to pick up silicosis when a gold mine worker has had 15 years of exposure silica dust. From their study of the TEBA database, Ehrlich and his colleagues estimate that if 60% of gold miners who worked more than 15 years in the mines in the 40 year period to 2012 are still living, this high risk group for silicosis and would be a minimum of 133,000 people.

But this is an underestimate, because it does not include increasing numbers of gold mine workers who circumvented the TEBA hiring process in the 1990s until the mid-2000s by signing on directly at the mine. Also, Ehrlich points out that there other important evidence about the incidence of lung disease in gold mine workers that would increase the potential numb of beneficiaries of any settlement.

This evidence emerges from the other major source of data on lung disease in mine workers' mandatory lung and heart autopsies under ODIMWA for all gold mine workers who died of any cause while in mine employment. A large database o the results of these autopsies from the 1970s to early 1990s were studied by other researchers after year 2000, and the results showed that 4% of black miners with less than ten years' of exposure, and 13% with 10 to 14 years of service, diec with silicosis. Ehrlich and his colleagues conclude that “even relatively short service ex-gold miners may remain at risk of later progression of silicosis to the radiological stage”.

They too will be entitled to compensation by law, and any settlement trust should include them when their disease progress to X-ray detectability, which is required for medical certification under ODIMWA and therefore by the trust before it pays any sick miner out. Ehrlich says that it is not known for certain how long disease progression to X-ray detectability takes f miners with these shorter periods of exposure in their mining careers.

In addition, miners with silicosis, at whatever stage of progression, also have an elevated risk of contracting TB throughou their lifetime. Many have repeated infections of TB after treatment, for which they are also eligible for compensation under ODIMWA and therefore under the settlement trust. Compensation for TB, which is curable, is less of a financial burden to any settlement trust than compensation for silicosis, which is both incurable and progressive (it gets worse and more disabling over time, which increases the compensation the worker is entitled to). But the lower payouts for TB are balance by the size of the epidemic in the region. Ehrlich points to a 2011 modelling study for TB in the subcontinent which concluded that there are 760,000 new cases of TB every year, which may be linked to mining activity.

With all these uncertainties and time-dependent liabilities for the proposed settlement trust, the lifetime of the trust become very important. The longer the trust operates, the more likely it is that it will have to pay out workers with relatively short lifetime exposure to mining, those that by-passed TEBA in the 1990s, and those that survive but continue to be re-infected with TB.

Conversely, if the trust is too short-lived, it will exclude these workers from benefiting when they eventually get sick. In approving any out-of-court settlement, the High Court will therefore have to decide the question of how long the trust must continue before it is wound up. This question is bound up with the financial amount of the settlement, and the extent of the “search and rescue” operation.

Given the damage that scientific inquiry has shown to have been caused to the migrant labour population by the gold mine in the subcontinent since the 1970s, let alone before that time, the settlement amount may turn out to be a real bargain for the gold mining industry. Certainly, its predominantly institutional investors, such as pension funds, seem happy. It is a de and humourless irony that successive generations of gold mine workers and their families in sub-Saharan Africa have suffered the devastating effects of lung disease, to say nothing of injury and sudden death from rock falls, so that pension fund managers investing in “blue chip” South African gold shares could assist generations of pensioners around the developed world to be comfortable in their ever-expanding old age.

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