Letter to the editor

Critical perspectives on trusts as a compensation option for occupational diseases in South Africa

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The paper, 'Critical perspectives on trusts as a compensation option for occupational diseases in South Africa',[1] refers.

The authors of the paper attempted to highlight the theoretical and practical shortcomings of trusts as a compensation option for diseases in South African mines. They concluded that trusts do not spread the costs of disease optimally, provide no framework for building incentives for employers to invest in disease prevention, are vulnerable to the principal-agent problem, and are open to manipulation by public officials. For these reasons, they argued that the statutory workers' compensation system should remain the pillar for occupational disease compensation in South Africa.

Missing from the critique were the reasons for the establishment of the trusts and their relationship to the statutory compensation system. If that gap were filled, it would be clear that trusts have a critical role to play in addressing historical injustices.

All the trusts referenced by the authors [the Asbestos Relief Trust (ART), the Kgalagadi Relief Trust, (KRT) the Q(h)ubeka Trust (QT), and the Tshiamiso Trust (TT)] were established in consequence of civil litigation in the courts. They were not intended to be substitutes for a just and equitable statutory workers' compensation system. Their aim was to recover, to the extent it was possible, the difference between the compensation the mine workers were entitled to receive from the statutory compensation system and the actual harm that they had suffered.

The statutory compensation system for occupational injuries and diseases remains hopelessly inadequate and inefficient. The benefits payable bear little relationship to the actual harm and loss suffered by sick and injured workers or their dependents. This is particularly so in the case of the Occupational Diseases in Mines and Works Act (ODMWA), which was established to provide benefits for mine workers who contract occupational lung diseases.

Lobbying efforts to reform the system remain weak and disorganised. There appears to be little prospect in the short to medium term of these shortcomings being addressed. It is against this backdrop that the first attempts to claim improved compensation through the civil justice system were brought on behalf of South African workers.

The first legal actions were brought by Leigh Day and Company against the UK-based parent companies of Thor Chemicals and Cape Asbestos. This was because Section 35 of the Compensation for Occupational Diseases and Injuries Act (COIDA) placed a statutory barrier against employees and their dependents suing their South African employers for compensation in respect of any occupational injury or disease. These cases were settled for the direct benefit of the named plaintiffs and their families and not for other employees of these companies who were injured, or who may have suffered harm later, as a result of the long latency period of many of the occupational diseases.

Neither case resulted in the establishment of a trust. But, in 1998, civil proceedings were filed against the South African company, Gencor, the parent company of asbestos mining companies, GEFCO and African Chrysotile Asbestos. The purpose was to interdict the winding up of the company pending a decision on its civil liability to asbestos miners who had contracted asbestos-related diseases. The settlement led to the establishment of the Asbestos Relief Trust (ART) in 2003. Shortly thereafter, an unrelated voluntary negotiation led to the formation, in 2006, of the Kgalagadi Relief Trust (KRT). This trust provides compensation to workers who contracted asbestos-related diseases because of exposure at mines controlled by the Swiss-based Eternit Group.

The total capitalisation of the two trusts was approximately R600 million. To date, the two trusts have compensated 5 305 claimants and paid out benefits to the value of R535 million. The trusts compensate not only workers and environmentally exposed persons who were sick at the time of their establishment, but also those who subsequently would develop asbestos pneumoconioses or malignancies during the approximate 25-year life of the trusts.

In 2011, the legal position of sick mine workers in South Africa changed with the Constitutional Court decision in the matter of Mankayi v Anglo Gold Ashanti. This decision was the product of five years of litigation. The court ruled that mine workers with occupational lung diseases covered by the ODMWA were not affected by the provisions of section 35 of the COIDA. They retained their common law right to recover their civil damages from the owners of the mines where they were negligently exposed to harmful dusts.

The Mankayi decision guided the silicosis class action litigation that led to a settlement with most of the established gold mining companies, and the formation of the Tshiamiso Trust in 2018. The settlement is open to criticism on the grounds that the benefits fall short of what might have been recovered if the matter had been litigated to a conclusion. There were doubtlessly compromises made in the settlement. Among the factors that concerned the claimants and their lawyers when the settlement was reached were that litigation is costly and slow and that eligible claimants were dying uncompensated. Critically, gold mining is an industry in decline. There was no guarantee that a court ruling in five or 10 years would deliver a better outcome for the claimants, by which stage many of the companies may have been deregistered or not in a position to pay.

Considering the very large numbers of claimants – more than

40 000 people have already registered claims against the Tshiamiso Trust – it is simply not practicable to litigate cases individually. There is no capacity in the civil justice system to deal with such volumes of claims within a reasonable period.

Collective settlements, typically the product of class actions, that are realised through the establishment of independent and capable trusts that process claims on an administrative basis are, in our opinion, the best current practicable way to ensure some modicum of justice.

It is worth noting that various trusts have achieved much more than just paying benefits. They have enhanced awareness about occupational lung diseases and have helped build capacity in different medical disciplines, especially in rural areas, to medically examine and diagnose ex-mine workers, that would not otherwise exist.

Reforming the statutory compensation is hugely challenging. At face value, it seems reasonable to make basic reforms, such as providing for better compensation and increased levies for employers. There is, however, little appetite on the part of the state and employers to effect retrospective changes that would require current employers to pay for the wrongs committed by previous employers, many of whom have closed their operations and disappeared, years or decades previously.

The reality is, therefore, that class actions and settlement trusts provide the only realistic means of redress. Class action settlements are indeed the product of compromise and accommodation and do benefit both sides. The claimants get previously inaccessible compensation. The defendant companies are insulated from further litigation and can estimate and provide for their liability.

It is wrong to suggest, as the authors do, that the trust settlements are a disincentive to taking appropriate remedial actions in the workplace. The cost of redress is an obvious incentive to avoid further liability by preventing further harm in the workplace.

The records of the ART, KRT and QT are good. They are well governed, transparent and accountable. It is still early days for the Tshiamiso Trust, and it is our hope that it succeeds in providing for the many victims of our mining history.

The litigation – and the various trusts – would not have been required if there was a fair and efficiently functioning workers' compensation system in South Africa. But that is not the case.

It is acknowledged that the existing settlements can never provide full redress. However, for the first time in South African industrial history, employers are being held to account, and are making financial redress for the damage they caused.

With the ART, KRT and QT winding down and the Tshiamiso Trust just getting started, the critique is timeous, if misdirected.

REFERENCES

1. Mushai A, Crossley J. Critical perspectives on trusts as a compensation option for occupational diseases in South Africa. Occup Health Southern Afr 2020; 26(5):199-202.

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