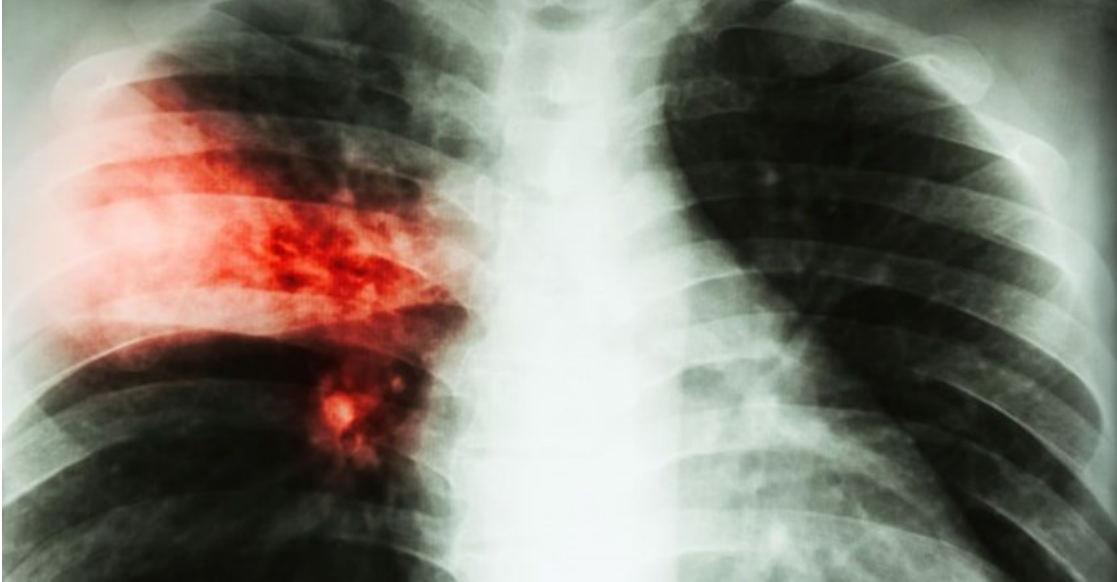


# Groundbreaking settlement in silicosis/TB class action

In the first class action settlement of its kind in South Africa, an agreement has been reached in the silicosis and tuberculosis case after three years of extensive negotiation.



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Richard Spoor Inc, Abrahams Kiewitz Inc and the Legal Resources Centre – representing claimants litigation - and the Occupational Lung Disease Working Group - representing African Rainbow Minerals, Anglo American SA, AngloGold Ashanti, Gold Fields, Harmony, Sibanye Stillwater and Pan African Resources – believe this agreement provides meaningful compensation to all eligible workers suffering from silicosis and/or tuberculosis who worked in these companies' mines from 12 March 1965 to date.



## Class action could suck the breath out of the mining industry

Nicci Botha 16 May 2016



The parties to the agreement believe that a compromise settlement is far preferable for all concerned than an inevitably lengthy and expensive litigation process would be, allowing for claimants more quickly to receive compensation and relief for their conditions. It must be emphasised, however, that the signing of the relevant documentation does not mean finality has been reached.

The settlement is subject to certain suspensive conditions, including the agreement being approved by the South Gauteng High Court. The parties' respective legal teams are working together to prepare the necessary paperwork in order that the court may review the agreement and approve of the process whereby all interested and affected parties will be given notice of the settlement and an opportunity to comment and make submissions before the court considers issuing its final approval.

A draft trust deed has been prepared and on approval of the settlement by the High Court, will be registered at the earliest opportunity. An effective date of agreement will be set based on a date after court approval.

## Claimants

There are 10 classes of claimants who, once properly certified, will be eligible for a benefit as follows:

1. Silicosis Class 1: R70,000; This is an early stage of silicosis (lung function impairment of up to 10%) which is not compensable in terms of ODMWA;
2. Silicosis Class 2: R150,000; This is the equivalent of 1st degree silicosis in Occupational Diseases in Mines and Works Act (ODMWA);
3. Silicosis Class 3: R250,000; This is the equivalent of 2nd degree silicosis in ODMWA;
4. Silicosis Class 4 with defined special aggravated medical condition: a special award of up to R500,000. This category provides relief to a small number of claimants who are suffering from extraordinary disease conditions which exceed most other silicotic claimants. There is no equivalent ODMWA compensation category;
5. Dependant of a deceased eligible silicosis claimant who died between March 1965 and the effective date: R100,000, where silicosis is deemed to be the primary cause of death;
6. Dependant of a deceased eligible silicosis claimant who died between 1 January 2008 and terminating on the effective date, where the deceased had the condition referred to in 2 or 3 above: R70,000;
7. First degree tuberculosis. An eligible claimant must: (i) have worked underground at a working group (WG) mine for two years; and (ii) have been diagnosed with first degree tuberculosis within a year of working at least one shift at a WG mine: R50,000;
8. Second degree tuberculosis (same conditions as 7 above save for second degree diagnosis): R100 000. The tuberculosis diagnoses are in line with MBOD definitions;
9. "Historical" tuberculosis (in absence of medical report determining degree of tuberculosis): An eligible claimant must: (i) have worked at a WG mine for 2 years between 12 March 1965 and 28 February 1994; (ii) have been issued with a tuberculosis certificate (without indicating degree of tuberculosis) within a year of working at least one shift at a WG mine: R10,000 or same condition as (i) and (ii) above but with proof of first degree tuberculosis: R50,000 or second degree tuberculosis: R100,000;
10. Dependant of a deceased tuberculosis claimant where: (i) the deceased worked underground at a WG mine for two years; (ii) the deceased died within a year of working at least one shift at a WG mine; and (iii) tuberculosis was the primary cause of the deceased's death: R100,000.

These benefits will increase annually by the extent of the increase in the CPI from the third year of operation of the trust fund. Benefits will be paid on the basis of beneficiaries' service at working group mines.

There is no limit on the number of potential claimants. Any claimant who has a qualifying claim will receive the compensation due to him or her during the lifetime of the trust. Individuals will be entitled to opt out if they do not wish to participate in the settlement.

The companies last year announced amounts that each has provided for as the estimated cost to them of the settlement based on actuarial assessments. These amounts total approximately R5bn.

Following the 33% increases on 1 April 2018, the current ODMWA benefit for 1st degree silicosis is R63 ,00, and for 2nd degree silicosis R140,506. The settlement awards are significantly higher than these amounts.

## Contributions by the companies

### • Administrative expenses

The parties have agreed that the companies will contribute R845m over the life of the trust solely for the administration expenses of the trust. There will be an initial R5m paid to establish the trust fund and preliminary systems and infrastructure. In the first year, the companies will contribute R100m of the total sum in order to ensure that the trust is established quickly and efficiently. Subsequent annual contributions required will be determined annually by the fund's financial administrator in consultation with the companies and the claimants' attorneys.

These expenses include:

- General administration
- Tracking and tracing eligible claimants and assisting them to lodge claims
- Provision of facilities for benefit medical examinations (BMEs)
- Coordinating this work with that of the statutory compensation funds so as to enhance the efficiencies of both the trust and the statutory systems
- Where reasonable and practicable, establishment of a financial literacy programme for the assistance of claimants who receive a benefit.

### • Benefit payments

The companies will make an initial contribution for benefit payments of R1.4bn for the first two years of benefit payments.

Thereafter, after consultations, the trust will notify the companies annually of the estimated amounts required. An actuarial expert will be appointed to assist in these calculations. Amounts payable by each company will be determined according to claims by former employees of each of them. Should there be shortfalls in any year, an additional amount may be requested. Any amounts not used during the year in question will be offset against a company's liability for the following year.

Six of the companies last year made financial provisions for the settlement. Though they used different bases for setting their provisions, the aggregate amount is approximately R5bn.

Financial guarantees are to be established with financial institutions for the amounts that will be required from each company over the life of the trust.

### • Legal fees

A range of attorneys' firms represented claimants in the negotiations and other legal processes, some going back 14 years. They included Richard Spoor Inc, Abrahams Kiewitz, Legal Resources Centre, Motley Rice LLC and Hausfeld LLP. The latter will be paid an amount of R355m for legal fees which the companies. The Legal Resources Centre will be paid a once off amount of R15m for its legal costs.

## The Tshiamiso Trust

Tshiamiso is a Setswana word meaning "to make good" or "to correct".

The distribution of claims and the administrative functions, including the tracking and tracing of eligible claimants and the facilitating of BMEs will be overseen by a board of trustees. There will be seven trustees in total. Three will be nominated by the companies, two by the claimants' attorneys, one by government and a consensus trustee will be nominated by the companies and the claimants' attorneys jointly.

## Trust advisory committee

In order to obtain input from other stakeholders, the trustees will establish an advisory committee comprising representatives of government, trade unions, community leaders and NGOs and other groups determined by the trustees. This committee will meet at least twice a year. The companies and claimants' attorneys will also be represented on the committee.

## Conclusion

All parties are pleased at the conclusion of these highly complex negotiations and hope that the agreement will be duly approved by the High Court. All parties recognise the constructive approach of their negotiation partners during the process.

The steps still required mean it is unlikely that the trust fund will be set up before the 3rd quarter of this year. However, the parties will all seek to get all necessary mechanisms and systems in place at the earliest opportunity.

As part of this, the parties to this agreement have already entered into discussions with the MBOD and its call centre to provide information to prospective claimants. Those with inquiries will be able to contact the call centre at 0801 000 240.

For mineworkers, this settlement provides an opportunity to receive a medical examination and much needed compensation for those suffering from silicosis and/or tuberculosis without the need to pursue extended litigation and the risks inherent with that approach.

For the companies in the working group, this represents a huge step towards their previously stated goal of a comprehensive solution to issues relating to compensation for occupational lung disease in the gold mining industry in South Africa that is both fair to past, present and future gold mining employees, and also sustainable for the sector. Mining companies have made significant progress in underground dust prevention over the years, but all parties believe that there should be continuing improvement in underground dust management techniques so as to ensure that silicosis and tuberculosis cease to be occupational health risks in South African gold mining.

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