

In 2011, South Africa said gold miners with silicosis could sue for compensation. Now, thousands plan to do just that

# From gold dust, a billion dollar claim

BY ED CROPLEY

SEMONGKONG, LESOTHO, MARCH 20, 2012

**T**hey came on horseback or by foot, trudging through Lesotho's highlands and clutching tattered identity documents to back their claims that South Africa's gold mining firms ruined their lungs.

On one day in January alone, around 40 former gold miners and widows crowded into a municipal office in Semongkong, 120 km (80 miles) east of Lesotho's capital. They were there to add their thumb-

prints to the names of nearly 7,000 others who are threatening the biggest class action suit Africa has ever seen.

In South Africa, a country still grappling with the consequences of apartheid, the case touches on race, politics and history. The implications for its gold mining industry and for its relations with the government – already strained by past talk of nationalisation – are huge.

The men – some South African, others from neighbouring Lesotho – worked deep underground for many years, often with insufficient protection. They inhaled silica dust from gold-bearing rocks and later

NO MASKS: Miners in Cooke Shaft near Johannesburg, September 2005.

REUTERS/MIKE HUTCHINGS



contracted silicosis. A disease which causes shortness of breath, a persistent cough and chest pains, it makes people highly susceptible to tuberculosis, which kills. It has no known cure.

The miners are led by Richard Spoor, a provincial lawyer who won a case last year that laid the legal ground for claims for compensation. He has help from South Carolina law firm Motley Rice, which made its name suing asbestos and tobacco companies and is one of the largest litigators in the United States. Neither firm will disclose commercial terms (see page 6).

"We're signing up 500 people a week at the moment," Spoor said.

A successful suit could collectively cost mining companies such as AngloGold Ashanti, Gold Fields, Harmony and global giant AngloAmerican billions of dollars, according to legal and industry experts. The largest settlement to date by the mining industry in South Africa was \$100 million in 2003 in a case brought by Spoor against an asbestos company.

"This case has damn serious implications," said Peter Major, a mining industry analyst at Cadiz Corporate Solutions in Cape Town. "There are going to be payouts, without a doubt."

The big four mining companies declined to comment in detail for this article, saying they had yet to see the arguments, which Spoor is finalising for the possible court filing.

Graham Briggs, the chief executive of Harmony, said the issue of silicosis was "a big topic" but he did not think it "class action material". Different conditions prevailed at different times in different mines, he said, and workers may have had more than one employer.

That doesn't sway miners with silicosis. For the vast majority, and the widows of men who died as a result of it, life is little different today from the 1980s. South Africa's first free elections in 1994 may have brought political reform and economic



SIGNED ON: Former gold miner, Thulani Bitsha, 39, at home in Eastern Cape province. Lawyer Richard Spoor says he's adding 500 names to his claim a week. **REUTERS/MIKE HUTCHINGS**

change, but for the hundreds of thousands of men who helped build the biggest economy on the continent and then got sick, the harm caused in the gold mines has yet to be made good. They want compensation, better health care and recognition that they have been treated badly.

"We had massive change in South Africa in 1994 and yet here we are, in 2012, and we still haven't found a way to resolve the biggest legacy of apartheid-era mining,"

**“**The whole silicosis issue has really been pushed onto the front burner. It's a big topic.

**Graham Briggs**

Chief Executive, Harmony



said May Hermanus, a former chief mines inspector and now head of the Centre for Sustainability in Mining and Industry in Johannesburg.

### LANDMARK CASE

The miner who opened the way to Spoor's campaign never heard the outcome of his legal battle.

In 2006, Thembekile Mankayi, who came from South Africa's impoverished Eastern Cape province, lodged a civil claim against AngloGold, Africa's biggest gold producer. He sought 2.6 million rand (\$319,000) in damages, loss of earnings, medical bills and pain and suffering caused by silicosis and related tuberculosis allegedly contracted while he was working underground at AngloGold's Vaal Reefs mine, 150 km southwest of Johannesburg, between 1979 and 1995.

The case, led by Spoor, reached the Constitutional Court, the highest in the country. But Mankayi died just days before it finished its deliberations in March 2011. The judges did not rule on his claim but did say lung-diseased miners could, for the first time in South Africa, sue their employers for damages.

REUTERS/MIKE HUTCHINGS



APARTHEID LEGACY: In a 2007 survey two-thirds of South African health and safety officers had not heard of silicosis. Here, Pumzile Dayi, President of the Ex Mine Workers Association, addresses former gold miners and mine widows in Eastern Cape province. **REUTERS/MIKE HUTCHINGS**

“As the history of this country painfully reminds us, mineworkers, African mine-workers in particular, have contributed enormously to this country’s economic wealth and prosperity, at great cost to themselves and to their health,” their ruling said.

Since the verdict, Spoor, a tall 52-year-old of Dutch descent, has searched for sick ex-miners in South Africa and Lesotho to build a class action suit. He says he has found 6,876 ex-miners and widows so far. Botswana, Swaziland, Mozambique, Zambia and Malawi - all of which shipped men in large numbers to South Africa’s gold mines - are next on his list.

In Lesotho, Spoor’s team has broadcast advertisements on state radio and established contact with far-flung village chiefs. Young lawyers and old trade unionists have trekked to places like Semongkong to un-

earth potential plaintiffs. Spoor declined to discuss what fee he would make in any settlement.

### “OLD T-SHIRTS”

More than a dozen former miners interviewed in Lesotho said they had never received protective kit such as face-masks in the mines.

“The only safety gear they gave us was gloves,” said 55-year-old Tele Nchaka, who now makes a living growing vegetables on a small plot outside Lesotho’s capital, Maseru. Nchaka was laid off from Gold Fields’ Kloof mine in 2008 after 33 years of service. “We didn’t have masks. To stop the dust, we just had old T-shirts that we used to make wet.”

Nchaka said he and his colleagues “were never made aware of the dangers of the dust.”

Gold Fields declined to comment on

either compensation or health and safety practices.

There have been attempts to clean up the mines, and since Nelson Mandela and the African National Congress (ANC) came to power in 1994, working conditions have improved. In 2002, maximum permissible dust levels were laid down in law for the first time, replacing guidelines in effect since 1991.

Over the past decade, mining firms have also improved ventilation and the use of safety gear. The industry pledged in 2005 that anyone beginning work after 2008 would not get silicosis.

Despite that, a 2007 survey of miners compiled by the Mine Health and Safety Council found problems with the use of dust masks. Miners complained that they were of poor quality, quickly became soaked with sweat and were too uncomfortable to

wear throughout an eight-hour shift.

The survey also said that many miners talked of “safety officers not giving them new masks when they should”.

A parallel survey of health and safety of officers in the mines found that a third were functionally illiterate, and two-thirds had never heard of silicosis. Just 3 percent said they had received training on dust control.

## COMPENSATION APARTHEID

Just over a century ago, in 1911, South Africa was the first country in the world to pass a law - the Mining Phthisis Act - that recognised silicosis as a disease for which sufferers were entitled to compensation. ‘Phthisis’ comes from the Greek for “waste away”.

However, the law and its subsequent amendments meant that throughout the 20th century lung-diseased miners - some white, the vast majority black - were treated differently from other workers: they were forced to accept a statutory compensation package that prevented them from suing their employers for damages.

Even before apartheid was introduced in 1948, the system was skewed along racial lines.

According to the minutes of an international conference on silicosis in Johannesburg in 1930, of 15 million pounds paid out by the mining houses in silicosis compensation from 1911 to 1929, 85 percent went to whites, who constituted less than 10 percent of the workforce.

Since the demise of apartheid in 1994, two-tier payouts have ended; in 1999 the ANC said the compensation regime needed an overhaul. The mining companies have accepted the need for reform, but no changes have been introduced, partly because they can't agree among themselves how to go ahead.

The maximum payout for an incapacitated mine-worker stands at a lump-sum 105,000 rand (\$13,000). Last year, South Africa's Medical Bureau of Occupational Diseases (MBOD), which assesses possible



silicosis victims, said it found 878 “fully compensatable” cases. How many of these were actually paid isn't clear.

## FAULTY LINE

One problem is navigating the system, as the case of Ketlareng Theko shows. After 27 years working at Gold Fields' Kloof mine near Johannesburg, the 58-year old developed a chronic cough and breathing problems. In 2009 he says he was dismissed on medical grounds.

His medical discharge document, completed by the MBOD, confirms Theko contracted silicosis and tuberculosis during his employment. It is written in English - a language the Lesotho miner does not understand - and its instructions are concise.

“Concerning possible compensation, the Compensation Commissioner for Occupa-

tional Diseases, PO Box 4566 Johannesburg 2000, (011) 713 6900, will send you forms to complete,” it says.

Theko, who can't walk more than a few hundred metres without the help of Springer, his mountain pony, tried the phone number but couldn't get through. Dozens of calls made by a Reuters reporter to the number in February also failed to connect. Operator Telkom said the line has been faulty since at least the start of January.

The Compensation Commissioner did not respond to requests for comment. Gold Fields declined to comment on Theko's case.

Theko's situation highlights another discrepancy that Spoor says his action seeks to address. It was noted by the Constitutional Court ruling on Mankayi's case.

The compensation legislation covering miners, now known as the Occupational Diseases in Mines and Works Act (ODIMWA), is far less generous than that protecting other workers. The latter scheme pays out monthly benefits, including extras such as funeral costs and a stipend for dependents



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should the family breadwinner die.

By contrast, the miners' compensation fund, which is financed through a levy on mining firms, is so underfunded that many miners never see a cent.

Accountancy firm Deloitte calculated that in 2003 the fund was essentially broke, with a shortfall on its estimated future obligations of 610 million rand, or \$144 million at today's prices. In response to that government-commissioned report, the mines went to court in 2010 to try to get the state to make up a large slice of the shortfall. The bid was rejected last year.

Though Theko wasn't paid, at least he found out about help. Of 205 Eastern Cape miners surveyed for a 2009 Department of Health report, only two had heard of the miners' compensation act. The MBOD doesn't have a website.

### SILICOSIS TIME-BOMB

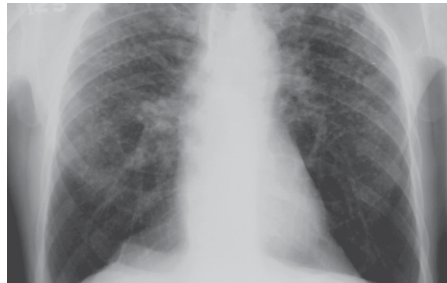
It's hard to estimate the potential size of a silicosis class action. South Africa is the source of 40 percent of all the gold ever mined. At its height in the 1980s the industry employed 500,000 men - two-thirds of them from Lesotho, Mozambique and the Eastern Cape - although production has fallen behind China and Australia and employment since halved.

But silicosis can take years to show up and check-ups are at best haphazard. A 2005 study by the National Institute of Occupational Health in Johannesburg, based on autopsies of miners, suggested 52 in every 100 had the disease.

Under South African common law, widows and children also have a claim for the loss of a breadwinner's earnings, meaning liability does not end with a sick miner's life.

A 2009 paper by researchers from Witswatersrand University and University College, London, which was published in the *American Journal of Industrial Medicine*, estimated there were 288,000 cases of compensable silicosis, and 10 billion rand

“The proof is sufficient to require compensation. They need to find an amicable settlement out of court. Going through the courts ... brands the industry irresponsible.”



DAMAGED LUNG: The cloudy spots on the X-Ray show silicosis. South Africa first said those with the disease could get compensation in 1911.

REUTERS/NIOH/NHLS

in unpaid compensation liability at 1998 values. Today, that would be 27 billion rand - more than \$3.5 billion.

### REHEARSING ARGUMENTS

Since the Constitutional Court ruling, only AngloGold has mentioned the issue in its financial reports, although it added that no reliable estimate of the possible liability could be given.

It is also unclear what insurance cover the mining firms have. The four big houses, as well as top South African insurers Sanlam and Old Mutual, declined to comment. Insurance industry sources said mines were likely to have a degree of cover with local insurers, with much of the final liability resting with reinsurers.

Any case will hinge on whether the mines are found to be negligent. In its 2011 results filing, AngloGold said Mankayi's case would involve the plaintiff providing evidence that he “contracted silicosis as a result of negligent conduct on the part of AngloGold Ashanti”.

Legal experts say the firms are likely to

argue that they provided adequate safety kit - and in any case were following government guidelines, so can't be liable if these weren't up to scratch.

Harmony boss Briggs said it's impossible to say when a miner contracted silicosis, so the question of blame is also unanswerable.

Motley Rice partner Michael Elsner counters that silicosis in South Africa is far simpler than asbestosis in the United States, where victims and defendants were spread across a wide range of industries, locations and state jurisdictions.

And plenty of men spent all their working life at one mine. “This one is going to be hard to get out of. It's pretty definitive,” said Major, the analyst. “You can take a miner, trace his history and if he spent 25 years at one company, they're definitely liable.”

Faced with a separate silicosis claim last year in the High Court in London, AngloAmerican has denied liability and said adequate safety procedures were followed. The case has yet to be decided.

Of course, Spoor and his claimants may settle before anything reaches court. “We want to engage the mining companies to find out what scope there may be for sorting this out between ourselves,” Spoor said. “One way or another, we have a common interest in resolving this.”

As Spoor signs more miners, battle lines are being drawn. The 250,000-strong National Union of Mineworkers, South Africa's biggest union, backs the campaign, and top ANC officials say the case against the mining firms is close to irrefutable.

“The proof is sufficient to require compensation,” said mining minister Susan Shabangu. “They need to find an amicable settlement out of court. Going through the courts is not caring and brands the industry irresponsible.”

The industry declined to comment.

*Additional reporting by Ed Stoddard in Cape Town and Myles Neligan in London; Edited by Sara Ledwith and Simon Robinson*

# U.S. class action lawyers spread their wings

BY TERRY BAYNES  
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The United States has made some noteworthy contributions to globalization. The assembly line. The fast food industry. And now, class action lawsuits.

More than 25 countries have introduced some sort of group litigation rules, up from around three in 2000, according to a 2011 report by Stanford Law School professor, Deborah Hensler. They range from established democracies like Italy, England and Israel to emerging market nations such as Indonesia and Bulgaria.

The U.S. Chamber of Commerce recently warned colleagues in Europe about the dangers such lawsuits pose.

"It's pretty scary stuff," said Lisa Rickard, president of the U.S. Chamber of Commerce's Institute for Legal Reform. Her office is especially worried about outside investors funding class actions, as has happened already in Australia. Rickard fears this will "fuel" more litigation.

## HOME FIELD NARROWS

For U.S. firms that specialize in filing suits, the spread of class-action litigation comes at an opportune time. Recent Supreme Court rulings have made it harder to make a living with class actions at home.

An early blow came in a 2010 investors' class action against one of Australia's largest banks, *Morrison v. National Australia Bank*. The court ruled U.S. securities laws only apply to U.S.-listed companies. That wiped out the case.

Last year, the high court allowed companies to use arbitration clauses in customer contracts, in a case between wireless carrier AT&T Mobility and phone customers Vincent and Liza Concepcion.



SETBACK: Betty Dukes' sexual discrimination class action against Wal-Mart was unsuccessful

That dealt a blow to consumer class actions.

*Wal-Mart v. Dukes*, a sexual discrimination case brought on behalf of 1.5 million current and former Wal-Mart employees, was the biggest setback of all, raising the bar for what a group of people must have in common to qualify as a single class.

"You've seen a narrowing of options for class actions in the United States," said Brian Ratner, a lawyer at the law firm Hausfeld. When firms have strong cases they can no longer bring at home, they're looking abroad.

Even in the United States, class actions are pretty new. The government first adopted the modern class action in 1966, allowing lawyers to file on behalf of unnamed individuals and collect contingency fees - a right to a share of any winnings. They really caught on in the 1990s, with suits against tobacco and asbestos companies from plaintiffs' attorneys like Richard Scruggs and Ronald Motley.

Some English-language countries followed suit, and a handful of U.S. firms have been quick to seize the opportunities.

Milberg, a securities-litigation firm, was an early player in Canada. Washington, D.C.-based Hausfeld planted a flag in the United Kingdom in 2008 with a price-fixing case against British Airways. Hausfeld recently settled a case on behalf of Barbados farmers and landowners, and is handling a vitamin

price-fixing case in Panama.

Early players are making money. In 2009, three U.S. law firms walked away with \$47 million when the Dutch court approved a class action settlement between shareholders and Royal Dutch Shell.

In mid-January, Bernstein Litowitz Berger & Grossman was one of three U.S. firms to win a \$58.4 million settlement for a group of investors in a Dutch court. The investors accused the reinsurance company Conventum of securities fraud. The court allowed the U.S. lawyers to take 20 percent of the settlement - more than local law would have allowed Dutch lawyers.

But there are still barriers. One is that many countries have "loser pays" laws, requiring the side that loses to foot the other side's legal bills. South Africa leaves the allocation of fees up to individual courts, but costs are often borne by the losing side.

Other stumbling blocks range from ingrained suspicion of American litigiousness to rules barring the contingency fees that make class actions lucrative.

"The law has to mature and develop in other countries before we'll have any idea whether these kinds of actions are going to have legs," said Max Berger, a lawyer at Bernstein Litowitz which represented investors in the Dutch settlements.

## FOR MORE INFORMATION:

**Ed Cropley**

edward.cropley@thomsonreuters.com

**Simon Robinson, Enterprise Editor, Europe, Middle East and Africa:**

simon.robinson@thomsonreuters.com

**Sara Ledwith, Assistant Enterprise Editor:**

sara.ledwith@thomsonreuters.com

**Michael Williams, Global Enterprise Editor:**

michael.j.williams@thomsonreuters.com