

Expert Analysis

From the Gold Mine to the Courtroom

Toxic tort, silicosis and the largest class-action lawsuit in South African history

By James Pizzirusso, Esq., and Josh Jowers, Esq.
Hausfeld LLP

On Sunday, March 6, 2011, Thembekile Mankayi was buried in Mthatha, South Africa. He died of lung disease, which he developed as a result of the silicosis and tuberculosis that destroyed his lungs. He developed these diseases during his 16 years as a South African gold miner. When he could no longer work, Mankayi received 16,320 rand (about \$2,150) as compensation for the harm he had suffered. Provisions of South Africa's statute protecting mineworkers provided him with the money in the form of a lump-sum payment that was to support him for the rest of his life.

The harm that Mankayi suffered as a gold miner ultimately led to his death. As a result of his efforts, however, and a decision in 2011 of South Africa's highest court, the Constitutional Court, thousands of former gold miners may yet receive significantly greater compensation for their injuries. International gold mining companies may now face liability far beyond that which they thought they would face under South Africa's statutory compensation schemes. Not only may the court's decision in the *Mankayi* case open up South Africa's gold mining industry to additional exposure, the decision could have a far-reaching impact on other South African industries that also tend to exact a serious physical toll on their workforces.

The basis of Mankayi's claim was that his employer, AngloGold Ashanti Ltd., breached a duty of care to provide him with a safe working environment that it owed under both the common law of South Africa and various statutes. The key issue in Mankayi's case involved the interpretation of two workers' compensation statutes, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Occupational Diseases in Mines and Works Act 78 of 1973.

COIDA is a statutory compensation scheme whereby companies pay a certain sum calculated by the government to provide for work-related injuries or occupational diseases. In exchange, employees covered under COIDA are barred from bringing common-law claims against their employers, though they may seek additional compensation from the government if their injuries result from employer negligence.

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ODIMWA, another statutory compensation scheme, requires owners of “mines and works” to pay a certain sum to a governmental body for each shift worked by an employee. The government then compensates employees who suffer from certain enumerated diseases (such as pneumoconiosis, tuberculosis, permanent obstruction of airways and progressive systemic sclerosis). ODIMWA lacks a provision for increased compensation where the employer’s negligence caused the injury or disease and does not bar common-law claims against employers. If an employee seeks a payment under ODIMWA, he is not allowed to make another claim under COIDA. Mankayi was initially awarded the \$2,000 lump-sum payment under ODIMWA.

After he received his lump-sum payment that was to provide care for the rest of his life, Mankayi filed a lawsuit against his employer in the High Court of Johannesburg, alleging that the company breached a duty of care to provide him with a safe working environment.¹ The court dismissed the case, finding it barred under the applicable statutes, and Mankayi appealed to the Supreme Court of Appeal,² which has final say on all non-constitutional matters in South Africa. In seeking to bring his claim for AngloGold Ashanti’s breach of the duty of care, Mankayi made two principal arguments.

First, he argued that because he received compensation under ODIMWA and that statute precluded dual recovery under COIDA, he could not be considered an “employee” under COIDA, the only statute which explicitly barred his claims. Next, he argued that the heading of the section in COIDA barring common-law claims — “Substitution of compensation for other legal remedies” — intended that common-law claims be barred *only* where an injured party could obtain compensation through COIDA. And because Mankayi could not be considered an “employee” under COIDA, its provision barring common-law claims, he argued, did not apply to him and he was free to bring those claims against his employer.

In response, AngloGold Ashanti made two counterarguments based on the same statutory text. First, it argued that because Section 35(1) of COIDA bars all actions by employees against employers for occupational injury or disease, the statute barred Mankayi’s common-law claims. AngloGold Ashanti likewise argued that the plain text of ODIMWA bars any person covered by its provisions, including Mankayi, from making a claim under COIDA as well.

After thoroughly reviewing predecessor statutes, the Supreme Court of Appeal focused on the text of COIDA and the interpretations of its provisions. The court relied on prior case law in which a predecessor statute of COIDA, with substantially similar language, had been held to preclude compensation for an injury even though the statute provided no compensation for the injury.

From this case, the court reasoned that the language in COIDA precluding common-law claims for injuries on the job also applied, regardless of whether the employee could receive compensation under COIDA. It concluded that the ODIMWA and COIDA must be interpreted together, as forming one system of employee compensation. Therefore, according to the court, COIDA’s provision barring common-law claims applied to claims that are compensable under ODIMWA, as well. As a result, the Supreme Court of Appeal dismissed Mankayi’s case.

Mankayi appealed to the Constitutional Court of South Africa.³ The Constitutional Court is a court of limited jurisdiction, but has final say on all constitutional matters in South Africa. After brushing aside a procedural matter regarding the tardiness

of Mankayi's appeal, the court directed itself to the question of its jurisdiction. The Constitutional Court can only review cases presenting a constitutional issue, and the court found a constitutional issue in the question of whether COIDA extinguished Mankayi's common-law rights to sue his employer. The court determined that the derogation of Mankayi's common-law right implicated Section 12(c) of the South African Constitution, which protects the right of all South Africans to "to be free from all forms of violence from either public or private sources."

Proceeding to the question of the interpretation of ODIMWA and COIDA, the court examined the history of the statutory regimes the laws created. Focusing on COIDA's application to claimants under ODIMWA, the Constitutional Court agreed with the Supreme Court of Appeal that Mankayi was an "employee" within the meaning of COIDA. Yet, the court determined that COIDA could *only* apply to employees eligible to make a claim under the statute.

This was the key to Mankayi's victory. Because ODIMWA required him to make a claim under that statutory scheme rather than under COIDA, Mankayi could not benefit from COIDA's greater compensation scheme. The court's interpretation meant that, for purposes of his occupational disease claims, COIDA did not bar Mankayi from bringing a subsequent common-law claim against his employer.

The court based its opinion on both a comparison of the compensation schemes available under the statutes and its interpretation of COIDA itself. First, the court observed that COIDA compensates employees for their disability rather than for the underlying causes. Next, the court set forth the substantial difference between the compensation each offers. Under COIDA, Mankayi would have received about 70,000 rand since he became incapacitated, rather than the 16,320 rand he received under ODIMWA. (He would also receive additional monthly pension payments and increased payment if the employer's negligence caused the disability.)

Turning to the text of COIDA itself, the court reasoned that the text serves two purposes. First, it eliminates a covered employee's right to bring common-law actions against his employer. Second, it limits the employer's liability to compensation paid under COIDA itself. Based on these two purposes, the court concluded that the provision barring employee claims applies *only* to employees covered by COIDA's provisions.

The Constitutional Court set aside the Supreme Court of Appeal's decision and remanded Mankayi's case to the lower courts so that he could proceed with his common-law claims against his employer. Unfortunately, Mankayi passed away a few days before the court issued its decision. The legacy of this case will endure, however, and the decision extends far beyond just Mankayi's claims against AngloGold Ashanti.

Mining is one of South Africa's largest industries, and the country produces a substantial share of the world's mining products. According to the South African Chamber of Mines, gold and coal mines alone employed 192,200 people in 2010.⁴ Though Mankayi was a gold miner, ODIMWA also covers most South African miners in other fields. Taking South Africa's entire mining industry into account, the industry employs nearly 5 million workers, though not all types of mines tend to produce the severe personal injuries at issue in Mankayi's case.

Though the mines have been making health and safety improvements in recent years, the scale of the industry, and thus the potential number of claimants, is significant.

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Thembekile Mankayi emerged victorious, and the Constitutional Court remanded his case to the lower courts so that he could proceed with his common-law claims against his employer.

Not only may a number of current employees now be able to bring common-law claims against South African mines, but the thousands — and potentially millions — of *former* miners may have claims against their ex-employers, as well. This is particularly important because the effects of silicosis and other lung diseases sometimes do not manifest until many years after exposure, often after the employee has left the mines. These potential plaintiffs are of far greater concern for the mining companies because they are more likely to have developed the compensable diseases that ODIMWA covers.

The scope of the potential liability is unclear, but potentially staggering. According to research published by the South African Medical Research Council, a significant proportion of former miners are affected by chronic respiratory diseases.⁵ The scope of the liability is clouded by a lack of rigorous research on former South African miners, particularly those who faced greater exposure to the kinds of dust that lead to chronic respiratory diseases. The research that has been done, however, reveals that many miners have been injured.

One study that focused on former gold miners in the Eastern Cape and Botswana — areas that have historically sent many men to gold mines in South Africa — “found very high prevalences of radiological silicosis, of the order of 25 percent.”⁶ A 2004 study found that “almost 20 percent of older, longer-service gold miners had developed silicosis.”⁷

According to other research, the gold mines might have particular cause for worry based on their past practices. For instance, one study has noted both that “the primary responsibility for detecting and reporting pneumoconiosis in black miners lies with medical officers employed by mining corporations,” and that evidence exists that “before 1985 medical officers of the South African mines deliberately underreported pneumoconiosis.”⁸ The same study reported that an estimated “128,575 mine workers have been certified as having acquired occupational diseases” between 1977 and 1997.⁹

If this research proves to be true, mining companies could face significant claims for hiding respiratory diseases from the gold miners. One researcher has estimated that a potential class action involving former gold miners from South Africa, Lesotho, Malawi, Swaziland, Mozambique and Botswana could cost employers as much as 50 billion rand.¹⁰

Lawyers from firms around the globe, as well as in South Africa, have taken notice of the Constitutional Court’s decision in Mankayi’s case and are leading the charge in representing the former miners. Among American firms, Hausfeld LLP and others have sought to represent miners affected by the *Mankayi* decision. The London law firm Leigh Day & Co. also filed suit against AngloGold American, of which AngloGold American South Africa is a subsidiary, on behalf of more than 400 former miners in London in September 2011.¹¹ The jurisdictional basis of the suit is that AngloGold American is headquartered in the U.K.

Attorney Richard Spoor, who has previously obtained a \$100 million settlement with former asbestos mining firms, has already signed up 6,900 plaintiffs from Lesotho South and Africa for a class-action suit based on the *Mankayi* decision.¹² Given the size of South Africa’s mining industry, the impact of Mankayi’s case may just be beginning to take shape.

NOTES

- ¹ *Mankayi v. AngloGold Ashanti Ltd.*, Case No. 06/22312, South Gauteng High Court, Johannesburg, 26 June 2008, unreported.
- ² *Mankayi v. AngloGold Ashanti Ltd.*, [2010] 3All SA 606 (SCA); 2010 (5) SA 137 (SCA).
- ³ *Mankayi v. AngloGold Ashanti Ltd.*, 2011 32 ILJ 545 (CC).
- ⁴ South African Chamber of Mines, Facts and Figures 2011, 12, available at http://www.bullion.org.za/Publications/Facts&Figures2010/F%20&%20F%202011_Final.pdf.
- ⁵ Rodney Ehrlich & Anamika Jithoob, *Chronic Respiratory Diseases in South Africa*, in CHRONIC DISEASES OF LIFESTYLE IN SOUTH AFRICA: 1995-2005, at 131 (Krisela Steyn, Jean Fourie, Norman Temple eds., South African Medical Research Council 2006), available at <http://www.mrc.ac.za/chronic/cdl1995-2005.pdf>.
- ⁶ *Id.* at 131.
- ⁷ *Id.*
- ⁸ T.W. Steen et al., *Prevalence of occupational lung disease among Botswana men formerly employed in the South African mining industry*, 54 OCCUPATIONAL & ENVTL. MED., Volume 1, at 24 (1997).
- ⁹ *Id.* at 19.
- ¹⁰ Jock McCulloch, *Hiding a Pandemic: Dr. G.W.H. Schepers and the Politics of Silicosis in South Africa*, 35 J. S. AFRICAN STUDIES 4, at 835 (December 2009).
- ¹¹ BBC News, *South Africa gold miners sue Anglo American*, Sept. 21, 2011, available at <http://www.bbc.co.uk/news/world-africa-14992024>.
- ¹² Ed Croyley, *Exclusive: South Africa gold firms to face silicosis class action*, REUTERS, Mar. 20, 2012, available at <http://www.reuters.com/article/2012/03/20/us-safrica-silicosis-idUSBRE-82JON020120320>.



James Pizzirusso (L) is a partner in **Hausfeld LLP**'s Washington office, where he heads the consumer protection practice group, and he has served as a visiting professor at George Washington University Law School. **Josh Jowers** (R), a 2011 honors graduate of George Washington University Law School, works in Hausfeld's Washington office. Hausfeld LLP is involved in efforts to represent miners in South Africa, but neither author is involved in the suits discussed in the commentary.

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