

Corporate legal accountability for human rights abuses in South Africa

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September 2008

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When South Africa became a democratic country on 27 April 1994, not only did it result in a fundamental change in the political landscape, but it also ushered in a new constitutional legal order unparalleled in the country's history. The adoption of a final constitution in December 1996 became the embodiment of this new legal order. For the first time in the country's history the constitution included a Bill of Rights that has attracted the greatest interest and has, and continues to have, the greatest impact on the lives of millions of people in South Africa.

New legal opportunities and challenges have emerged that previously would not have been possible. One such area has been in the field of corporate legal accountability for human rights abuses in South Africa. In 2002, the Truth & Reconciliation Commission (TRC) submitted its final Report of the Reparations & Rehabilitation Committee, entitled "Reparations and the Business Sector". This report found that major corporations in the extractive industry generally benefited financially and materially from the policies of apartheid. In this regard, the TRC singled out the Anglo American Corporation for, amongst other things, maintaining single-sex hotels that eroded the family structures of mineworkers, allowing apartheid security forces to repress strikes at its various mining operations and failing to implement the most basic standards of the International Labour Organization (ILO). By 1993, the mortality rates on gold mines as a result of accidents stood at 113 for every 100 000 miners.

One of the legacies of apartheid that persists to this day is the desperate situation of ex-gold mineworkers who, under apartheid, were repatriated home by mining corporations when they sustained serious injuries or contracted the deadly silicosis disease or pulmonary-tuberculosis. Silicosis is a debilitating occupational lung disease caused by inhalation of crystalline silica dust, a risk associated with work underground in gold mines. Once back home, these mineworkers would live on meagre pensions with no adequate medical treatment and would often die a slow and painful death.

Two recent studies on the incidence of legally compensable (but uncompensated) occupational lung disease in ex-mineworkers have begun to reveal the dimensions of this 'bigger problem'. In Thamaga, Botswana, in a random sample of 234 underground mineworkers, it was found that 31% (310 per 1000) had pneumoconiosis, but only a few mineworkers had received any compensation. According to the study, 6.8% of these workers had 'progressive massive fibrosis, the most crippling form of silicosis that rapidly leads to complete respiratory failure and death'. Similarly, in a study of a random sample of ex-mineworkers, in Libode in the rural Transkei (Eastern Cape), a prevalence of 22% to 37% of pneumoconiosis was found. Of this number, two-thirds had received no compensation, and only 3% had received full compensation. Preliminary results of a study in Lesotho of a similar but larger cohort of former mineworkers suggest an incidence presently of 40%. On the basis of these studies, it is estimated that there are almost half a million ex-mineworkers in southern Africa suffering from compensable lung disease and that the total amount of unpaid compensation is of the order of 2.8 billion Rand.

It is against this background that an opportunity has been identified for assailing the legislation that deals with compensation for mineworkers who contract occupational diseases such as silicosis. The 1973 Occupational Disease in Mine Works Act (ODIMWA) regulates compensation for mineworkers, whilst the Compensation for Occupational Injuries and Diseases Act (COIDA) regulates compensation for all other workers. The provisions of

ODIMWA are discriminatory in that it pays and provides substantially lower benefits to mineworkers than what any other worker would receive under COIDA for the same injury or disease.

In 2006, we (Abrahams Kiewitz Attorneys and Richard Spoor Attorney) launched a test case on behalf of an ex-mineworker, Mr. Thembikele Mankayi against AngloGold Ashanti, claiming damages for contracting silicosis in one of its underground mines. Apart from the legal issues raised, the case has presented significant challenges to both plaintiffs and lawyers acting on their behalf. Plaintiffs such as Thembikele Mankayi are impoverished and indigent and do not have the financial means to bring cases such as this and others before South African courts to impact the lives of thousands of others. As a result, public interest lawyers play an important role by taking these cases on risk, meaning on a contingency basis. The Contingency Fees Act 66 of 1997, provides for lawyers and clients to enter into an agreement, if in the opinion of the lawyer, there are reasonable prospects of success in the litigation. The basis of the agreement is that the lawyer agrees that he or she shall not be entitled to any fees for services rendered unless the litigation is successful. However, other than public interest organizations such as the [Legal Resources Centre](#) and [Lawyers for Human Rights](#) that have traditionally been associated with public interest cases, public interest law among South African lawyers has dwindled since 1994.

Generally young black lawyers are enticed to take up lucrative positions in huge South African commercial firms formerly dominated by whites, whilst the number of medium-scale black firms decrease due to mergers with these commercial firms. The result is that the public interest lawyers who do take on these cases generally come from very small law practices and are completely out-resourced as far as their counterpart defendant firms are concerned. Law firms acting on behalf of big mining corporations are not only well endowed with infrastructure, resources and capacity but they also have the ability to obtain the services of the best legal counsel to put the best arguments forward. Public interest lawyers coming from small practices have the courage and commitment to take on these cases but they often lack the infrastructure to carry cases of this magnitude and have very few resources that enable them to easily bring together the best legal counsel.

So, whilst the Bill of Rights provides the best opportunities to impact the lives of countless South Africans, it is severely hamstrung by the equality of arms that millions such as Thembikele Mankayi lack in order to redress the huge socio-economic imbalance that still to this day persists in South Africa as a result of apartheid.