

# Powers of the inspectorate to close a working place

Mine and Occupational Health and Safety 2010

*Portions compiled by*

**Willem Le Roux**

a director of

**Brink Cohen Le Roux Inc.**

Updated, supplied and presented by

**Pieter Colyn**

a director of

**Brink Cohen Le Roux Inc.**

BCLR Place

85 Central Street

Houghton

Johannesburg

Telephone number: (011) 242-8000

Telefax number: (011) 242-8001

E-mail address: [pcolyn@bclr.com](mailto:pcolyn@bclr.com)

## 1 Designation and functions of chief inspector and other inspectors

- 1.1 Section 47(1) of the Mine Health and Safety Act, 29 of 1996 (“the MHSA”) establishes a Mine Health and Safety Inspectorate which is administered by the Chief Inspector of Mines. The Mine Health and Safety Inspectorate is part of the Department of Mineral Resources. The Chief Inspector is appointed by the Minister of Mineral Resources (see section 48(1) of the MHSA).
- 1.2 The Chief Inspector must, amongst other things, ensure that the provisions of the MHSA are complied with and enforced, and that all the duties imposed upon the Chief Inspector and the other Inspectors of Mines in terms of the MHSA and any other law are performed. The Chief Inspector of Mines must appoint Principal Inspectors of Mines and Inspectors of Mines to assist him/her to discharge his/her duties (see section 49(1)(a) and (c) of the MHSA).
- 1.3 On the other hand, section 27(1) of the Occupational Health and Safety Act, No. 85 of 1993 (“the OHASA”) empowers the Minister of Labour to designate an officer serving in the Department of Labour as Chief Inspector for the purposes of the OHASA. The Chief Inspector is empowered to delegate any power conferred upon him/her, which has not been excluded in section 35(1) (the provision dealing with an appeal against a decision of an Inspector) and section 42 (delegation and assignment of functions by the Minister) to any other officer serving in the Department of Labour. Furthermore, the Chief Inspector must perform his/her functions subject to the control and supervision of the Director-General of the Department of Labour and may perform any functions assigned to an Inspector by the OHASA (see sections 27(2) and 27(3)(a) of the OHASA).
- 1.4 The Chief Inspector must, amongst others, ensure that the provisions of the OHASA are complied with and enforced, and that all the duties imposed upon the Chief Inspector and the other Inspectors in terms of the OHASA, and any other law, are performed.

## 2 Inspector’s powers: General

- 2.1 In terms of section 50 of the MHSA, the Inspectorate, through its various Inspectors, has wide powers to enter any mine, conduct inspections of working places, question persons, examine documents and other articles, and generally to obtain evidence.
- 2.2 Generally, the Inspectors may for the purposes of monitoring or enforcing compliance with the MHSA –
- enter any mine at any time without a warrant or notice;
  - enter other places after obtaining the necessary warrant from a magistrate;
  - bring into and use at any mine, or at any other place referred to above, the necessary vehicles, equipment and material to perform any function in terms of the MHSA;
  - question any person on any matter to which the MHSA relates;
  - request and examine documents, and make copies thereof;
  - require explanations from persons on any entry or non-entry in such documents;
  - inspect any article, substance or machinery or any part or sample of it;
  - inspect any work performed;
  - inspect any condition;
  - inspect medical surveillance arrangements;
  - seize any document, article, substance or machinery or any part or sample of it; and
  - perform any other prescribed function.
- 2.3 In terms of section 29 of the OHASA, the Chief Inspector, or his/her delegates, has wide powers to enter any premises, which are occupied or used by an employer or on or in which an employee performs work, to conduct inspections of workplaces, question persons, examine documents and other articles, and generally to obtain evidence.
- 2.4 Generally, the Inspector may for the purposes of monitoring or enforcing compliance with the OHASA –
- enter any premises, at all reasonable times, without previous notice;
  - question any person on such premises on any matter to which the OHASA relates;
  - require from a person with control or custody of a book or document to produce same;
  - require explanations from persons on any entry or non-entry in such book or document;
  - inspect any article, substance, plant or machinery;
  - inspect any work performed;
  - seize any document, article, substance or machinery;
  - direct any employer, employee or user to appear before him/her; and
  - perform any other prescribed function.
- 2.5 These functions may be performed on the premises of an employer. The OHASA defines “*premises*” as including any building, vehicle, vessel, train or aircraft. An “*employer*” is defined in the OHASA as any person providing work for any other person and remunerating, expressly or tacitly, that other person. The definition of an employer also includes such other person who employs a person deemed to be an employee (see sections 1(1) and 1(2) of the OHASA).

### 3 Specific powers of inspectors of mines in terms of section 54 of the MHSA

3.1 Section 54(1) of the MHSA provides as follows:

“If an Inspector has reason to believe 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 and safety of persons at the mine, including but not limited to an instruction that-

- (a) operations at the mine or a part of the mine be halted;
- (b) the performance of any act or practice at the mine or a part of the mine be suspended or halted, and may place conditions on the performance of that act or practice;
- (c) the employer must take the steps set out in the instruction, within the specified period, to rectify the occurrence, practice or condition; or
- (d) all affected persons, other than those who are required to assist in taking steps referred to in paragraph (c), be moved to safety.”

#### 4 Requirements for validity of section 54 order and related issues

- 4.1 Before an Inspector of Mines may issue the order he/she must have “*reason to believe*” that certain circumstances exist. This requirement is discussed in paragraph 9 below.
- 4.2 The instruction must be given to the employer or a person designated by the employer, or in their absence, the most senior employee available at the mine to whom the instruction can be issued.
- 4.3 Where the instruction has not been issued to the employer, the Inspector must give a copy of the instruction to the employer at the earliest opportunity.
- 4.4 An Inspector may issue the instruction either orally or in writing. Where such an instruction has been issued orally, the Inspector must confirm it in writing and give it to the person concerned at the earliest opportunity.
- 4.5 An instruction to halt the operations at a mine or part thereof must either be confirmed, varied or set aside by the Chief Inspector as soon as practicable.
- 4.6 An instruction issued to halt the operations at a mine or part thereof, is effective from the time fixed by the Inspector and remains in force until set aside by the Chief Inspector or until the Inspector’s instructions have been complied with. (See section 54(1) to 54(6) of the MHSA)

#### 5 Inspectors’ powers to order compliance in terms of section 55 of the MHSA

Section 55(1) of the MHSA provides as follows:

“If an inspector has reason to believe that an employer has failed to comply with any provision of this Act, the inspector may instruct that employer in writing to take any steps that the inspector—

- (a) considers necessary to comply with the provision; and
- (b) specifies in the instruction.”

#### 6 Requirements for validity of section 55 order and related issues

- 6.1 Before an Inspector of Mines may issue the order he/she must have “*reason to believe*” that an employer has failed to comply with any provision of the MHSA. This requirement is discussed in paragraph 9 below.
- 6.2 An instruction must specify the period within which the prescribed steps must be taken.
- 6.3 Such period may be extended by an Inspector at any time by giving notice in writing to the person concerned.

#### 7 Inspectors’ special powers to deal with dangerous conditions in terms of section 30 of the OHASA

##### 7.1 Circumstances under which a section 30 prohibition order may be given

The Inspector may prohibit an employer from, amongst others, continuing or commencing with the performance of an act –

- when, in the opinion of the Inspector
- the performance of that act
- threatens or is likely to threaten
- the health or safety of any person (see section 30(1)(a) of the OHASA).

##### 7.2 Other types of section 30 prohibition orders that may be given by Inspectors and enforcement of such orders

The Inspector may give any instruction, which is necessary to protect the health or safety of persons. Such an instruction may include, but is not limited to the following –

- a written prohibition to a user of a plant or machinery to cease with the use of such plant or machinery in a manner which threatens or is likely to threaten the safety or health of any person;
- a written prohibition to an employer not to expose employees in the course of their employment for a longer period than the specified period in the prohibition to any article, substance, organism or condition which threatens or is likely to threaten the employees’ health or safety;
- the blocking, barring, barricading or fencing off, of a part of a workplace in order to enforce a prohibition order;

The employer may be required to take the necessary steps within a specified period as set out in the instruction, to rectify a particular life threatening occurrence, practice or condition.  
(See sections 30(1)(a) – (d) of the OHASA)

#### 7.3 Requirements for a section 30 instruction

- The Inspector must be of the “*opinion*” that the performance of the act complained of, or the permission thereof “*threatens or is likely to threaten the health and safety of any person*”;
- This instruction must be given to the employer or to a user of plant or machinery;
- The Inspector has to issue the instruction in writing.  
(See section 30 of the OHASA).

#### 7.4 Relevant definitions

7.4.1 An “*employer*” is defined in sections 1(1) and 1(2) of the OHASA. See paragraph 2.5 above.

7.4.2 An “*employee*” is defined in sections 1(1) and 1(2) of the OHASA as:

“... any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.”

7.4.3 “*Plant*” is defined in section 1(1) of the OHASA as:

“... fixtures, fittings, implements, equipment, tools and appliances, and anything which is used for any purpose in connection with such plant.”

7.4.4 “*Machinery*” is defined in section 1(1) of the OHASA as:

“... any article or combination of articles assembled, arranged or connected and which is used or intended to be used for converting any form of energy to performing work or which is used or intended to be used, whether incidental thereto or not, for developing, receiving, storing, containing, confining, transforming, transmitting, transferring or controlling any form of energy.”

7.4.5 “*User*” is defined in section 1(1) of the OHASA as:

“... the person who uses plant or machinery for his own benefit or who has the right of control over the use of plant or machinery but does not include a lessor of, or any person employed in connection with, that plant or machinery.”

### 8 Inspectors’ special powers to direct compliance in terms of section 30 of the OHASA

8.1 Circumstances under which a section 30 compliance direction may be given.

The Inspector may direct an employer or a user to take steps to comply with a provision of a regulation of the OHASA –

- when an Inspector is of the opinion
- that an employer or a user has failed to comply with such a provision (see section 30(4) of the OHASA).

Furthermore, the Inspector may also direct an employer or a user to take steps to safeguard the health and safety of any person at a workplace –

- when an Inspector is of the opinion
- that the health or safety of such person is threatened by the refusal or failure of such employer to take reasonable steps in the interest of such person’s health and safety (see section 30(3) of the OHASA).

#### 8.2 Time period for taking the necessary steps

- When issuing a direction, an Inspector must specify the period within which the specified steps must be taken (see section 30(3) and (4) of the OHASA).
- Such period may be extended by an Inspector at any time by giving notice in writing to the person concerned.

### 9 Requirement that inspectors must have a reasonable belief or opinion that certain circumstances exist before issuing relevant orders or directions

9.1 Section 54 and 55 of the MSHA provide that an Inspector of Mines must have “*reason to believe*” that certain circumstances exist before the Inspector is entitled to exercise his or her power. The question arises whether this requirement must be construed objectively, so that a court of law could enquire into the reasonableness of the Inspector’s belief, or subjectively, in which event a court of law will not be able to do so.

9.2 Section 30 of the OHASA provides that whenever an employer performs an act, which in the “*opinion*” of any Inspector threatens or is likely to threaten the health or safety of any person, the Inspector may issue a prohibition or order or compliance direction. Furthermore, section 30 provides that if an Inspector is of the opinion that an employer has failed to comply with the provisions of the OHASA, such Inspector may issue a compliance direction. Thus only if certain circumstances exist, may the Inspector exercise his/her powers in terms of section 30.

9.3 It is important to note that the exercising of the Inspector’s special powers in terms of section 54 and 55 of the MSHA and section 30 of the OHASA constitutes “*administrative action*” as provided for in the Promotion of Administrative Justice Act, No. 3 of 2000. The exercise of the relevant powers is also subject to the general principles of administrative law. For those reasons the powers may not be exercised in an arbitrary manner. There must be objective facts which justify the exercise of the powers. Consequently, the factual circumstances which allegedly justify the exercise of administrative power may be subject to judicial review.

- 9.4 Our courts have had the opportunity on various occasions to interpret statutes with similar wording, in which case it has been held that there must be a factual basis for the reason. It is not sufficient that the official *“honestly thinks that there is a reasonable cause to believe”*. A *“reasonable cause”* must in fact exist. The use of these words are intended to serve as an objective condition, limiting the exercise of an otherwise subjective arbitrary power. (see **Nakkuda Ali v M F De S Jayaratne** [1951] AC 66 at 77; **Ndabeni v Minister of Law and Order and Another** 1984 (3) SA 500 (D & CLD) at 511–513; **Hurley and Another v Minister of Law and Order and Another and Another** 1985 (4) SA 709 (D & CLD) at 716–721; and **United Democratic Front and Another v Acting Chief Magistrate, Johannesburg** 1987 (1) SA 413 (WLD) at 418–421; also referred to in P A Anscombe, **Handbook on the Mine Health and Safety Act and the Regulations** (Juta, 1998) at 1–32 to 1–33 and 1–56 to 1–57).
- 9.5 In **Ndabeni v Minister of Law and Order** 1984 (3) 500 (D) the learned judge referred to the judgment of **Watson v Commissioner of Customs and Excise** 1960 (3) SA 212 (N) where it was stated that:
- “(T)here can only be reasonable cause to believe ... where, considered objectively, there are reasonable grounds for the belief ... (I)t cannot be said that an officer has reasonable cause to believe ... merely because he believes he has reasonable cause to believe.”
- 9.6 A subjective belief on the part of the Inspector will therefore not suffice. In **Sigaba v Minister of Defence and Police and Another** 1980 (3) SA 535 (TkS) Rose-Innes J stated that *“ the criterion is not a subjective, but an objective one”*. *Rose-Innes J further stated at 542 that “the words “if he has reason to believe” do not in my opinion mean “if in his opinion he has reason to believe”, nor “if he is satisfied that he has reason to believe”, and they certainly do not mean “if he states that he has reason to believe”*. This passage was quoted with approval in **United Democratic Front and Another v Acting Chief Magistrate, Johannesburg** 1987 (1) SA 413 (O) at 418; **Hurley and Another v Minister of Law and Order and Another** 1985 (4) 709 (D) at 718 – 719; and **Ndabeni supra** at 512.
- 9.7 See also De Smith, Woolf and Jowell **“Judicial review of Administrative Act”** 5th edition 1995 at 305:
- “...the public official who has power to cancel a licence when he has reasonable grounds to believe the licensee to be unfit to hold a licence, must be prepared to justify in court the reasonableness of their beliefs; they cannot defeat an attack upon the grounds on which they have exercised their discretion merely by proving that they honestly thought that their beliefs had been reasonable. The criterion of reasonableness is not subjective but objective in the sense that it is subject to independent scrutiny.”
- 9.8 In dealing with the question of what a reasonable belief is, our courts have held that a reasonable belief is such as would be formed by a reasonable man in the circumstances in which a person was placed in a given case. The reasonable man *“is ... the man of ordinary intelligence, knowledge and prudence.”* (see **Rex v Mbombela** 1933 AD 269 at 272).  
(See G E Devenish *Administrative Law and Justice In South Africa* (Butterworths, 2001) at 232).

## 10 Requirement that there must be an endangerment to the health or safety of any person before issuing relevant orders

- 10.1 Section 54 provides that the Inspector must have *“reason to believe”* that certain circumstances exist that *“endangers or may endanger the health or safety of any person at the mine”*, before the Inspector is entitled to exercise his or her power.
- 10.2 Section 102 of MSHA defines *“health”*, *“occupational health”*, *“occupational hygiene”*, *“occupational medicine”* and *“safety”* as follows:
- *“health”* refers to occupational health at mines.
  - *“occupational health”* includes occupational hygiene and occupational medicine.
  - *“occupational hygiene”* means the anticipation, recognition, evaluation and control of conditions at the mine, that may cause illness or adverse health effects to persons.
  - *“occupational medicine”* means the prevention, diagnosis and treatment of illness, injury and adverse health effects associated with a particular type of work.
  - *“safety”* means safety at mines.
- 10.3 Section 30 provides that the Inspector must be of the opinion that the performance of an act *“threatens or is likely to threaten the health or safety of any person”*, before the Inspector is entitled to exercise his or her power.
- 10.4 Section 1 of the OHASA defines *“healthy”* and *“safe”* as follows:
- *“health”* means free from illness or injury attributable to occupational causes.
  - *“safe”* means free from any hazard.
- 10.5 The Collins Concise English Dictionary defines *“safety”*, *“endanger”*, *“danger”* and *“peril”* as follows:
- *“endanger”* to put in danger or peril.
  - *“danger”* the state of being vulnerable to injury, loss,..., risk.
  - *“peril”* exposure to risk or harm
  - *“threat”* an indication of imminent harm, danger or pain. A person or thing that is regarded as dangerous or likely to inflict pain or misery.
  - *“threaten”*: to be a threat to. To be a menacing indication of something.

- 10.6 Considering the above definitions which are pertinent to the MHSA, it would appear that the occurrence, practice or condition at the mine must expose persons to injury or illness, or will have to have adverse effects on a person's health. Only if the Inspector has objective grounds upon which to believe that an occurrence, practice or condition exposes any person to injury or illness or will have an adverse effect on a person's health, the Inspector may issue a section 54 order.
- 10.7 Considering the above definitions which are pertinent to the OHASA, it would appear that the performance of the act must be hazardous and must be likely to cause injury or illness to any person. Only if the Inspector has objective grounds upon which he can form an opinion that the act is hazardous and is likely to cause injury or illness to any person, the Inspector may issue a prohibition order.
- 10.8 Very often employers set for themselves a safety objective, for example to achieve zero risk and harm in the workplace. Such a goal must be distinguished from the legal criterion of safety, as well as the legal criterion when health or safety is endangered or threatened. The legal safety criterion determines when a workplace is regarded as "safe" or "safe as far as reasonably practicable" and when health and safety is endangered or threatened. These questions are completely separate from any goal set by the employer. In other words, even if an employer does not achieve its own safety goal, such fact does not mean that the workplace was "unsafe" or not "safe as far as reasonably practicable", or that health or safety was endangered or threatened.
- 10.9 Very often, however, an Inspector will close a whole mine or shaft, or factory after an accident has occurred, on the basis that there was a failure to comply with the safety objective, which are set by employers for themselves.
- 10.10 It would appear that Inspectors believe that it is not necessary for them to have objective reasons before they exercise their powers.

## 11 Abolition of right to make representations to the inspector prior to the issuing of a closure order or other order

- 11.1 The MHSA was amended by the Mine Health and Safety Amendment Act, No. 7 of 2008 (the "MHSAA"). The amendments as contained in the MHSAA came into force on 30 May 2009. In terms of section 17 of the MHSAA, the right to make representations to the Inspector prior to the issuing of a closure order or other order, has been deleted.
- 11.2 The old section 54(7) provides that before giving an instruction under sub-section (1)(a) in terms of which the operations at the mine may be halted, the Inspector must allow the employer or the employer's representative and the representatives of employees a reasonable opportunity to make representations. Furthermore, the old section 54(10) provides that before giving any instruction under sub-section (1)(b) to (d) (see paragraph 1 above), the Inspector must allow such opportunity to make representations as may be prescribed.
- 11.3 In terms of the MHSAA, section 54(7) to (10) are deleted. In other words, there is no right to make prior representations to the Mine Health and Safety Inspectorate prior to the issuing of any of the aforesaid orders. In practice this obligation on the part of the Mine Health and Safety Inspectorate has been adhered to only in very few circumstances, which is unfortunate. The action which may be taken by the employer is therefore only of a reactive nature in the form of an appeal or an application to Court for relief (see in this regard paragraph 14 below).

## 12 Reasonable opportunity to make representations

- 12.1 Where the Inspector has formulated his opinion concerning a particular situation at a workplace, the OHASA does not specifically require the Inspector to allow representations before issuing an instruction to the employer.
- 12.2 Although section 30 of the OHASA does not specifically grant a right to make representations, there exists a common law rule (the *audi alteram partem* rule) which provides that a person affected by an administrative act, is entitled to receive proper notice of any act or proceedings, so as to afford such a person an opportunity to respond. In terms of the *audi alteram partem* rule, the employer and certain other persons will have a similar right to make representations when an Inspector exercises his/her special powers in terms of the OHASA. Whether such representations should be made before or after the Inspector exercises his/her special powers, and how such representations should be made (orally or in writing), will depend on the specific circumstances that exist at the time when the Inspector exercises his/her special powers (see **Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment & Others** [1999] 2 ALL SA 381 (A) at 382 – 383, W J Hosten and others **Introduction to South African Law and Legal Theory** (Butterworths, 1983) at 651 to 652 and L Baxter, **Administrative Law** (Juta, 1984) at 542 – 557 for the application of the *audi alteram partem* rule. See further the Promotion of Administrative Justice Act, No. 3 of 2000 ("the PAJA").
- 12.3 The common law rule referred to above must be read with the relevant provisions of the OHASA and the PAJA. An Inspector must therefore allow the employer or his representative and the representative/s of the employees a reasonable opportunity to make representations before the issuing of an instruction to halt workplace operations, unless there are justifiable grounds not to do so. The only justification for not allowing such a reasonable opportunity to make representations will be if the Inspector has reason to believe that the delay caused by allowing representations, could endanger the health and safety of any person.
- 12.4 The employer, should in its representations to the Inspector deal with the hazards and risks of the operations in question. The following are general issues which may be covered in such representations:
- the level of risk to which employees were/are exposed;
  - the number of employees exposed to the hazard;
  - the training and supervision of any employees associated with the alleged non-compliance;

- the steps taken by the employer to eliminate, control or minimise the risk posed by any hazard;
- the employer's development and implementation of a health and safety improvement plan;
- the employer's health and safety records;
- the employer's compliance records;
- any general neglect, complacency or wilful non-compliance on the part of the employer, as alleged by the Inspector.

### **13 Guidelines on how to respond to section 54 and 55 notices, as well as section 30 instructions**

- 13.1 Any instructions issued under section 54 and 55 of the MHSA should immediately be complied with. Copies of such instructions should be supplied to the health and safety representative and the health and safety committee. Copies should also be prominently and conspicuously displayed and the contents should be orally communicated to employees (see section 56 of the MHSA).
- 13.2 It is advisable to prepare a detailed action plan referring to the Inspector's various instructions and to designate specific persons to perform the necessary functions. A copy of such action plan should be furnished to the Inspector concerned. It is also important that the mine keep a copy of such action plan on file.
- 13.3 If the instructions are unfounded, the mine can approach an appropriate court to grant a declaratory order and interdict.
- 13.4 Any instructions issued under section 30 of the OHASA should, as a general rule, immediately be complied with. The contents of such instructions must also be brought to the attention of the health and safety representatives and employees concerned (see section 30(6) of the OHASA). It is advisable to hand copies to them and also to display copies on notice boards at the workplace.
- 13.5 It is also advisable to prepare a detailed action plan referring to the Inspector's various instructions, and to designate specific persons to perform the necessary functions. A copy of such action plan should be furnished to the Inspector concerned. It is also important that the employer keeps a copy of such an action plan on file.
- 13.6 If the instructions are unfounded, the employer must exhaust its statutory remedies (see paragraph 16 below) and/or may approach an appropriate court to set aside the Inspector's instructions or to interdict the Inspector from taking certain steps.

### **14 Failure to comply is an offence**

- 14.1 It is a criminal offence to hinder, oppose, obstruct or unduly influence an Inspector in the performance of his/her functions in terms of the MHSA. Upon conviction a fine of R50,000.00 or imprisonment of two years may be imposed (see section 88 and 92, read together with schedule 8 of the MHSA).
- 14.2 It is also a criminal offence to refuse or to fail to comply with an order or instruction of an Inspector. Any person convicted of such an offence may be sentenced to a fine or to imprisonment for a period not exceeding six months (see sections 91 and 92 of the MHSA).
- 14.3 It is a criminal offence to fail to comply with a prohibition order, compliance direction or notice (see sections 38(1)(a) and (b) of the OHASA).
- 14.4 It is also a criminal offence to hinder or obstruct an Inspector in the performance of his/her functions in terms of the OHASA (see section 38(1)(e) of the OHASA).
- 14.5 Upon conviction a person may be imprisoned for a maximum term of one year or a fine for a maximum amount of R50,000.00 may be imposed (see section 38 of the OHASA).

### **15 Right to lodge an appeal against an inspector's decision and to apply to court for relief**

- 15.1 Very often the Mine Health and Safety Inspectorate exceeds their powers and closes a whole mine whereas merely a small area affected by an accident may pose a danger to employees. In such cases the employer's option is as follows:
- 15.1.1 to lodge an appeal against the order to the Chief Inspector; and simultaneously to apply to the Labour Court on an urgent basis to suspend the operation of the order pending the finalisation of the appeal to the Chief Inspector and ultimately the appeal to the Labour Court; or
- 15.1.2 to apply to the High Court for an order suspending the operation of the order pending the launching and finalisation of an application for a review of the order.
- 15.2 In terms of the MHSA, any person who is the subject of a decision of an Inspector, except a decision to impose an administrative fine, may appeal against the decision to the Chief Inspector. Such an appeal must be lodged with the Chief Inspector within 30 days of the decision and must set out the grounds of appeal. See section 57 of the MHSA, read with section 21(1) of the Amendment Act. After considering the grounds of appeal and the Inspector's reason for the decision, the Chief Inspector must as soon as practicable confirm, set aside or vary the decision, or substitute any other decision for the decision of the Inspector (see section 57 and section 57A of the MHSA).
- 15.3 In terms of the MHSA, any person adversely affected by the decision of the Chief Inspector, may appeal against the decision to the Labour Court. Such an appeal must be lodged with the Registrar of the Labour Court in accordance with the Rules of the Labour Court and within 60 days of the Chief Inspector's decision. The Labour Court must consider the appeal and confirm, set aside or vary the Chief Inspector's decision (see section 58 of the MHSA).

- 15.4 An appeal does not suspend the decision of the Mine Health and Safety Inspectorate. Furthermore, the Labour Court may suspend the operation of the Mine Health and Safety Inspectorate's decision pending the determination of the matter, if there are reasonable grounds to do so (see section 59 of the MHSA).
- 15.5 In terms of section 35 of the OHASA, any person who is the subject of a decision of an Inspector, or at whose instance a decision of an Inspector was taken-
- may appeal in writing, setting out the grounds of appeal against that decision, to the Chief Inspector
  - within sixty days after the Inspector's decision was made known.
- 15.6 After considering the grounds of appeal and the Inspector's reasons for the decision, the Chief Inspector must, as soon as is practicable confirm, set aside or vary the decision, or substitute for such decision, any other decision which the Inspector in the Chief Inspector's opinion ought to have taken (see section 35 of the OHASA).
- 15.7 Any person, aggrieved by a decision of the Chief Inspector, may appeal against the decision to the Labour Court. The Labour Court must consider the appeal and confirm, set aside or vary the decision. An appeal in connection with a prohibition imposed under section 30(1)(a) or (b) of the OHASA shall not suspend the operation of such prohibition (see section 35(3) to (5) and the discussion in paragraph 7 above).

## 16 Claim for damages in the event of the wrongful closure of a mine (or a factory) or a part thereof

- 16.1 In the South African law of delict, damages may be recovered from a party who caused damage to another in a wrongful and negligent manner. In the South African law of delict, compensation for so-called pure economic loss, that is patrimonial loss resulting from damage to the plaintiff's property or injury to his personality, may in principle be claimed under the *actio legis Aquiliae* (Neethling et al *Law of Delict*, 4th edition, p11). In essence, the "Aquilian" action lies with patrimonial loss caused wrongfully, or unlawfully, and culpably.
- 16.2 In the case of the recovery of such damages from the State there is some limitation, which is contained in section 104 of the MHSA. Section 104 provides as follows:
- "The State Liability Act, 1957 (Act No. 20 of 1957) applies with the changes required by the context in respect of the Mine Health and Safety Inspectorate, and in such application a reference in that Act to the Minister of a Department concerned must be construed as a reference to the Chief Inspector of Mines."
- 16.3 It is important to note that the legislation does not affect and restrict the liability of an official, i.e. an Inspector who takes unlawful action in terms of section 54. Damages may be recovered in the event of the taking of unlawful action both from the Department of Mineral Resources and the Inspector involved. The existing section 3 of the State Liability Act provides that no execution, attachment or like process shall be issued against the State. However, this section has recently been found to be unconstitutional by the Constitutional Court (*Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC)).
- 16.4 The powers granted to an Inspector in terms of section 30 of the OHASA are intrusive and far-reaching, and an Inspector is afforded a very general scope within which to invoke such powers. It is therefore important that such powers be restricted to a degree. The requirement that the Inspector must have a reasonable opinion adds a degree of balance in favour of the employer or user (see paragraph 9 above).
- 16.5 It is also important for a prohibition order, compliance direction, or notice to comply with the principles of administrative justice as enshrined in the Promotion of Administrative Justice Act, No. 3 of 2000. For that reason the administrative action taken by an Inspector must be justifiable, must not contravene the law and must not be used for a purpose which is different from the purpose for which it was intended by the Legislature.
- 16.6 When an Inspector gives a prohibition order, compliance direction or notice which does not comply with the above constitutional principles and the requirements of section 30, and/or the Inspector does not have a reasonable opinion that such order, direction or notice is in the interests of the health or safety of persons, the employer or user may institute a claim for patrimonial loss that it has sustained as a result thereof to the extent that the Inspector was acting negligently or in bad faith.

## 17 Incorrect application of section 54 by the inspectorate - a recommendation for the issuing of a guideline

- 17.1 Very often an Inspector closes a whole mine or shaft when an accident has occurred in a confined area and where at the worst, he/she could have had objective reason only that the particular area constituted a danger to the health or safety of employees. It would appear that Inspectors believe that it is not necessary for them to have an objective reason to close a working place. Furthermore, they seem to believe that if any area on a mine may present a danger to the health or safety of employees, they may close the whole mine.
- 17.2 As indicated above, such an application of the provisions of section 54 would be wrong. A lawful, just and reasonable application of section 54 by the Mine Health and Safety Inspectorate is essential to ensure the legitimacy and the success of action taken by the Department of Mineral Resources.
- 17.3 For that reason it is recommended that a guideline be drafted by the Chief Inspector setting out the requirements referred to in paragraphs 4 and 9 above, to achieve this objective. In addition such guideline should also provide that the employer be given an opportunity to make representations to the Inspector concerned prior to the issuing of the order in terms of section 54.