

5-9-2018

South Africa's historic silicosis class action: why the settlement matters

Penelope Andrews

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs



Part of the [Health Law and Policy Commons](#), [Torts Commons](#), and the [Workers' Compensation Law Commons](#)

THE CONVERSATION

Academic rigor, journalistic flair



Shutterstock

South Africa's historic silicosis class action: why the settlement matters

May 9, 2018 10.10am EDT

The lawyers for miners who either fell sick or died after contracting silicosis and tuberculosis on South Africa's gold mines, have reached a historic class action settlement with the industry. The R5 billion (US\$400 million) settlement becomes the country's second class action resolution and therefore very much a precedent setter.

Class action is a newish feature within South Africa's legal landscape. It was incorporated into the country's post-apartheid era constitution adopted in 1996. But class action litigation has been used infrequently in South Africa, unlike in the US where it's become a prominent feature of justice.

The constitutional provision quite clearly sets out that

anyone acting as a member of, or in the interest of, a group or class of persons [may approach the courts].

Despite this, there isn't a significant body of procedural rules in place. Cases such as the silicosis matter contribute to the growing body of rules of the game and are likely to influence future class

Author



Penelope Andrews

Dean of Law and Professor, University of Cape Town

actions. In particular, clarification of the space should allow vulnerable communities to use class action to secure justice.

The silicosis case will see multitudes of former gold mining workers who acquired respiratory diseases, such as Silicosis and Tuberculosis, during their working lives from 1965 to date, receive due compensation.

The compensation process is to be arranged through a new entity that's been set up specifically for this purpose – the Tshiamiso Trust. The agreement identifies various classes of eligible claimants, depending on the stage of the diseases. The amounts of compensation ranges from R10,000 to R500,000.

The proposed silicosis settlement notes that:

a compromise settlement is far preferable to all concerned than an inevitably lengthy and expensive litigation process, allowing for eligible claimants more quickly to receive compensation and relief for their conditions.

In my mind the significance of this settlement is captured by five elements: compensation, accountability, deterrence, education and reinforcing rights.

Significance of the settlement

Compensation: This relates to the compensation that the claimants will be paid. For many, especially the employees who are ill and their dependent spouses and children, the payments will enable them to secure medical assistance and to ensure access to some of the basic necessities of life. They will at least have a measure of certainty that some of their needs will be taken care of.

Accountability: The settlement is an indication that employers will be held accountable, no matter how long after the harm has occurred or manifested itself. In other words, the obligation of employers to create safe working environments is reinforced.

Deterrence: Although past employment conditions did not protect the claimants, it is hoped that gold mining companies are put on notice about ensuring that working conditions protect the health and safety of workers. Employers must put in place processes and programmes to reinforce health and safety. Although mining is essentially a dangerous occupation, mining companies should minimise harm.

Education: The class action and settlement agreement will serve as a useful educational tool for the wider public who seek healthy and safe working conditions. In addition, the process of settlement, including the notices, applications, negotiations between the lawyers, companies and workers will educate the public on legal processes and heighten awareness of health and safety considerations in all workplaces.

Reinforcing Rights: This matter is significant in its potential to reinforce South African society's appreciation and pursuit of rights embodied in the Constitution. The settlement agreement reassures workers and others that the law can be used as an instrument of justice. It shows that those who violate the rights of people will be held accountable.

Alleviating harm

The agreement is ground breaking in that it is the first class action settlement of its kind. It follows another silicosis litigation which led to the establishment of the Qhubeka Trust in March 2016.

The Constitutional Court has also allowed a claim by the dependants of a deceased miner to sue his employers for his death from silicosis and tuberculosis.

And class action litigation that prompted the settlement might be continued by victims who choose not to be part of this settlement. For those who endorse the agreement, it leads to a full and final settlement of the claims against the gold mining companies.

The settlement is conditional to a confirmation by the court. This is a requirement built into the class action procedures to guard against abuse of the system.

No doubt the establishment of the Qhubeka Trust and the constitutional court litigation made a substantial contribution to – and considerably influenced – the cause of action and approach adopted by the lawyers negotiating the current settlement.

As is the case with all litigation involving damages, those who are harmed cannot be made whole. But they and their dependants can at least be provided with some level of compensation that may alleviate the effects of the harm. Hopefully this settlement will do the same.



Tuberculosis Occupational health and safety gold mining South African law silicosis class action RandD