Occupational diseases in the South African mining industry: Pointers for a redesigned framework informing the social protection of migrant mineworkers and their families

Presented at: IRASA Annual Conference, Burgerspark Hotel, Pretoria,18 January 2018
(Theme: "Contemporary Challenges Facing South African Labour and Employment Relations"

Prof Marius Olivier, Director: Institute for Social Law and Policy;
Extraordinary Professor, Faculty of Law, Northwest University, South Africa;
Adjunct-Professor: Faculty of Law, University of Western Australia, Australia

ISLP
Institute for
Social Law and Policy

NORTH-WEST UNIVERSITY
YUNIBESITI YA BOKONE-BOPHIRIMA
NOORDWES-UNIVERSITEIT

Overview

- Access to workers' compensation for migrant mineworkers suffering from occupational lung diseases
- Related institutional, legal and operational challenges and considerations
- Conclusions

Workers' compensation: TB- and silicosis-specific occupational diseases in the South African mining industry

- 1903 Milner Commission Report

  "The extent to which Miners' Phthisis [TB] prevails at the present time is so great the preventive measures are an urgent necessity, and that such a large number of sufferers in our midst is a matter of keen regret."

- 2014 World Bank Report – TB incidence among mineworkers is ten times higher than the WHO threshold for TB emergency, driven among others by silica dust

TB- and silicosis-specific occupational diseases in the South African mining industry

- 2009 study for the Department of Health:
  - "Between 1902 and 1925, 'silicosis was the subject of no fewer than nine legislative acts, six commissions, ten parliamentary select committees and four major state industry reports'… It was estimated in 1911 that the annual silicosis mortality among rock drillers was 140 per 1000. The Mining Regulations Commission of the time noted that the 'white death' 'mowed down miners… at an average age of thirty-five', and that 'most of these miners' lives had been at least fifteen years shorter than those of their compatriots in Australia'.
- What started as a disease affecting white mineworkers, became, in the words of a Yale Global Health Justice Partnership report (2014), "a 'hidden epidemic' among black mineworkers caused by continual exposure to levels of silica dust low enough to not cause acute silicosis but high enough to lead to chronic silicotic disease"

TB- and silicosis-specific occupational diseases in the South African mining industry

- Government responses, in areas of compensation and regular medical examinations, were swiftly forthcoming –
  - South Africa was the first nation in the world to provide workers' compensation for silicosis and TB in 1912 and 1916 respectively
  - Yet, Black miners had to wait until 1993 for the racist nature of the legislation to be removed
- Despite awareness raised via several commissioned reports and studies, and legislative action taken by government, limited progress has been made thus far
- In fact, according to some reports the picture appears to be worsening – e.g., the rates of silicosis in the platinum mining industry have been increasing

Impact

- Due to weak data, the numbers of mineworkers, ex-mineworkers and family members currently affected are unclear – in *Nkala* (see below) the court estimated that up to 500 000 could benefit from the court's class action finding; the current figure may be lower
- Increased burden on family members (in particular females) and widespread (rural) poverty, fuelled by the comparatively weak social security systems obtaining in neighbouring countries
  - (Ex)mineworkers and their families usually cannot benefit from the SA social assistance system, as this is generally restricted to citizens and permanent residents

Impact

- The regional impact has been dramatic – as indicated by Shaw:

  "Thus, the world's highest national prevalence, incidence and mortality rates that occur in southern Africa all have their source in the South African mining industry.",

  noting an earlier observation by the South African Health Minister, Dr Aaron Motsoaledi:

  "If TB/HIV is a snake in Southern Africa, we know that its head is in South Africa in the mines. We are exporting TB and HIV throughout the region."

- An occupational disease, in the form of silicosis and pulmonary tuberculosis, may only materialise, and certainly worsen, after a mineworker has returned to his or her country of origin

Challenges posed by the current framework

- Related challenges are discussed later
- (1) Insufficient data:
  - Lack of reliable data; underreporting is particularly prevalent in this area
  - Historical preference for gathering information and reporting on occupational injuries and fatalities – as noted by Shaw:

    "Causation [*i.e. in relation to occupational injuries*] is usually ascribed to those in control of workplaces and mining companies provide an easily identifiable offender to hold to account. Diseases, in contrast, cause chronic and domestic crises and rarely gain media attention. Social norms have historically defined responsibility for diseases differently to responsibility for injuries, with individuals more likely to be seen as personally responsible for the diseases they acquire."

Challenges posed by the current framework

- (2) Problems of governance:
  - The amount of regulation on the one hand, and the tendency to de-regulate, apparent from the 1996 Mines Health and Safety Act with its emphasis on a performance-based regulatory approach, have not resulted in any significantly improved occupational disease outcomes
  - It has been suggested that there is a need to address, among others, behavioural norms in the mining industry

Challenges posed by the current framework

- (3) Inadequate standard-setting, enforcement and compliance:
  - Despite international instruments ratified by SA and regional instruments containing clear standards and a guiding framework
  - See the criticism expressed by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2015, regarding non-compliance with the ILO Safety and Health in Mines Convention (No. 176 of 1995), ratified by SA in 2000 – with particular reference to the rights of workers and their safety and health representatives, including the right to know and be informed of workplace hazards, and to obtain information relevant to their safety or health
    - Also, the need for statistical information on the number of reported occupational accidents and cases of occupational diseases

Challenges posed by the current framework

- (4) Inferior statutory benefits: In comparison with COIDA (Compensation for Occupational Injuries and Diseases Act, 130 of 1993) (covering occupational injuries and occupational diseases, other than lung diseases in the mining industry), ODMWA (Occupational Diseases in Mines and Works Act, 78 of 1973) provides for inferior benefits, generally in relation to:
  - The maximum salary on which compensation is based is much lower under ODMWA;
  - Compensation, in the event of total temporary disablement;
  - Compensation, in relation to 30% (or less) disablement; and
  - Compensation, in relation to 100% disablement

Challenges posed by the current framework

- (4) Inferior statutory benefits (continued): As noted by the Constitutional Court in *Mankayi v Anglogold Ashanti* (2011)
  - "Except for a person suffering from tuberculosis who is entitled to 75% of his monthly earnings when ill, the only benefits payable to a person who is suffering from a compensatable disease contracted as a result of risk work is a lump sum which amounts to approximately one and one third of his annual salary if that employee suffers from a compensatable disease in the first degree, and about three times his annual salary if the compensatable disease is in the second degree."

Challenges posed by the current framework

- "There is no provision for payment of funeral expenses, or any lump sum or pension for dependants. The statute does however provide that the dependants of a person who died of a compensatable disease would receive the lump sum that would have been payable to that person had he not died. In other words, where the person suffering from a compensatable disease has been paid the lump sum, the dependants get nothing even if they are children. To make matters worse, the person who finds himself afflicted with a compensatable disease merely because of legislative classification, has no right to claim additional damages even if the employer was negligent, a right that is preserved for employees who suffer occupational diseases."

Challenges posed by the current framework

- "The differences between the compensatory regimes of COIDA and ODIMWA are quite apparent. A person whose disease is certified as a compensatable disease loses all the benefits of COIDA and receives much less under ODIMWA. The purpose is obviously to reduce the burden on the COIDA fund by converting an occupational disease into a compensatable disease. This means that the person benefits to a considerably lesser degree from another fund to which the employer makes a contribution and a much smaller contribution at that, because of the smaller benefits payable. The saving to the employer arising out of the redefinition of the disease amounts to a reduction in the contribution to the COIDA fund, which exceeds the amounts to be paid to facilitate the lesser compensation under ODIMWA. It must be emphasised that an employee who has a claim under ODIMWA has to be excluded. The drastic reduction in his compensation is obligatory."

Civil society intervention and jurisprudential responses – confirmation of legal claims

- Increased civil society intervention, especially over last 20 years
- *Mankayi* (Constitutional Court, 2011):
  - An ex-mineworker who had contracted an occupational lung disease and was compensated under ODMWA, wanted to institute an (additional) common-law claim against the respondent mining company, based on the alleged failure to provide him with a safe and healthy work environment
  - Court held that, unlike COIDA, mineworkers who have contracted compensatable diseases under ODMWA retain their common-law right to claim against their employers

Civil society intervention and jurisprudential responses – confirmation of legal claims

- *Nkala and others v Harmony Gold Mining Company Limited and others* (High Court, Gauteng, 2016)
  - 69 applicants sought to bring a class action against 32 companies operating in the gold mining industry. They claimed compensation on behalf of current and former underground mineworkers who contracted silicosis or pulmonary tuberculosis (TB), and on behalf of the dependants of mineworkers who died of silicosis or TB contracted whilst employed in the South African gold mines
  - The court therefore had to consider two separate but related issues:
    - Whether a class action should be allowed in the circumstances; and
    - Whether the claim of a mineworker, should he or she be deceased, was transmissible to his/estate, for the benefit of dependants.

Civil society intervention and jurisprudential responses – confirmation of legal claims

- A. Class action: The Court held it to be in the interests of justice to allow the class action, and approved two sub-classes
  - Mineworkers or ex-mineworkers with confirmed silicosis, with or without confirmed TB, wherever they live, who could show they worked underground in one or more of the respondent mines (82 such sites were identified) from 12 March 1965, for however a short a period; and
  - Mineworkers or ex-mineworkers with TB only who worked underground at one of the respondent mines for at least two years over the same period
- The date of 12 March 1965 coincided with the date of implementation of new regulations on mine dust control under the then Mines and Works Act, 27 of 1956.

Civil society intervention and jurisprudential responses – confirmation of legal claims

- B. Transmissibility of claim: The Court held that any claim for general damages that a mineworker brings, or may wish to bring, against any of the mining companies is transmissible to his estate should he/she die before the close of proceedings
- The implication is that dependants of mineworkers or ex-mineworkers who die of silicosis or TB contracted in mines would be able to "inherit" the claim of the mineworker, once he or she has died

Developments subsequent to *Nkala*

- The High Court did not allow an appeal to be lodged in relation to the class action ruling, but gave permission for its ruling on the transmissibility matter to be taken on appal
- The mining companies petitioned the Supreme Court of Appeal for leave to appeal the class action
- However, settlement negotiations have reached an advanced stage; the mining companies have apparently set aside R5bn; settlement is expected in 6 weeks (announcement: 11 March 2018)
  - The settlement needs to be approved by the High Court

Related institutional, legal and operational challenges and considerations

- According to a 2010 ILO report, despite entitlement under the various South African employment injury benefit laws, access to the benefits available is subject to several challenges –
- (1) Different and largely uncoordinated institutional avenues for, respectively, undertaking medical assessments and providing employment injury-related services and facilities

Related institutional, legal and operational challenges and considerations

- (2) Unfamiliarity with prescribed and required procedures, documentation and timelines, aggravated by problems of language and illiteracy – see, among other:

  "Few miners know that ODMWA … entitles them to a medical benefit examination every second year, including chest x-rays and lung function tests. A former worker who has received treatment for occupational tuberculosis is also entitled to a medical examination 12 months after completion of treatment, in order to establish whether any permanent damage to the lungs has occurred (thereby entitling the mineworker to compensation)." (AIDS and Rights Alliance for Southern Africa, 2008)

Related institutional, legal and operational challenges and considerations

- (3) Inability of beneficiaries resident in neighbouring countries, either financially or medically or both, to travel to South Africa for purposes of lodging of claims, medical assessments and care, pursuing objections and appeals and benefit payments. Their dependants may be similarly unable to travel.

Related institutional, legal and operational challenges and considerations

- (4) Unsuitability of the ODMWA requirement to have the deceased's lungs removed and sent for examination prior to compensation being approved, in the event of dependants wanting to claim compensation –
  - Cultural and practical inappropriateness of this requirement
  - Also, " … compensation authorities in South Africa have failed to disseminate culturally sensitive information about the autopsy process widely enough" (Yale Global Health Justice Partnership (2014))

Related institutional, legal and operational challenges and considerations

- (5) Limited but insufficient steps that have been taken to extend medical examination services and facilities to affected former workers from neighbouring countries
  - Some progress has been made – relying on private sector and international support, government has commenced with gradually making assistance available, via mobile outreach and one stop services, also in certain neighbouring countries, as announced in 2016

Related institutional, legal and operational challenges and considerations

- (6) The lack of streamlined and uniform payment mechanisms (and difficulties with processing those) for cross-border workers' compensation payments
  - In the case of Mozambique, for example, payments had to be made via a bank indicated by the Mozambican government; lately, however, the South African government has been utilising individual bank account payment mechanisms

Related institutional, legal and operational challenges and considerations

- Also, insufficient provision in the Bilateral Labour Agreements with certain Southern African countries:
  - E.g., concerning compensation procedures, required documentation and informing mineworkers and ex-mineworkers of their social security entitlements
  - For several reasons these agreements cannot be seen as truly reciprocal agreements, sufficiently supporting the health and welfare of migrant (mine)workers, as they are focused on providing labour for South Africa(n mines) and oriented towards migration control and deportation

Conclusions

- The reach, impact and gravity of the situation called for decisive civil society interventions and ground-breaking judicial responses; as noted in a 2004 UCT monograph (White):
  - "In my view the South African gold mining associated silicosis and tuberculosis epidemic is without precise parallel in human history, when its extent in terms of duration, intensity and magnitude are all taken into account. This occupational diseases epidemic is directly fueled by the transference of health costs from the employer to the state and individual, which removes the incentive for the employer to effectively limit the exposure to silica dust. The nature of the gold mining industry (poor ore content and deep mining) in South Africa, combined with cheap, replacable labour compound this problem."

Conclusions

- SA governmental responses have been limited and inadequate to deal with both the root causes of the "hidden epidemic" and the consequences thereof
  - It is only lately that certain decisive steps have been taken to deal with the consequences – i.e. when migrant mineworkers have been affected

Conclusions

- Address regulatory neglect – as noted by Shaw (emphasis added):

  "Regulations have thus been perceived to be more relevant to prevention of occupational trauma. *In South Africa, this regulatory neglect has tragic consequences, with the highest rates of TB in the world experienced in the gold industry as a result of occupational exposure to silica. Despite the early recognition of TB as an occupational disease in South Africa, with legislation providing compensation of victims predating the rest of the world, regulatory attention to occupational diseases has not resulted in improved rates of infection or disease-related fatalities.*"

Conclusions

- There is an urgent need for an integrated and consistent workers' compensation framework
  - Despite a Cabinet announcement in 1999, the integration of COIDA and ODMWA has 19 years later not been achieved
  - The confusing and inconsistent treatment, operational context and benefit access available under these laws, together with inconsistencies in the underlying preventive and adjudicative regulatory instruments, calls for an integrated framework institutionally and operationally, and in terms of the benefit structure
  - Apparently some progress is currently being made, with collaborative efforts involving the Departments of Health, Labour and Mineral Resources spearheading the process

Conclusions

- Enhance the tracking, tracing and identification of beneficiaries
  - **Tracing and tracking** ex-migrant workers and/or their survivors for purposes of ensuring access to South African social security benefits, would among others require a targeted public awareness campaign, as it might well be that current efforts have restricted coverage and effect
  - See in this regard the **order made in *Nkala***, to make known the notices to be given, indicated in the judgment –
    - The court provided the text of the notices, along with a text for radio notices. Fifty newspapers were named, including 16 in other Southern African countries. A long list of radio stations was also given. The notices had to be in multiple language;
    - Each mine in the list was ordered to post the notice in a prominent place at each mine for 180 days, as well as on all company website home pages

Conclusions

- Linked to the previous point, there is an evident need to develop a database of current and ex-mineworkers, and of nominated and actual beneficiaries, informed by sufficient detail to facilitate communication and benefit provision/access
- Significant progress has been made – the Department of Health has developed a database of ex-mineworkers that covers both the demographic details and medical records of the ex-mineworkers – covering 700 000 claimant records; this will assist all agencies across government to track and trace persons with unclaimed benefits

Conclusions

- It would be of assistance to SA social security institutions, also for future purposes, to maintain a database of migrant workers who have left South Africa
- However, maintaining database information and exchanging same with institutions in neighbouring countries would require an electronic system of data storage and linking – some SA social security agencies still have a manual system of record-keeping
- As also proposed by SADC instruments, there is a need to develop a Labour Market Information System (LMIS) at regional and country levels

Conclusions

- Expedite government payments and deal effectively with backlogs
  - Within the ODMWA framework, when the Department of Health's Compensation Commissioner assumed office in 2012, he reportedly found 32 rooms filled with paper files, many of which were incomplete or duplicated
  - Payments have accordingly accelerated: The fund has paid out R220m to 6 700 people in 2017, up from the 2 000 claimants compensated in 2015 to 2016

Conclusions

- Revise and strengthen Bilateral Labour Agreements (BLAs) and consider concluding suitable Bilateral Social Security Agreements (BSAs) with other SADC countries
  - The 2017 White Paper on International Migration foresees, among others, a SADC special work visa (an economic visa regime) – a quota-based regime to be implemented through bilateral agreements specifying responsibilities for signatory and contracting states
  - Importantly, sufficient provision needs to be made in bilateral agreements to ensure appropriate access to SA social security benefits for migrant workers, also when leaving South Africa