

Key employer considerations in the Mine Health and Safety Act Amendment Bill

By Kate Collier, Kenneth Coster, Mbali Nkosi | 28 June 2022

Proposed amendments to the Mine Health and Safety Act place greater obligations on employers, which is to be welcomed in some respects but other amendments are problematic and may be open to legal challenge.

The draft Mine Health and Safety Amendment Bill, 2022 (the Bill), gazetted on 14 June 2022, is currently open for public comment.

Written representations and comments on the draft proposed changes must be submitted to the Department of Mineral Resources and Energy (DMRE) by 29 July 2022.

In our view, the Bill proposes some good and regrettably some very onerous and unattractive amendments to the Mine Health and Safety Act, 1996 (MHSA).

The discussion below is limited to the proposed amendments which, in our view, affect "employers", as defined in the MHSA.

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Amendment to definition of Employee

A key concept in the MHSa is the broad definition of "employee" and the incorporation / extension of an employer's duties towards the health and safety of all persons working on the mine. The proposed amendments narrow the definition of employee, to be "*any person who is employed by the employer or owner of a mine and who is working at a mine*". This is a fundamental shift in the obligations of the employer towards contractor personnel, but this change seems not to have filtered through to other key provisions and may create more questions than certainty if the Bill remains in its current form.

Amendment to the definition of Mining Area

The MHSa does not confirm its scope of application (which is unfortunate) but general principles indicate that it would apply to, or within, a mining area (subject to exceptions). The proposed amendment to the definition of Mining Area is therefore significant - excluding operations where a mineral is used in a *manufacturing or beneficiation* process on land adjacent or non-adjacent to the mining right area and where operations incidental to mining are being undertaken by the employer.

The appointment of a Chief Executive Officer

The MHSa requires that the "chief executive officer" (CEO) take reasonable steps to ensure that the employer complies with its obligations in terms of the MHSa. The CEO is a defined term and, currently, is determined through a factual assessment of the person that is responsible for the overall management and control of the business, or where the employer is a company, if another person who is member of the board is designated to fulfil the duties of the CEO.

The Bill introduces the requirement that a CEO must be appointed in writing by the employer, irrespective of whether the duties of the CEO are to be performed by the de facto CEO or a member of the company's board of directors. If the MHSa is amended as proposed, employers must ensure that irrespective of the CEO being responsible in terms of the MHSa by virtue of law, or where a member of the board has been designated that its board resolves to furnish such person with a written appointment letter and that such written appointment is then issued.

The proposed new section confirms that the CEO for purposes of the MHSa need not be the *de facto* CEO, only that that person is a member of the board of directors of the company. The appointed CEO must be responsible for the health and safety of employees and persons who are not employees.

Although still untested, the Bill's proposed section 2B(2) specifically requires the CEO to make all appointments in terms of the MHSa. This is practically unfeasible (and unlikely the intended consequent of this proposed amendment). Notably, the Bill does not propose to remove the ability of the CEO and other senior personnel to delegate responsibility and practically the careful planning of that delegated authority will become increasingly important for employers.

Suitable PPE

The Bill proposes an addition to section 6 of the MHSa to the effect that every employer must ensure that sufficient quantities of personal protective equipment (PPE) are provided for employees, but also that that PPE is *suitable*. Employees who are required to use it must be able to use it effectively for personal protection.

Suitability is determined in the Bill to be:

- size and fit of PPE;
- type of workplace hazards;
- purpose;
- nature of work to be undertaken; and
- gender.

Substance over form regarding responsibility?

The Bill introduces a new section 7(6) which reads as follows:

"Where this Act requires the employer or a manager to appoint any person to perform any functions contemplated in this Act and such appointment is not made, the employer must ensure that the functions of the person who should have been appointed are performed." (emphasis added)

On our reading, it appears that a formal letter of appointment for a person in a specifically required role, is not as important as the fact that an employer does in fact have a duly qualified person performing the role at its operations. If we are correct in our interpretation, this proposed amendment is to be welcomed as it demonstrates an intention to prefer substantive compliance, over and above formative/tick-box compliance.

Importantly, in our view, this proposed section should not be interpreted as allowing discretion over whether specified appointments should be made, in favour of the employer generally discharging those functions – but rather, an additional means through which to hold the employer responsible for each health and safety obligation.

What your COP says, is law

Section 9 of the MHSa is amended in the Bill by the introduction of a new section 9(8). This proposed amendment reads:

"Every employer must comply with the requirements of the code of practice by such employer, in terms of subsection (2) and (3)."

Currently, the MHSa requires that an employer prepare and implement a Code of Practice (COP) in line with a guideline issued by Chief Inspector of Mines. The proposed amendment takes this obligation further to ensure that once implemented that there is compliance with the requirements of the drafted COP. This will require greater levels of care in assessing the reasonableness and practicality of measures listed in COPs and non-compliance with the requirements of a specific COP is no longer merely an "internal" or disciplinary matter.

In addition, a seemingly minor proposed deletion to current section 49(6), would see the need for the Chief Inspector of Mines to gazette any guidelines for mandatory COPs removed. This is a curious proposed change, considering a Labour Court judgment confirming this need and, the practical importance of this in ensuring that employers receive reasonable communication or notice of the guidelines. It is unclear how the DMRE would hold employers liable for a failure to implement a COP, if they cannot demonstrate that the employer was, or should reasonably have been aware of the existence of the guideline. The Government Gazette serves this purpose.

Training must be in accordance with needs of the work performed, and training records must be readily available

Although that term "*reasonably practicable*" is, (and remains) specifically defined in the MHSa, the proposed amendments remove this qualification from the training obligations placed on employers. It is possible then, that there is a proposed attempt to hold employers to a higher standard of care, possibly strict liability, in respect of their training obligations. If this is the case, this amendment may be subject to specific legal challenge and the current proposal is certainly problematic in its current formulation.

The Bill proposes to amend section 10(1)(b) of the MHSa by deleting the phrase "as far as reasonably practicable" and requiring every employer to ensure that every employee is properly trained, and that the *nature of such training must be determined by the employer having regard to the needs of the work performed*.

The current draft does not indicate what is contemplated by "properly trained", and the section seems to recognise that only some of the training provided is "formal", in that records of formal training must be available (as opposed to all records). Formal training would be defined as "*any relevant training... which must be properly structured, documented and assessed*".

It is, however, likely that template training programs will not be readily regarded as "*proper training*" and that – employers will need to tailor training content for staff depending on the activities they are required to carry out and work required to be performed by each employee across the operations.

Caution must be paid to the training modules for contractor employees, as it will be for the employer (not the contractor) to demonstrate that it regarded the needs of the work it requires to be performed and will be required to play a far greater role in the work specific training (in addition to induction and health and safety training) than currently envisaged.

Furthermore, an amended section 10(4) requires employers to keep a record of all formal training provided in respect of each employee and for such training records to be readily available. This provides additional guidance to the practicalities of the record keeping obligations already set out in the current section 10.

Employers must provide mine environmental engineering AND occupational hygiene services

Should the Bill be enacted in its current form, it will become mandatory for employers to appoint, on a part time or full-time basis, a person to provide both mine environmental engineering services as well as occupational hygiene services and such services would include the measuring and assessing levels of exposure to health hazards, recommendations, and monitoring of the effectiveness of control measures and reporting thereon to the employer.

There is thus also no longer a need to determine whether occupational hygiene services are required by risk assessment (as is the case currently) as the Bill negates such a step.

Registered OMPs

The Bill also proposes that in addition to the appointment of environmental and occupational hygiene services and the Occupational Medical Practitioner (OMP), that "*other [duly registered] Occupational Health Practitioners*" be appointed "*in so far as it is necessary*".

The appointed OMP must be registered with the Health Professional Council of South Africa and confirmation of this registration, together with their professional registration number must be supplied to the Principal Inspector of Mines within 7 days of their appointment.

A new section 13(4C) stipulates that: "*An employer must ensure that the Occupational Medical Practitioner issues a certificate of fitness for work for every medical examination conducted in terms of subsection (2)(c) [being the initial medical examination and other medical examinations at appropriate intervals as part of the system of medical surveillance and ensuring fitness to work]*" Although not strictly a new obligation, there have in some instances been employers who sought to arrange for other members of the medical or wellness department to issue the so called "fitness certificates". The amendment makes it clear that all medical fitness certificates must be issued by the appointed OMP.

The Bill also envisages a new section 13A which explicitly places the obligation on the OMP to notify an employee found unfit to work about that employee's right to appeal the decision within 30 days. Importantly, the proposed amendments also include time periods in which appeals to the Medical Inspector must be determined – proposed as being within 60 days after the appeal is lodged.

Further, the proposed new section 13A(2) will require the Employer to report any dismissal by the employer of an employee on grounds of unfitness to perform work. The reason for this, and the possible role that the DMRE may then play in this process is not prescribed, or indicated.

An administrative fine fund

The Bill establishes a new section 43(eB) regarding the establishment and control by the Mine Health and Safety Council (MHSC) of an administrative fine fund for fines imposed in terms of section 55B of the MHSA.

Furthermore, subject to the approval of the Minister of Mineral Resources and Energy, the MHSC must according to a new proposed section 43(eC) use the monies collected in terms of section 55B for the promotion of health and safety in the mining industry.

Although not necessarily controversial, this proposed amendment signals perhaps a greater emphasis by the DMRE regarding the imposition of fines for health and safety contraventions in future, as opposed to the big stick of criminal liability.

Observation required for issuing of instructions in terms of section 54

We welcome the proposed amendment to the infamous section 54(1)(a) of the MHSA which it is hoped will read as follows should the Bill be enacted:

"If an inspector observes that any occurrence, practice or condition at a mine, endangers or may endanger the health or safety of any person at the mine, the inspector may give any instruction necessary to protect the health or safety of any persons at the mine." (emphasis added)

Current wording in the MHSA requires that an inspector only has to have a reason to believe that there was an unsafe act or occurrence to justify the imposition of a stoppage notice.

The Bill envisages a situation in which an inspector must physically observe an unsafe act or condition before issuing such notice. Such a provision is, in our view, likely to provide far greater certainty on the need for an instruction in terms of section 54 and the appropriateness of action of that nature (as opposed to an instruction in terms of section 55 of the MHSA).

A seemingly minor, but very important change is the substitution of the role of the Chief Inspector of Mines to the Principal Inspector of Mines in respect of the confirmation, variation or setting aside of section 54. This not only aligns with what is practically occurring but streamlines the legal processes in the context of internal appeal processes.

A section 54 by any other name?

The Bill proposes new sections 50(7A), (7B) and (7C) which stipulate that:

"(7A) An inspector may, in order to collect or secure evidence for purposes of an investigation in terms of section 60 or an inquiry in terms of section 65 –

(7B) An inspector may –

(7C) If the prohibition is issued orally, the inspector must confirm it in writing and give it to a person contemplated in section 54(2) at the earliest opportunity."

As set out above, whilst the limitation on the new criteria to be met prior to the issuing of section 54 notices is to be welcomed, these additions are, in our view, problematic. It is not clear from the above what is meant by the term "site" and the extent to which this could be applied.

While the importance of securing the scene of an accident for proper investigation must be supported (and is a reasonable requirement, on the face of it) stricter protocols will be required such as the extent of the area that may, or should, be subject to this rule and the period that it may remain in place. It is not uncommon for extensive periods of time to pass before an investigation or inquiry is completed – in some cases in excess of 12 – 18 months and the current draft in theory would permit the site to be prohibited from functioning for all of that time.

Internal appeal processes and challenges to decisions of inspectors

The Bill introduces a new section 57(4) which states:

"No person may apply to the Labour Court for the review of an administrative decision, except a decision contemplated in section 55B, until that person has exhausted the appeal process contemplated in this section."

This aligns with the existing legal principle that internal remedies must be exhausted before a review is launched in Court proceedings.

Of far greater concern, however, is the proposed amendment to the current section 59(2)(b) which on its current wording permits employers to approach the Labour Court to suspend the operation of a decision pending the determination of the matter. This includes the internal appeal processes that must be followed and which, in the ordinary course, do not suspend the decision.

The proposed amendment limits this ability to a decision of the Chief Inspector of Mines; implying that the decision must remain effective and in place during the period of any internal appeal to the Chief Inspector of Mines. This seems unreasonable and places the employer at a risk of being unfairly prejudiced, particularly where the decision is overturned or amended. If this amendment is pursued in its current form, we expect legal challenges will follow.

In terms of the Bill, an employer may approach the Labour Court directly for a review of a decision to the imposition of an administrative fine only.

Significant vicarious liability amendments

The Bill introduces a new section 86A to the MHSA. This provision is similar to the proposed new sections 50(7A), (7B) and (7C) which were specifically not enacted in the 2008 MHSA Amendment Bill and which largely reflect the current provisions contained in the Occupational Health and Safety Act.

The concern for employers is likely to lie in the proposal that the issuing of instructions prohibiting certain conduct is not in itself sufficient proof that all reasonable steps were taken to prevent the act. In other words, employers will be required to do

more than simply issue instructions to employees, such as train, supervise and enforce.

Of greater concern perhaps, is that the proposed amendment also contemplates that it would not be a defence "*that the death of a person, injury or illness was caused by the act or omission of an employee of the employer if the act or omission fell within the scope of the authority or employment of the employee.*" This may be open to legal challenge too and would require employers to carefully and deliberately draft each employees' scope of authority and/or job description to ensure that working safely and compliance with all procedures is specially included, such that any deviation whatsoever would be outside of that employee's scope of authority or employment.

Interestingly, when similar amendments were proposed in 2008, those proposals also sought to prevent the use of the defence of ignorance or mistake. This has not been included in this round of proposed amendments.

Material increases to penalties imposed

The Bill proposes substituting sections 92(1) – 92(5) of the MHSA with a new provision regulating penalties that may be imposed on an employer convicted of offences under the MHSA. Importantly, this then pertains to employers having been found guilty following a criminal trial and does not amend the quantum of administrative fines that may be imposed by the DMRE.

The proposed amendment reads:

"Any employer or company convicted of an offence in terms of any section of this Act may be sentenced to a fine not exceeding 10% of the employer's annual turnover in the preceding financial year as reflected in the last available financial statements, in the Republic and the employer's exports from the Republic, whichever is greater or to imprisonment determined by a competent court." (emphasis added).

We note that sections 92(6) and 92(7) are not part of the proposed substitution and it appears then that the penalties and orders set out in section 92(6) would remain.

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