A "historic settlement"

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(This article was first published in "Without Prejudice – The Law Magazine" Vol 18 No 6, July 2018)

As has been reported in the media, a "historic settlement" was reached on 3 May in what is commonly referred to as the "silicosis class action" (although the class covered both silicosis and tuberculosis). While the outcome alone is sufficient to warrant the positive sentiments, I would like briefly to draw some attention to the difficult context within which the settlement was negotiated. In this respect, what is also remarkable about the settlement is that it was achieved despite, amongst other issues, significant interrelated problems; the complexity of the litigation itself; and the broad range of other interested stakeholders outside of the litigation proper. The Occupational Lung Disease Working Group on the one hand, and the class representative lawyers on the other, negotiated in an effort to reach a settlement that was fair and sustainable for all parties.

"Three Pillars"

The overarching goal of the Working Group (which was formed in 2014) was "to engage all stakeholders in order to work together to design and implement a comprehensive solution that is fair to past, present and future gold mining employees, and also sustainable for the sector."

However, in order to be a "comprehensive solution", the Working Group needed to take into consideration three separate but interrelated issues. The class action brought by Richard Spoor Inc., Abrahams Kiewitz Inc. and the Legal Resources Centre was obviously one such issue. However, inextricably linked to the underlying issues in the class action were two further issues.

One was the legislative scheme in which workers (and miners specifically) were compensated. Without going into too much detail, workplace injuries and diseases other than those diseases affecting the lungs of miners are in effect covered by the Compensation for Occupational Injuries and Diseases Act (COIDA), whereas miners' pulmonary diseases (silicosis and TB specifically) are covered by the Occupational Diseases in Mines and Works Act (ODMWA).

The history of this split goes back to the Miners' Phthisis Allowances Act of 1911 but, suffice to say, two separate occupational compensation regimes, which approach compensation in different ways between different classes of workers, was always bound to result in

problems. That COIDA is overseen by the Department of Labour and ODMWA by the Department of Health, only added an additional layer of bureaucratic incongruence. Rationalising this legislative scheme is sensible, and has been on the government's radar for some 20 years.

The other issue was the fact that the statutory bodies tasked with assessing miners for pulmonary diseases and appropriate compensation, the Compensation Commissioner for Occupational Diseases (CCOD) and the Medical Bureau for Occupational Diseases (MBOD), had become dysfunctional in the mid-90s. The net result, before Dr Barry Kistnasamy took over in 2012, was that several hundred thousand claims for compensation had been neglected, and roughly R4.5 billion in levies sourced from the mining industry for compensation sat idly in a government account.

At the table

The negotiation table brought its own complexities. The parties at that table were the claimants' lawyers (assisted by Motley Rice LLC and Hausfeld LLC – two American firms with a wealth of class action knowledge) and a small negotiation team representing the six mining houses that formed the Working Group – Anglo American SA, AngloGold Ashanti, African Rainbow Minerals, Sibanye-Stillwater, Harmony and GoldFields.

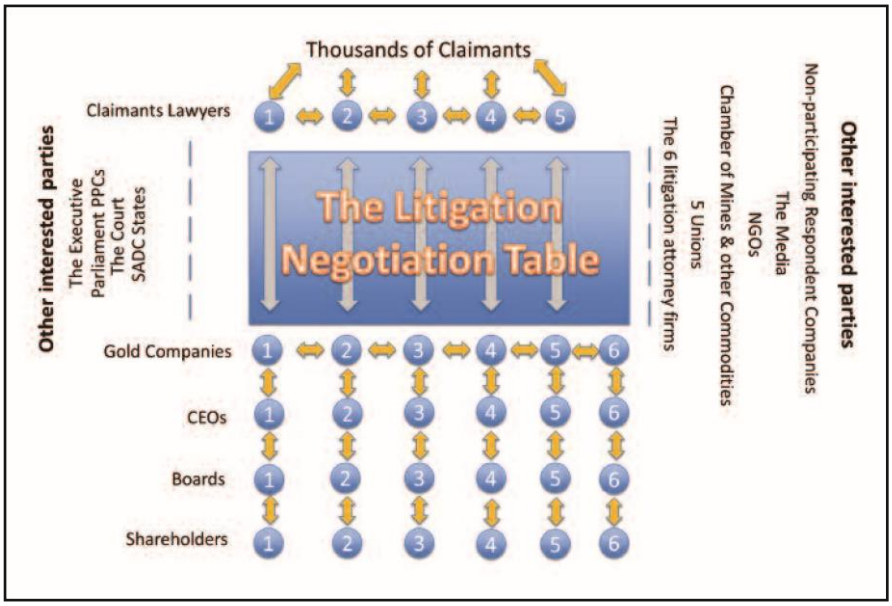
However, the negotiation room contained only a fraction of the parties involved more broadly. Each representative lawyer had a group of several dozen representative claimants (some located far afield in rural areas) as their mandate givers for the negotiation. On the Working Group side, the negotiation team would report back to the Working Group itself, then each company representative would report back to their internal stakeholders. These included internal legal teams; each company's CEO and board; and, ultimately, the shareholders. In addition, assisting each party were various advisers: actuarial, financial, health and safety, medical and academic.

Other stakeholders

While only the parties to the litigation itself could settle the class action, given the breadth of the interrelated problems this was not the extent of the stakeholders with an interest in the matter more generally. The larger context was filled with stakeholders that all had legitimate claims to various degrees of engagement on the wider issues. The stakeholders included, at least:

- three government departments and related ministers – Labour (administering COIDA), Health (administering ODMWA) and Mineral Resources (as department for the industry as a whole);
- The Compensation Commissioner – Dr Kistnasamy;
- The Chamber of Mines, which represents all mining industries;
- five labour unions representing mineworkers – NUM, NUMSA UASA, AMCU and Solidarity; and
- various Non-Governmental Organisations (such as the *amici* in the high court).

In addition to these parties, many of the traditional labour-sending areas fell outside of South Africa's borders and ex-miners can be found all over the SADC region. The parties also had to take this into consideration.



The negotiation dynamic.

Finally, the high court itself, which certified the class, still has the role of oversight in that the settlement (at time of writing) must still be approved judicially. This is a common feature of class action settlements to ensure that the deal struck is, broadly speaking, fair to the class as a whole.

The class action

While the negotiation dynamic was complex, the class action was equally complicated – both in law and fact. An ideal class action is focused on a single wrongdoer, who has committed a single act that has had a widespread effect (for example, the Deep Water Horizon oil spill by BP, or the recent VW emissions scandal). The more defendants there are, the more complicated the action becomes. In the context of the current matter, the claim involved 32 respondents, ultimately spread across nine separate mining companies in respect of 82 separate mines. To complicate matters, the class covered some 50 years

during which time ownership and responsibility of mines (and sometimes even individual shafts within mines) often changed. In addition, silica dust levels were not consistent across mines, or even within different areas of the same mines. Proving culpable exposure to sufficient silica dust for any particular miner at any particular mine under the ownership of any particular mining company at the relevant point in time would have been immensely difficult. In addition, class actions are new to South African law and none have been successfully completed, let alone one as complex as this. Litigation would have been uncertain and taken a long time – to the ultimate detriment of all involved, particularly the plaintiffs. A fair settlement was, in these circumstances, essential.

But the class action also brought the plaintiffs the benefit of economies of scale. A class action allows plaintiffs to maximise the potential size of the problem for the defendants. As a result, litigating at a class level requires both plaintiffs and defendants to step back and take a macro-view of the entire landscape within which the litigants find themselves. In this particular scenario, this allowed the negotiating parties and the related stakeholders to see the overlap of the underlying issues in each of the three pillars and so approach the broader issues in a more comprehensive manner. This was because it became clear that such an approach was in the overall interests of all stakeholders. Had the litigation proceeded in a piece-meal fashion via single test-cases against individual mining companies, the impetus to adopt this approach would likely have been diminished.

In that broad context, the settlement is an incredible achievement by all parties involved. "Historic" is an apt term. And while a matter this large is likely to be a fairly rare occurrence, the settlement highlights what can be achieved by good faith mutual-gains negotiations when combined with a willingness to collaborate not just with the "other" side but with all relevant stakeholders. Even complex multi-stakeholder negotiations in which the parties are beset on all sides by a range of problems can result in a mutually acceptable outcome.

In addition, when an approach to dispute resolution appreciates the broader picture, it allows gains in one area to feed into improvements in other problem areas. Interrelated problems can lead to combined solutions. At present, government's efforts to rationalise the compensation legislation have been revived and the Working Group and other stakeholders are engaging in that process. Furthermore, as at the end of the 2017/18 financial year, the MBOD/CCOD, under Dr Kistnasamy's leadership and with the support of the Working Group, the Chamber of Mines and other stakeholders, has increased the number of statutory payments to qualifying miners some 1 000% when compared with 2012. The settlement itself is designed in such a way to further assist with improved efficiency at

the MBOD/CCOD, with many of the qualifying criteria overlapping with the ODMWA system. This has the potential to unlock even more of that R4.5 billion at the same time as settlement payments are made from the estimated R5.2 billion settlement amount.

An important stage of the project is complete, but much work lies ahead. Hopefully it will continue in the spirit, and with the commitment that led to the settlement in the first place.

Ainslie is an Associate at Bowmans. For a year during the negotiations he assisted John Brand, who is a consultant to Bowmans and was the lead facilitator and negotiator for the Working Group.