Beating the Odds: The Quest for Justice by South African Asbestos Mining Communities

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In March 2003 a small community group, ‘The Concerned People Against Asbestos (CPA)’ based at Prieska in the Northern Cape, won a court case in a foreign country. That case may change the way in which multinational corporations behave in the developing world. Until now the hidden costs of mining in Southern Africa have been paid for by labour. The CPA’s victory may also help to end that injustice. It is usual to depict communities like Prieska as dis-empowered and impoverished. Despite its lack of resources the CPA was able to synchronise an elaborate game of small and big politics. The group’s victory suggests that such communities have levels of political and organisation skill which given the right alignments can be irresistible.

Asbestos is the most versatile of minerals. To the touch a piece of raw asbestos feels like rock yet it is possible to tease apart individual strands with one’s fingers and when placed under a microscope each fibre can be seen to consist of thousands of fine threads. Asbestos is resistant to heat and cold, and to acids and alkalis: it can be woven into cloth or mixed with cement. Its remarkable qualities, which accounts for its wide commercial appeal, also create serious risks for those who mine, manufacture, or use asbestos-based products. Asbestos causes three diseases, namely asbestosis, lung cancer and mesothelioma, which is an otherwise unknown cancer of the lining of the lung or the abdominal cavity. The first two diseases are dose related and are therefore confined to the workplace. By contrast mesothelioma can result from trivial exposure and the latency period between exposure and diagnosis, which can be as long as 40 years, makes its destruction of the human body seem inexorable. The disease is always fatal. At the beginning of the twentieth century asbestos was a curiosity. By 1950 it had become an essential ingredient in the commodities around which the post-war prosperity of OECD states was built. Twenty-five years later asbestos was such a feared carcinogen that private householders and public authorities were willing to spend fortunes removing asbestos insulation from homes and work places. The tide of litigation which began in the late 1970s has seen the major US asbestos companies take refuge in bankruptcy. Litigation soon followed in the UK, where a large number of claims are settled each year. In 1997 litigation by men and women who had mined asbestos in South Africa began in a London court.

South Africa is the only country to have mined all three commercial varieties of asbestos, namely crocidolite (blue), amosite (brown) and chrysotile (white). The mining of amphibole fibre began near Prieska in the northern Cape in 1893 and ended
just over a century later with the closure of the last mine, Merencor.\textsuperscript{4} The big mines were owned and operated by British firms the Cape Asbestos Company (later Cape PLC) and the Griqualand Exploration and Finance Company Limited (Gefco).\textsuperscript{5} The industry began slowly and with the exception of the First World War the market for fibre was unstable. The Great Depression led to a loss of demand from which the industry only recovered with the outbreak of World War Two. The post-war economic boom meant strong markets for asbestos and between 1950 and 1960 the value of South African output almost trebled.\textsuperscript{6} The shift to industrial mining saw the introduction of pneumatic drills which increased output but also created clouds of dust. By the early 1950s work conditions were so hazardous that miners were contracting asbestosis after less than six months employment.\textsuperscript{7} The Department of Mines made little attempt to improve conditions and the mines remained unsafe until they closed. Once asbestos was disturbed by mining large areas of the Northern Cape and what is now the Limpopo Provinces became contaminated. Tailings or waste from the mills was used to seal roads, footpaths, and school playgrounds and the residue of tailings can be seen today on the back roads of Kuruman. Tailings were also used by local communities to make house bricks while in the mid 1950s the Prieska town council used mill waste to surface the golf course.

Prieska is a small town on the southern bank of the Orange River which for over a century was the centre of asbestos mining in the northern Cape. Asbestos was first blended at Prieska in 1927 and from 1930 to 1957 a succession of mills were built in the town to process ore from nearby mines. The mill was the town’s largest building and it was also the major employer. Everyone who lived at Prieska tells much the same story about the dust. Schalk Lubbe remembers that during the 1940s and 1950s dust was visible as it came out of the mill chimneys. In summer Lubbe and his family often slept outside to escape the heat and in the mornings their bedding would be saturated with fibre (Lubbe, 1999). The mill ceased production in 1964 but continued to act as a storage depot until 1972. The site is now waste ground which greets visitors who come into the town from the north across the Orange River. The withdrawal of mining from the mid-1980s had a major impact upon the local economy: in 1980 the unemployment rate at Prieska was thirty per cent, by 2000 it had almost doubled (Moodley, 2001). In addition to unemployed miners Cape Asbestos and Gefco left behind unreclaimed mine sites which continue to expose the people of the northern Cape to airborne fibre. The extent of asbestos related disease (ARD) in the mining areas is unknown. Poor transport and communications and an inadequate health service make estimating the disease burden difficult. The literature about mesothelioma on the asbestos fields goes back to the 1950s, but the latency period and the effects of environmental exposure creates problems in estimating disease rates (Reid, 1900). Even less is known about lung cancer and asbestosis.

**The Concerned People Against Asbestos**

On the 22 December 2001 an out of court settlement was reached in London between Cape PLC and 7,500 former asbestos miners and their families (Summary, 2001). The agreement, which came after more than four years of legal struggle, promised the plaintiffs £21 million in what was the first action of its kind to be brought before an British court. The claimants are South African, and their injuries were sustained in South Africa while they were employed by fully owned subsidiaries of a parent company registered in Britain. The plaintiffs were supported by the South African government which made representations to the Law Lords on their behalf. Cape agreed to pay £10 million by 30 June 2002 and a further £1 million each year for
another ten years. In return, the South African government and the Legal Services Commission in the UK, which had funded the case, promised that they would support no further claims against the company. The South African government also released Cape from any obligations to clean up polluted mine sites and the plaintiffs solicitors Leigh, Day & Co. agreed not to represent any other South African asbestos victims (Summary, 2001). They also agreed that upon receipt of the first £10 million to destroy all documents relating to the case. The agreement was contingent upon Cape obtaining the approval of its shareholders and creditors, a factor which eventually proved an obstacle. The Cape case, which may change the way that multinational companies (MNCs) behave outside of the European Union, had its origins in a small community group, ‘The Concerned People Against Asbestos’.

Members of the Prieska community who had worked on the mines began coming to the ANC’s Constituency office in early 1995. Most had symptoms of ARD and they wanted assistance in applying for compensation from the Medical Bureau for Occupational Disease (MBOD) (Skeffers, 2001). Like most people in the region, Cecil Skeffers who dealt with the claims, had seen the effects of asbestos at first hand. His father and father-in-law had worked for Cape and both have asbestosis. Skeffers approached the provincial government in Kimberley in the hope of speeding up the claims. The Deputy Director of Health, Dr. Kitsamy, had no idea there was a problem with asbestos but he offered to help. Skeffers then invited Dr. Kitsamy to a community meeting at Prieska. As a result more people with ADR came forward. There were so many that in early 1996 it was decided to form a group and the ‘Concerned People Against Asbestos’ (CPA) was born. The core members of the CPA were Cecil Skeffers, Obet Mahlo, Ishmael Ngedee, Linda Nells, and Santa Lubbe, all Prieska people who had a family connection with the mines. Initially their aims were limited to obtaining compensation through the MBOD for those with occupational disease.

The immediate problem facing the CPA was to arrange transport for those requiring a medical examination. Medical Bureau reviews were conducted 600 kilometres away in Johannesburg and transport was costly. Following lengthy negotiations the MBOD agreed to pay for the claimant’s transport. After four trips, in which ten people were sent at a time, it was found that most applicants had second degree disability and the numbers coming forward were rising. According to Obet Mahlo: ‘When the M.B.O.D. in Johannesburg realised that so many of our people were ill, they tried several times to stop the process’ (Mahlo, 2000). The Bureau said that too much money was being spent and that the Prieska community was exploiting the situation for profit. Claimants were frustrated by the attitude of state officers who had little understanding of local conditions. The compensation system was run from Gauteng and there were no local representatives from the Department of Health at Prieska or Kuruman to provide information. As the number of claimants continued to rise the CPA began networking in the northern Cape towns of Marydale, Griquastadt, Kuruman, Uppington and Danielsk. The CPA faced many challenges. According to Obet Mahlo (2000):

This community could never in the past express its grievances or exercise it’s democratic right to expression, choice of life, and real basic human values. The community had always had people who had decided for them, when and how their lives should be lived. This made it an enormous task for the Constituency Office to function in the Prieska Community.

Another problem was the acceptance of ARD as normal. From the 1920s it was common knowledge in the northern Cape that if a man or woman got water on the
lungs they would soon die. What the communities had identified was a symptom of mesothelioma, the most lethal of the ARDs, which went undiagnosed until the late 1950s (Marchand, 1991). At Prieska most families were affected by the dust and ARD was unavoidable for those who worked on the mines. According to one community member:

Most women employed to crush the asbestos rocks were greatly harmed. It is customary for our mothers to carry their young on their backs there only can only imagine how many innocent infants were unwittingly exposed to this toxic substance. The consequences our people in that area were subjected to is unthinkable in today’s new Democratic South Africa (Mahlo, 2000).

Asbestos was mined in the northern Cape for a century and many families have suffered from ARD for generations. The CPA had to work hard to transform a phenomena previously seen as natural into a political problem to be resolved by collective action. The industry went into decline from the late 1980s and after the last mines closed and the last of the jobs had gone the issue of lung disease took on a different meaning. The first majority elections in 1994 also helped to change community expectations about health and the role of the state.

In November 1997 a meeting convened by Ms. S. Ramurath, from the Department of Environmental Affairs and attended by representatives from the Departments of Water Affairs, Health, Housing, Labour, and Minerals and Energy, was held at Prieska to discuss the ARD crisis (Minutes, 1997). Ms. Ramurath viewed the problem in terms of screening for ARD, environmental rehabilitation and compensation. The Department of Minerals and Energy representatives emphasised the need for information about the extent of the hazard and the rehabilitation of abandoned mines.

The CPA’s initial concern about workers compensation had widened. Ishmael Nagdee pointed out that the community saw the problem in terms of immediate hazards: there were houses contaminated with raw asbestos insulation and bricks made from asbestos waste; there was an environmental problem at Koegas where tailings were being washed into the river from which people downstream drew their water and there was a lingering risk of exposure for children whose parents had worked in the mines. The medical view from within the community was different again. Dr. Pieters, a Prieska physician, complained that there had been no proper consultation from the Department of Health about what was a health problem. People were ill and there was no adequate care. The matron at the Prieska Hospital pointed out that the hospital had no proper X-ray equipment and no beds for patients who had to be sent to Kimberly for treatment.

The CPA began collecting information about ARD but there was no data on the existing exposure levels in the towns. In 1998 the CAP invited Everite, the Swiss owned asbestos conglomerate and their environmental team, to do a study. The final report which was based on random sampling found that there was little airborne fibre at Prieska, a result that has never been replicated. At the time the readings were taken it was windy and it had rained the previous week (Skeffers, 2001). There is in fact ample evidence that disease rates in the region are very high. A subsequent study of 955 respondents in the Prieska district with either occupational or environmental exposure found much unreported disability. The researchers concluded that there were a large number of previously undiagnosed compensatable cases of ARD. A more recent estimate from the Northern Province suggests that almost all women who worked on the mines suffer from asbestosis (Davies, 2001).
In 1998 the CPA met with a consultant named Dr. Ahmon Randeree, a Canadian then working with the Health Department at Kimberley. Asbestos is a major industry in Canada and he immediately recognised the kinds of health problems which may exist in the region. Randeree advised the CPA that to establish the extent of the problem it was necessary to have 1,000 people X-rayed. As Johannesburg was too far away and the cost of examining a large number of people was too great it would best be done at the Kimberly Hospital. Randeree then made an appeal in the local press for doctors to volunteer. The Health Department paid for accommodation and travel and the X-rays were free. Randeree also gave the CPA the idea of taking their case to court. At that stage the community had not considered that possibility (Skeffers, 2001).

All the CPA’s work was voluntary and the group’s only material resources were the use of an office at the Prieska Hospital and access to a phone and fax. There was no national, let alone international, press coverage of the issue and The Diamonds Fields Gazette was the only newspaper to take an interest in what was happening at Prieska. In June 1998 the CPA invited Dr. N. B. Pityana from the Human Rights Commission to the first community meeting. He said that someone should be held accountable for what he termed ‘the gross human rights abuses’ by the asbestos industry. That meeting was important in widening the circle of the CPA’s interests (Skeffers, 2001). The group had to decide whether its primary focus should be on the South African compensation system with which the CPA had begun, the legal system in South Africa or the more abstract principles suggested by Dr. Pityana which reached out beyond the national boundaries. The CPA needed to widen its constituency, and make new alliances, but it also had to retain control of the political process. It invited locals leaders from the ANC to community meetings but they did not understand the asbestos issue (Skeffers, 2001). The National Union of Mine Workers (NUM) then became involved. The union was large and powerful and was independent of government. Its support proved important in giving the CPA access to the national stage (Skeffers, 2001).

As the burden of disease became more visible it was increasingly clear that the problems left by the mining companies could not be resolved within the existing legislative frameworks. There were simply too many cases of disability for a new government facing a fiscal crisis over housing, health and education to resolve. For those who live with ARD there are medical costs and the loss of productive life. A recent study of the economic burden in the Northern Cape has found that every household in the Prieska community is affected and that the average monthly cost to a family of a single case of asbestosis is R400 (Moodley, 2001). The impact of mesothelioma is greater again with medical treatment costing around R71,000 per person (Moodley, 2001). The authors estimated if there are 5,000 ARD claimants in the region then the medical costs for those people over the next twenty years will be in excess of R357 million (Moodley, 2001). Secondly, many cases of ARD are due to environmental exposure and therefore are not covered by the MBOD. Exposure is an ongoing problem which pushed the CPA agenda into the field of environmental politics. The impact of ARD was reflected in the range of government departments with which the CPA had to deal; they included Health, Housing, Minerals and Energy, Roads, Environmental Development, Local Government, Justice, and the Premiers’ Office. Without a clear focus the CPA’s endeavours would soon have fractured between those different constituencies.
The Law

While visiting Canada Dr. Randeree met a lawyer named Richard Meeran, from the London firm Leigh, Day & Co. This legal firm was running a case on behalf of Natal factory workers and was sympathetic to taking on another involving the activities of a British company in South Africa. With the help of Action for Southern Africa (ACTSA) the CPA invited Meeran to Prieska. At that time the CPA had two aims: to reduce the risk of illness in the community and to get some compensation to those already affected. The core members of the CPA had a closed meeting with Meeran and selected five test cases with which to bring an action against Cape PLC in London (Skeffers, 2001). The case was funded by the British Legal Aid Board.

Under British law multinational corporations have been protected by two principles: the separation of corporate identity (the corporate veil) and forum non conveniens. Under the separation principle the parent company of a wholly-owned subsidiary is not held responsible for its misdeeds, except where it can be shown the independence of the subsidiary is a sham. As a result corporations can dictate the behaviour of subsidiaries yet claim protection from prosecution. That separation has fostered the double standards in regard to occupational health and safety which are the hallmark of MNCs (McCulloch & Tweedale, 2004). Adding to the protection afforded by the corporate veil is the principle of forum non conveniens which requires that cases should be tried in the country where they can be litigated most cost-effectively. The burden of proof is on the defendant to show that a particular forum is best. Among the factors influencing that decision are the location of witnesses and documents. The term 'forum shopping' is used in the US to describe disputes over a venue and US courts have generally opposed relocating hearings to the metropole. In the Bhopal tragedy, Union Carbide wanted the case heard in India while the plaintiffs wanted it heard in the US where damages would have been far higher. Union Carbide won (Chouchan, 1994). Given the barriers of forum non convenienc and the corporate veil, Cape’s lawyers never imagined they could lose (Meeran, 2002).

Leigh, Day’s first forum case was that of Edward Connolly who had developed throat cancer as the result of his employment at RTZ’s Rosing uranium mine in Namibia. The Connolly case went on appeal to the House of Lords but was eventually lost on the statute of limitations, in December 1998. At the same time as the Connolly case, Leigh, Day was running a second action involving a chemical company which had transferred a hazardous technology from the UK to South Africa. From the 1980s, Thor Chemicals Holdings Ltd. made mercury-based compounds at a factory in Margate. It was a small firm and there was much criticism from the Health and Safety Executive about the elevated levels of mercury in the blood and urine of employees. Around 1986 Thor shifted its plant and key personnel to Cato Ridge, Natal where the same health problems soon arose. In February 1992 the deaths of three workers and the sickness of another resulted in a prosecution in the Pietermaritzburg Magistrates court and a fine of £3,000.9

In 1995 Leigh, Day brought an action against Thor in the English High Court on behalf of twenty workers. They claimed that the plant was inherently flawed and that Thor had failed to protect its South African employees from a foreseeable hazard. Thor sought to stay the action on forum grounds and asked that the case be heard in South Africa. Leigh, Day argued that the case should be heard in UK because the technology and production system were imported into South Africa from the UK; the day-to-day supervision of the plant was directed from the UK and even the mercury levels were monitored from the UK. On the opening day of hearings the judge asked Leigh Day:
'What are these South African claimants doing in my court?' (Meeran, 2002). The first three days were devoted to the question of jurisdiction which was resolved in the plaintiffs favour. The men had suffered serious injuries: one man had been in a coma for three years and evidence of his condition clearly affected the judge. Thor lost on appeal and was forced to pay £1.5 million in damages (Meeran, 2002). Thor was the first successful forum non conveniens in a UK court, and it encouraged Leigh, Day to bring a second case against the company. That case was to go to trial in October 2000 but Thor settled on the first day of hearings. As part of the settlement Leigh, Day agreed not to take part in any further litigation against Thor nor to assist future plaintiffs in any way.10

The Connolly, Thor and Cape PLC cases overlapped in time and the gains made in Connolly and Thor fed into the Cape action. In part that was a matter of good luck, in part it was the result of good management. If Leigh, Day had started with Cape, which was far larger than Connolly or Thor, and lost that would have discouraged them from pursuing any such case in a UK court (Meeran, 2002).

In February 1997 a compensation claim began in the English High Court on behalf of three Cape Asbestos workers who had also lived near the Penge mine and two Prieska residents who had environmental exposure from nearby mills.11 Cape's operations in South Africa were directed from London until 1948 when the company was re-structured: from then until 1979 Cape Asbestos operated in South Africa through wholly-owned subsidiaries (McCulloch, 2002). Cape closed its main UK factory at Barking in 1968 due to the known hazards of asbestos but continued to operate mines in South Africa until 1979. The plaintiffs claimed that the parent company, which exercised de facto control over the operations of its subsidiary, knew those operations were hazardous to employees or those who lived nearby and owed a duty of care to those people through the control it exercised over its subsidiaries. To succeed in court the claimants had to identify test cases of ARD caused at Cape mines, then prove that a duty of care was breached. In effect they had to pierce the corporate veil separating Cape Asbestos from its South African mines. But first the claimants had to establish their right to have the case heard in a British court. Cape applied for a stay on the grounds of forum. In January 1998, after an eight day hearing spread over six months their application was granted: but on appeal in July 1998 the Court of Appeal reversed that decision. The court found that the breaches of care had taken place in England (where decisions about occupational health and safety were made) rather than in South Africa.

For the next three years various courts adjudicated on the forum in which the case should be heard. Cape argued that it would be best run in South Africa where the witnesses, records, and claimants were domiciled. The claimants argued that they could not get justice in South Africa because legal aid for personal injury claims had been abolished and therefore they had no way of funding their case. There was, in addition, a lack of expertise in South Africa to run such a complex action. South African courts are conservative when it comes to awarding damages for pain and suffering, an area in which the poor would otherwise hope to make the largest claim for damages (Spoor, 2001). Cape PLC was so determined to avoid a British forum that it offered to fund the plaintiffs claims if the case was heard in South Africa (Meeran, 2002). Cape has no assets in South Africa and so it was in effect forum shopping in reverse.

In January 1999 Leigh, Day began a second action against Cape involving almost 2,000 claimants. The company applied to stay those claims on forum grounds arguing
that the larger group changed the basis of the existing claim and that the initial five cases should also be stayed; Judge Buckley then reversed the previous decision. The CPA and the National Union of Mineworkers wrote in protest to the Minister of Justice in South Africa pointing out that although Cape Asbestos had left behind thousands of injured and dying people, the company had never compensated any South African worker. "It took the English Courts only five minutes to consider all the difficult issues in our case. The English Courts are ignoring the pain of African workers and communities", they wrote.13 The matter then went back to the House of Lords for final appeal with the South African government making a submission on behalf of the plaintiffs. The Law Lords handed down their decision in favour of the claimants on 20 July 2000. The main issues cited by the Lords were the lack of legal aid in South Africa, which would prevent the case being brought to trial and the lack of local expertise in bringing such group claims to court.14 The Lords decision dealt purely with where the case should be heard: they did not address the issue of whether the parent company, Cape, owed a duty of care to the claimants through the operation of its South African subsidiaries.

The decision came as a blow to Cape and its legal team. Having spent several million pounds defending a forum claim, Cape immediately sought an out of court settlement. A fear of bad publicity was certainly a factor in that decision for had the case had gone to court, it would have revealed the most deplorable work practices at Cape mines (McCulloch, 2002). Furthermore, if the case had gone to court and the claimants had won it would have been for a sum far in excess of the £20 million offered by Cape (Meeran, 2002). Leigh, Day accepted the offer because of Cape's uncertain financial future. A trial could well have bankrupted the company which was an outcome against the interests of both parties (Summary, 2002).

While the Cape case was being fought in London, the CPA continued to push the asbestos issue in South Africa. In November 1998 the National Asbestos Summit was held at Johannesburg. The Summit was attended by delegates from government, affected communities, labour, industry, and NGOs. There was also a large delegation from Zimbabwe's mining industry anxious to preserve a South African market for their fibre. The hearings were wide ranging and covered community development and rehabilitation, health, compensation and the regulatory system. The Summit endorsed a review of existing compensation schemes and called for the establishment of a comprehensive health system. It succeeded in publicising the impact of asbestos mining on community health but it lead to no concrete outcomes. The environmental problems facing the CPA included hundreds of abandoned mines, the dump at Prieska, roads dressed with mill waste, raw insulation in the ceilings of domestic dwellings and house bricks made from tailings.

The CPA met with the head of environmental planning in the provincial government, Thabo Makweya in early 1999. The court case was running in London and the CPA decided that it was important to keep the issue on the national agenda. It was a risk as there was conflict in the community and many in Prieska opposed the move. The national stage was a new scene and it posed a challenge for a group with few resources. Some members of the CPA were worried that the project would be hijacked by the national political parties which would use the issue for their own advantage (Skeffers, 2001). To counter that problem the CPA got members onto the local executive committee of the ANC. By mid-1999 the CPA was fighting battles on three fronts: within the local community, on the national stage and internationally with the Cape case in London. The group was keen to maintain focus and circulate information and so the workload was divided into five portfolios: Obet Mahlo did
legal work and processed claims; Cecil Skeffers covered health; Linda Nells did social issues; Santa Lubbe was responsible for information and Ishmael Nagdee did networking.

In addition to fighting an asbestos company in a London court, the CPA faced local opposition. The National Party member Mr. P. W. Saaiman claimed that the CPA was running an ANC line and that the Everite report showed there was no risk to the community (Skeffers, 2001). He said the CPA was corrupt and was damaging the town and its economy. The group were also opposed by the commercial elite in the northern Cape who feared that the issue would discourage investment and tourism. The Industrial Development Corporation, together with Green Valley Nuts, were at that time promoting the development of a pistachio plantation at Prieska. In addition to the National Party, the CPA's opponents included elements within the Departments of Housing, Minerals and Energy, Roads, Environmental Development, Local Government, and Justice – all of which saw the asbestos issue as a potential drain on their limited resources.

As a consequence of the growing national publicity, in mid-1999 a Johannesburg law firm Malcolm Lyons set up an office in Prieska to recruit clients for a second action against Cape. Lyons made promises and gave out soup and bread when they conducted interviews. As a result, some of the Leigh, Day claimants joined Lyons (Skeffers, 2001). The CPA knew that the community could not fight on two sides and that all claimants had to pull together. Leigh, Day was working with the national government and the NUM, Lyons was not. The CPA held a public meeting to explain the issue; most people supported Leigh, Day but a small number went with Lyons which created further tension.

While the Cape PLC case dragged on in London, the CPA used marches, vigils, and demonstrations as a means of generating publicity and maintaining community support. In November, as the judges were considering the issue of the forum, it sponsored an exhibition of photos at Kimberley by Hein du Plessis which attracted national publicity. With the support of local churches, on 4 November 1999, the CPA organised a march in Prieska. They invited the BBC and the South African press and the event received wide publicity. There was a major setback at the end of November when a British court rejected the case outright. The struggle had been going on for four years and it was difficult to keep community expectations under control. A group of community leaders wrote directly to the British Prime Minister, Tony Blair, appealing for justice. Thabo Mbeki was in Britain at that time and they hoped that he would talk to Blair about the issue. Again it was a risk as the CPA could have alienated the ANC government. At that point the CPA changed its tactics and began holding a series of street meetings. The meetings ensured that everyone talked and that they shared information over a shared quest for justice. The CPA also appealed to the churches in Prieska and they held regular prayer days which welded the community together. The CPA stopped talking to TV and newspapers reporters who, by running sensationalist stories, raised expectations which could not be met.

The CPA was careful in setting its agenda but its limited resources had been eroded by the protracted legal battle. The CPA paid no salaries and most of the key figures in the group were unemployed. Cape PLC knew that the structure was struggling and its lawyers offered Skeffers R100,000 to act on the company's behalf; he declined (Skeffers, 2001). By January 2000 there was friction within the CPA structure. The workload was increasing and the opposition had far more money and expertise. To take some of the pressure off the group Obet Mahlo began working as a project officer.
with Leigh, Day and Cecil Skeffers took a job with the Department of Welfare. The CPA then set up a provincial structure with a representatives in each town (Skeffers, 2001). The group used faxes to keep local communities abreast of the legal battle and held a general meeting in early 2001.

The Settlements

In June 2002 Cape PLC failed to make the first payment to the Hendrik Afrika Trust set up for the victims. The company had promised to restructure its operations but only part of that process had been completed (Financial Times, 2002). The situation was complicated by Cape’s poor financial position, due in part to the massive costs it had incurred in defending the case. While the Cape settlement remained in limbo, a second case involving an asbestos company was begun in South Africa. In May 2002 the Nelspruit legal firm Ntuli, Noble and Spoor Inc. initiated an action against the South African corporate giant Gencor on behalf of miners who had worked for Gefco, a fully owned subsidiary. Gencor was set up in the early 1960s by Afrikaner capital with Anglo American holding around a thirty per cent stake. It became a massive organisation and for a long period controlled Gefco. In 1980 Gefco bought Cape’s mines which it operated until 1996. The Gencor case was the first action of its kind in South Africa for occupational disease contracted in the mining industry. It was funded by the British law firm Thompsons, which has extensive experience of representing British asbestos workers.

Ntuli, Noble and Spoor Inc. faced various legal and procedural problems in mounting a case against Gencor (Spoor, 2002). It had long been assumed that the existing legislation and most especially section 35 of the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 (COIDA), previously the Workmens Compensation Act No 27 of 1956 (WCA), precluded employees from suing an employer for negligence resulting in occupational injury (Spoor, 2001). In general, South African workers have a right to compensation from state regulated and industry funded boards but no right to take common law action. The most important category of labour excluded from such benefits by COIDA are mine workers who instead can seek compensation under the Occupational Diseases in Mines and Works Act No 78 of 1973 (ODMWA). Spoor argued that the immunity provisions within COIDA did not prevent workers from suing employers for injury or disease due to negligence (Spoor, 2001).

Gencor claimed that it had never owned or controlled the Gefco or Msauli mines; that the period in which claims should have been lodged had passed, that some of the claimants were not yet sick and that in any case no South African court would grant payments of the kind demanded (Business Report, 2003). It was very much to the claimants advantage that once the question of the right to sue was established the case against Gencor was relatively simple. Ntuli, Noble and Spoor had obtained copies of Department of Mines dust counts from the 1970s and 1980s which showed that work conditions at Gefco mines were appalling. The Gencor case began at the moment when the Cape settlement had stalled. In July 2002 Leigh, Day reassured community representatives that the existing agreement offered its clients the best chance for a settlement. But it also acknowledged that taking Cape to court would be costly and involve the risk of losing (Meeran, 2002). Gencor had major assets and the best outcome for Leigh, Day’s clients was for the Gencor case to run without jeopardising the Cape settlement. By September 2002 Leigh, Day believed there was a better chance of a resolution if the two cases were cojoined. Many Cape claimants had worked for Cape before 1979 and for Gencor after 1981. For that reason and given
the problems of gaining a full settlement from Cape in September 2003 Leigh, Day agreed to co-join the actions. That decision had a precedent in the original Cape agreement which curiously contained reference to Gefco. In addition to the initial £21 million, Cape had offered the claimants an extra £1 million if they agreed not to bring further claims for compensation against Charter PLC, Gefco, the Transvaal Consolidated Land and Exploration Company Ltd, or the GASA group of companies.

After six years of legal argument in Britain and South Africa, on 13 March 2003 an agreement between thousands of South African workers and the two mining companies was signed. Cape PLC agreed to pay £7.5 million in compensation to 7,500 workers and Gencor agreed to set up a trust fund for its workers, worth R448 million (£37.5 million). In addition, Gencor agreed to pay £3.21 million to those Cape claimants who were also exposed at Gencor’s operations. Around R40 million was set aside for rehabilitation of mining sites under a scheme to be administered by the Department of Mineral and Energy Affairs. The Gencor trust is the largest settlement in South Africa’s history, and the first time black miners have received such compensation from their employers.

The Gencor agreement is 77 pages in length and was designed to both settle an existing claim and prevent the emergence of future claims. Gencor has walked away with a payout of R450 million out of a total of R18 billion in assets, which it no doubt sees as a victory. Among the numerous parties to the agreement are the law firms Ntuli, Noble and Spoor, and Thompson’s Solicitors in London, who funded the case. Also party to the agreement are the Asbestos Interest Group (Mary Moffat Mission), The Pomfret Claimants, and the mining houses Gefco, Msauli Asbes Beperk, African Chrysotile Asbestos Ltd, and Hanova Mining Holdings, and significantly the government of South Africa. The new Cape agreement reduced the size of the original settlement by two-thirds and involves a one-off payment. The 7,500 claimants are to receive £7.5 million from Cape PLC and £3.1 million from Gencor making a total of £10.6 million or just £1,413 each. There is no trust to cater for those who will become ill in the future and the new version stands in stark contrast to the original settlement which was centred on such a mechanism. After Cape’s failure to honour the original settlement, Leigh, Day insisted on a one-off payment simply because they felt that they could not trust Cape (Meeran, 2002). Consequently claimants will received very different benefits if they happen to fall under the Gencor or Cape settlements. In some instances, that will see individual members of the same family awarded different levels of benefits for the same disability. There is nothing to prevent those who in the future develop mesothelioma or lung cancer from suing Cape PLC.

The End Game

How should the settlements be judged? According to payouts of asbestos sufferers in US or UK courts or by their impacts upon the former mining communities of the Northern Cape and Limpopo Provinces? Should they be viewed in terms of the legal precedents they establish? The average payout for a single case of mesothelioma in Californian courts is around US$1 million. Payouts have also been achieved in British courts which make the Cape and Gencor settlements appear trivial. But that is not necessarily the way the settlements are viewed from within South Africa where the money will greatly benefit impoverished communities. In reaching that settlement Leigh, Day was faced with a choice of taking whatever money was available or risking Cape going into voluntary bankruptcy. In Richard Meeran’s words, if that had happened, ‘The banks would have taken all the money’ (Meeran, 2002). When the
Cape case began in London in 1997 the claimants chances of success were poor. Over the past thirty years asbestos companies in the UK (and the US) developed strategies for frustrating legitimate claims for compensation. Like its competitors, Cape PLC had money and ready access to legal and medical expertise. From 1948 a corporate veil separated Cape Asbestos from its South African subsidiaries and that veil appeared to offer an insurmountable barrier to plaintiffs. Cape PLC had no assets in South Africa and it knew that British courts would be reluctant to hear the case in Britain. The company also had time on its side for the longer the case was drawn out, the fewer plaintiffs would be left alive. That proved to be so and Cape was so successful in delaying proceedings that 776 claimants died before the final settlement. Cape probably assumed that no British government, even a Labour government, would have welcomed the subject of investment during the apartheid era being scrutinised at length in a London court. Finally, a loss by Cape PLC would have carried serious implications for British MNC.

Although the CPA had few natural allies and several determined opponents it also had some notable advantages. Work conditions on the mines were almost a parody of apartheid and once the issue of a forum was decided it would have been relatively easy to convince a court that Cape PLC was negligent. The CPA had the political imagination and flexibility to fight a case on the local, national and international stages: there was a high level of political skill in the community and its members and leadership had the endurance and persistence which were essential for survival under apartheid; it had the support of the NUM and the International Chemical, Energy and Mineworkers Federation, and NGOs such as One World Action, the World Development Movement and Amnesty International. A number of concerned individuals including the Canadian physician Dr. Randeree provided much needed expertise as did some officers in the Department of Health at Kimberly; the provision of legal funding in the UK and in particular the commitment of Leigh Day in London were vital. The same was true of Ntuli, Noble & Spoor in South Africa. The South African government had good reason to support the claimants as otherwise it would have been left to pay the cost for rehabilitating the mines and providing medical care for former miners.

It was much to the CPA’s advantage that in the UK the story fell into two established contexts – the legacy of the anti-apartheid movement and the activities of the anti-asbestos lobby. A major part of Cape’s profits came from the low wages paid to black and coloured workers and from the absence of occupational health and safety measures. As the NGO, Action for Southern Africa (ACTSA), pointed out on numerous occasions, the case arose because a British company took advantage of apartheid. In conjunction with the South African Department of Justice, ACTSA made a submission directly to the High Court in support of the plaintiffs initial claim. Once the case had run into trouble, ACTSA wrote directly to Cape’s shareholders and sponsored a photographic exhibition of the mining communities. After Cape failed to make the first installment on the settlement in June 2002, ACTSA members protested at meetings of the Cape board. They also targeted Cape’s banks, the Royal Bank of Scotland and Barclay’s. Public opposition to asbestos in the OECD states had been running for over two decades when the Cape case was launched in London. As a result there was no need for the claimants to politicise the British press or the public about the dangers of asbestos. The British press soon took up the story and ran numerous pieces about the deplorable conditions on the mines.

The Cape/Gencor claimants won the right to run a class action in a British court for injuries sustained in South Africa and they also won a common law settlement in
South Africa against a mining company. The British financial press viewed the Cape
judgment in terms of its impact on MNC and suggested that UK parent companies
will have to review their exposure to claims in English courts. Such cases would be
both expensive to defend and involve much bad publicity. In future, parent
companies will either have to step back from the operations of their subsidiaries so
that they enjoy a genuine autonomy or take a hands on approach to ensure that
breaches do not occur. The second strategy would force British corporations to close
the gap between their occupational health and safety practices at home and abroad.
Within South Africa the Gencor case may have a rather different but equally profound
impact. The day after the agreement was signed, Ntuli, Noble & Spoor announced
that it would turn its attention to the plight of gold miners suffering from silicosis
(Business Day, 2003) The only studies of occupational disease among migrant workers
who have returned home are by Steen (1997) and Trapido (1998). Those studies
suggest that in Botswana and the Eastern Cape there are large number of miners with
undiagnosed disabilities. Richard Spoor estimates that the total payout for hitherto
invisible occupational disease may be as high as R50 billion (Spoor, 2001). Any case
against the major mining houses would likely involve the governments of
neighbouring countries, such as Mozambique, which supplied migrant labour to
South Africa. If that happens the occupational health and safety conventions in the
region will change fundamentally.

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Endnotes

1. Unless otherwise indicated all archival materials cited are from the National Archives
of South Africa, Pretoria. The CPA Papers are documents held at the Prieska offices of The
Concerned People Against Asbestos. They consist of letters, memos and minutes covering
the history of the group and in particular the battle for legal compensation in the UK.

2. On the UK experience see Geoffrey Tweedale (2000), Magic Mineral to Killer Dust: Turner &
Newall and the Asbestos Hazard, Oxford: Oxford University Press.

3. During the 20th century South African produced all of the world’s amosite and all but three
per cent of its crocidolite. Those fibres, which are known as amphiboles, are the most efficient at
causing lung cancer and mesothelioma.

4. For a history of mining see Jock McCulloch (2002), Asbestos Blues: Labour, Capital, Physicians and
the State in South Africa, Oxford: James Currey.

5. In 1970 Gefco became a fully owned South African company.

6. By 1960 production had reached almost 200,000 tons and the asbestos mines were employing
1,000 white and more than 20,000 black and coloured workers. See Annual Report, Department of Mines for the year ending 31 December 1960, Pretoria: Government Printing and Stationary Office, 1961 p.40.

7. At Cape Asbestos mines young men with no previous exposure were contracting asbestosis
after less than twelve months employment. See ‘Report on Health Conditions at Asbestos Mines’,
Dr. G. B Peacock, Assistant Health Officer, Pietersburg, June 1952, NTS 2258 695/280,
volume 1.

8. ‘Asbestos Related Disease: A community-based Survey and Capture-Recapture Analysis’ by
M. J. Hopley & G. A. Richards, Respiratory Units, Chris Hani Baragwanath Hospital and the
Johannesburg Hospital, University of the Witwatersrand unpublished study, The CPA Papers,
undated (1999).


11. Simultaneous claims were also lodged on behalf of four Italian workers employed at Cape’s Turin factory run by a wholly owned Cape subsidiary Capaminanto: by virtue of Article 2, The Brussels Convention, the Italian claimants could not be prevented from bringing their claim to an English court. The case was settled out of court.


13. See ‘Opinions of The Lords on Appeal for Judgment in the cause Schalk Willem Burger Lubbe (Suing as Administrator of the Estate of Rachel Jacoba Lubbe) and 4 Others (Appellants) and Cape PLC (Respondent) and Related Appeals, 20 July 2000’, p.13.


25. One case of mesothelioma involving a young surgeon who had been exposed to asbestos while a medical student was recently settled in a London court for £1.5 million. See ‘Surgeon Dies from Hospital Exposure to Asbestos’ in The British Medical Journal, 320:1358 (20 May 2000).


Bibliographic Note

*Business Day* (2003), ‘South African Gold Mines may face Gencor-Type Claims’ (Johannesburg) 14 March.


Minutes of Asbestos Forum (1997), held at Prieska, 6 November, *The CPA Papers*.


Skeffers, Cecil (2001), interview, the Community Centre, Prieska, 22 November.


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